



**Muthee v Warungu & another (Miscellaneous Application
45 of 2020) [2022] KEELC 2993 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 45 OF 2020**

BM EBOSO, J

MAY 31, 2022

BETWEEN

MICHAEL WARUNGU MUTHEE APPLICANT

AND

MARGARET WANJIKU WARUNGU 1ST RESPONDENT

PETER KAMAU JOSEPH 2ND RESPONDENT

RULING

1. Michael Warungu Muthee (the applicant) contends that he is a son to the late Muthee Kariuki who died on 20/9/2013. From the evidence presented by the respondents, he is one of the two administrators of the estate of the late Muthee Kariuki. The other administrator is Lucy Wambui Muthee. The applicant brought the present application alone, without joining his co-administrator. Similarly, he did not designate himself as bringing the application in his capacity as administrator of the estate but this fact clearly emerges from the grounds set out in the application and from the supporting affidavit. The fact also emerges from the applicant's written submissions.
2. The two respondents are administrators of the estate of the late Joseph Warungu Kariuki who died on 22/2/2013. Although they were not designated as administrators of the estate of the late Joseph Warungu Kariuki in the present miscellaneous application, this fact does emerge from the evidence placed before this court. The two respondents contend that the late Muthee Kariuki and the late Joseph Warungu Kariuki were brothers. On his part, the applicant contends that he is a biological son of the late Muthee Kariuki and a step son of the late Joseph Warungu Kariuki.
3. Prior to their demise in February 2013 and September 2013 respectively, the two brothers had a land dispute at the Karuri Land Disputes Tribunal. On 30/4/2010, the Tribunal rendered an award in which it directed that land parcel number Kiamba/Thimbigua/1738 [the suit property] should be divided into two equal portions and that the portion occupied by Joseph Warungu Kariuki should



- be transferred to him. Subsequently, on 22/7/2010, Kiambu Senior Principal Magistrate Court [Hon D.A Okundi PM] adopted the award of the Tribunal and issued a decree to that effect in Kiambu SPMC Land Case No 13 of 2010.
4. It does emerge from the evidential materials presented to this court that upon the death of Muthee Kariuki, the applicant and his co-administrator initiated Kiambu CMC Succession Cause No 84 of 2017 in which they obtained a certificate of confirmation of grant vesting the whole of the suit property into their names. They concealed from the succession court the fact that one half portion of the land had been awarded to the late Joseph Warungu Kariuki and therefore belonged to his estate. Subsequently, the respondents made an application to the succession court and the certificate of confirmation of grant was revoked to the extent that the one half portion which had been awarded to the late Joseph Warungu Kariuki was excluded from the certificate of confirmation of grant. The ruling was rendered by Hon G Omodho on 30/8/2019.
 5. Subsequent to that, in September 2019, the applicant solely made an application in Kiambu SPMC Land Case No 13 of 2010 seeking substitution orders in respect of the two deceased brothers. Substitution orders were granted on 29/4/2020. What followed was the present application, dated 1/12/2020, through which the applicant seeks an order enlarging the time within which to “file an appeal out of time in respect of CMC Land Case No 13 of 2010”. [I have reproduced the plea verbatim to underscore the jurisdiction the court is invited to exercise].
 6. The application was supported by the applicant’s affidavit sworn on 1/12/2020. He deposed that the Tribunal’s award was delivered on 30/4/2010 in favour of the late Joseph Warungu Kariuki. He added that the award was adopted as a judgment of the court on 22/7/2010 in Kiambu SPMC Land Case No 13 of 2010. He further deposed that the late Muthee Kariuki subsequently filed an appeal in Central Land Appeal’s Committee at Nyeri but the Committee was later disbanded. He contended that he was aware that his late father was willing to pursue the appeal but he died before pursuing it. He urged the court to grant the order sought in the application.
 7. The respondents opposed the application through a replying affidavit sworn on 12/10/2021 by Peter Kamau Joseph. He deposed that the two deceased brothers litigated over the suit land culminating in the award of the Tribunal in 2010. He added that after the Tribunal rendered its award, his late father expected to be served with an appeal but none was forthcoming. In the absence of an appeal, his late father applied for adoption of the award and the magistrate court adopted the award and issued a decree. It was his position that no appeal was filed to challenge the award. He faulted the applicant for initiating succession proceedings and misleading the succession court to distribute the suit property as part of the late Muthee Kariuki’s estate yet he was aware that one half portion of the land had been given to the late Joseph Warungu Kariuki and belonged to his estate. It was his case that the family of the late Joseph Warungu Kariuki has lived on their one half portion for decades and that the one half portion belongs to the estate of the late Joseph Warungu Kariuki.
 8. The applicant canvassed the application through written submissions dated 11/2/2022. He submitted that “the delay to pursue the matter or to have the appeal filed at the earliest time was occasioned by the demise” of his father. He added that he is a layman and not fully conversant with the procedures of the court. The applicant submitted that matters touching on land are very sensitive and our courts are supposed to overlook all other issues and deal with their merits. He urged the court to grant him leave to file an appeal out of time as sought.
 9. The respondents filed written submissions dated 21/2/2021 through the firm of Kiarie Njuguna & Co advocates. Counsel pointed out that the late Joseph Warungu Kariuki whom the applicant refers to as his step-father is actually his late paternal uncle since Joseph Warungu Kariuki and Muthee Kariuki



