



REPUBLIC OF KENYA



**Nguwa & 8 others v Kanyolo & another (Miscellaneous Application
52 of 2022) [2023] KEELC 20649 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20649 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION 52 OF 2022
MAO ODENY, J
OCTOBER 13, 2023**

BETWEEN

**KADZO JEFWA NGUWA 1ST APPLICANT
ROBERT KAHINDI KIRAO 2ND APPLICANT
JOHN KARISA KIRAO 3RD APPLICANT
LAWRENCE MUMBA KIRAO 4TH APPLICANT
HENRY KATANA KIRAO 5TH APPLICANT
ALPHONCE MAJIMBO KIRAO 6TH APPLICANT
RODGERS KIRAO MWAGIRANI 7TH APPLICANT
JOSEPH KAVELI KIRAO 8TH APPLICANT
POSHIA KIRAO 9TH APPLICANT**

AND

**ALEXANDER MUSYOKI KANYOLO 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT**

RULING

1. This ruling is in respect of a notice of motion dated November 16, 2022, by the applicants seeking the following orders;-
 - a. Spent.



- b. That this honourable court be pleased to grant leave to the applicants to file appeal against the decision of the National Land Commission dated February 15, 2019 in regard to plot No Kilifi/Jimba/325 out of time.
 - c. That this honourable court be pleased to direct the 2nd respondent, National Land Commission, to avail to the applicants and/or their advocates on record with certified copies of minutes, proceedings, evidence adduced, determination and/or all records in their possession in relation to the review of plot No Kilifi/Jimba/325.
 - d. That this honourable court be pleased to stay the execution of the directive of the National Land Commission issued on February 15, 2019 to regularize all that parcel of land known as plot No Kilifi/Jimba/325 in favour of the 1st respondent Alexander Musyoki Kanyolo.
 - e. That costs of this suit provided for.
2. The application was based on the grounds listed on the face of the application and supported by the affidavit of Lawrence Mumba Kirao sworn on November 18, 2022 whereby he deponed that the applicants were the lawful administrators of the estate of the late Kirao Kombe Hare who was the lawful owner of plot number Kilifi/Jimba/325 (the suit property). That the deceased's ownership was confirmed by the chairman of Kilifi Jimba Settlement Scheme upon a verification exercise conducted by the Ministry of Lands in the year 2009. That before the ownership documents were processed, the deceased died on August 21, 2012.
 3. The applicant also stated that in the year 2013, the National Land Commission(NLC) undertook another verification process and confirmed to the Kilifi Land Registrar *vide* a letter dated July 11, 2013 that ownership documents of the suit property be issued in favour of the deceased. That the confirmation was further affirmed in October 2018 at the Watamu NLC dispute hearing over parcels of land within the scheme.
 4. However, on January 28, 2020 when they visited the Kilifi registry to collect their title documents, they learnt that the suit property had been registered in the name of Alexander Musyoki Kanyole, the 1st respondent herein that prompted the applicants to file a complaint to the NLC by filing a letter on the same date.
 5. The applicant further stated that it was at that point that they also learnt of the NLC gazette notice dated February 15, 2019 indicating that the 1st respondent be registered as the owner of the suit property and that no party had appeared at the Watamu dispute hearing. That it was for that reason that the applicants were unable to challenge the NLC's decision within the statutory period.
 6. The 2nd respondent opposed the application *vide* a notice of preliminary objection dated February 13, 2023, on the following grounds;
 - a. That the matter before this court contravenes rule 30(1) of the National Land Commission, Review of Grants and Dispositions of Public Land Regulations, 2017, as a party aggrieved by a decision of the commission may appeal within fourteen days, the commission's decision to the court.
 - b. That the applicant's appeal was not filed within 30 days of the making of the commission's decision as required by section 79G of the [Civil Procedure Act](#).



- c. That the applicant's appeal is not in the form of a memorandum of appeal as required by order 42 rule 1 of the [Civil Procedure Rules](#).
7. Both the application and preliminary objection were canvassed by way of written submissions.

Applicants' Submissions

8. Counsel for the applicant submitted that failure by the NLC to serve or inform the applicants of their decision was in contravention of rule 31(2) of the NLC (Review of Grants and Dispositions of Public Land) Regulations, 2017; article 10(1), 47(1) and 50 of the [Constitution](#) of Kenya. That failure to grant the leave sought would occasion gross injustice.
9. Counsel relied on the case of [Kitumbua Njira Tsango and 2 others v Mbwana Jumaa Mwachangoma and another](#) [2020] eKLR where he submitted that such an application and in similar circumstances as the present one was allowed. Counsel also submitted that in allowing the application, the court stated that the applicants could not be faulted for not filing the appeal within time as there was no evidence that the applicants were ever made aware of the decision as per the regulations which provided that the decision be delivered to the parties within 60 days. The court further noted that it is not mandatory for one to annex a draft memorandum of appeal before being allowed leave to file an appeal out of time.
10. Counsel therefore urged the court to allow the application as prayed.

2nd Respondent's Submissions

11. Mr Kiilu, counsel for the 2nd respondent submitted that the delay of over 2 years since the applicants became aware of the decision by NLC was not explained in the application and as such, the application was an afterthought.
12. Counsel stated that section 79G of the [Civil Procedure Act](#) prescribes that appeals be filed within 30 days of the making of a decision and relied on the case of [Gerald M'limbine v Joseph Kangangi](#) [2008] eKLR.
13. It was counsel's submission that the appeal should be in the form of a memorandum as stipulated under order 42 rule 1 of the [Civil Procedure Rules](#), and not an application such as the present one. Counsel relied on the case of [Haron Ongechi Nyaberi v British American Insurance Co Ltd](#) [2012] eKLR.
14. Mr Kiilu further submitted that section 30(1) of the NLC (Review of Grants and Dispositions of Public Land) Regulations, 2017 gives a party aggrieved by a decision of the NLC, 14 days to appeal to the court. To counsel, the applicants were not keen on following up on the determination by the NLC despite attending the Watamu hearing in 2018.
15. Counsel argued that the applicants' failure to follow due process could not be saved by article 159(2)(d) of the [Constitution](#) of Kenya and relied on the cases of [Lalji Bhimji Shangani Builders and Contractors v City Council of Nairobi](#) [2012] eKLR; and [Nicholas Kiptoo Arap Korir Salat v IEBC and 6 others](#) [2013] eKLR. Counsel urged the court to dismiss the application.

Analysis And Determination

16. The 2nd respondent's case was based on the preliminary objection that one, the appeal has been filed out of time and second, that the appeal is not in the form of a memorandum of appeal as required by order 42 rule 1 of the [Civil Procedure Rules](#). It must be noted that the present application is not an appeal but an application for leave to file an appeal out of time. I therefore see no basis in the 2nd respondent's preliminary objection. The same is therefore dismissed.



17. The applicants invoked section 95 of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules* which provide as follows:-

95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Power to enlarge time [order 50, rule 6]

Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

18. The grant of leave to file an appeal out of time is discretionary and the same must be exercised judiciously. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal held: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly) the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

19. This application is for extension of time to file an appeal against the decision of the NLC dated February 15, 2019 and the applicants invoked the NLC (Review of Grants and Dispositions of Public Land) Regulations, 2017. Regulation 30 therein provides that:-

A person aggrieved by the decision of the commission may, within fourteen days of the commission's decision, appeal to the court.

20. Regulation 31 (2) thereunder further states that a certified copy of the order shall be made available to the parties within seven working days of the order being made by the commission.

21. In the present case, the applicants averred that they attended the NLC dispute hearing conducted in Watamu and were informed that the suit property will be registered in favour of the deceased.

22. It was the applicant's case that they only learnt of the NLC's decision to register the 1st respondent as the owner of the suit property on January 28, 2020 which facts were not disputed by the respondents. The only contention raised by the 2nd respondent in their submissions was that the delay of two years to file the present application was unexplained.



23. There was no evidence that the National Land Commission communicated the decision to the applicants within 60 days as per the regulations. The respondent did not tender any evidence of such communication. They failed to provide information that they indeed communicated the decision to the applicant.
24. I find that the delay in filing this application has been sufficiently explained by the applicants which facts have not been disputed by the respondents.
25. The application is therefore allowed, applicant to file an appeal within 28 days failure to which the order lapses. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF OCTOBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