were brothers. Counsel added that no appeal had been filed at the Provincial Appeals Committee, contending that the purported memorandum of appeal exhibited by the applicant was unsigned and bore the cause number relating to Kiambu CMC Land Case Number 13 of 2010. Counsel added that the purported letter from the Provincial Commissioner had no case number.

10. Counsel for the respondents further submitted that during adoption proceedings, the two deceased siblings were in court and none objected to the adoption on the basis of a pending appeal because none had been filed and the period for filing an appeal had lapsed. Counsel added that from the time the award was read to the time the late Muthee Kariuki died, he had sufficient time to lodge and prosecute an appeal. Citing the decision in *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR, counsel submitted that the applicant had failed to satisfy the criterial upon jurisdictions to extend time is exercised. Counsel urged the court to reject the application.

Analysis and Determination

11. I have considered the application, the response to the application, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The following four key issues fall for determination in the application: (i) Whether as a co-administrator of the estate of the late Muthee Kariuki, the applicant has locus standi to alone initiate court proceedings on behalf of the estate of the late Muthee Kariuki; (ii) Whether an adoption order made by the Magistrate Court under Section 7 of the repealed Land Disputes Tribunal Act is appealable to this court; (iii) Whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to enlarge time; (iv) What order should be made in relation to this suit.
12. The first issue is whether, as a co-administrator of the estate of the late Muthee Kariuki, the applicant has locus standi to alone initiate court proceedings on behalf of the estate of the late Muthee Kariuki. An administrator is a personal representative of a deceased person within the meaning assigned to the statutory office under the *Law of Succession Act*. The powers and duties of personal representatives are defined at Sections 79, 80, 81, 82, 83 and 84 of the *Law of Succession Act*. Where a grant is issued to two or more personal representatives, they are expected to execute their mandate jointly. Whenever they contemplate and decide to initiate proceedings on behalf of the estate, they do so in their joint names. The only exception is set out in Section 81 of the *Law of Succession Act* and this relates to a scenario where one or more of several personal representatives dies. Section 81 of the *Law of Succession Act* provides thus:

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”
13. Joint exercise of powers of personal representatives is mandatory not just when instituting suits. It is similarly expected when instruments that bind the estate are to be executed.
14. In the present suit, the applicant is a joint administrator of the estate of the late Muthee Kariuki. He brought this suit without joining the co-administrator. He has not exhibited any evidence to suggest that the co-administrator is now deceased. In the circumstances, the finding of the court on the first



issue is that as a joint personal representative, the applicant has no locus standi to alone institute proceedings on behalf of the late Muthee Kariuki. He can only do so jointly with his co-administrator.

15. The second issue is whether an adoption order made by the magistrate court under Section 7 of the repealed Land Disputes Tribunal Act is appealable to this court. This court is the successor to the pre-2010 High Court in relation to disputes relating to environment; occupation, use and title to land.
16. The principal relief which this court was asked to grant is contained in prayer 3 of the application under consideration. It reads thus:

“3 That the applicant be granted leave to file an appeal out of time in respect of CM Land Case No 13 of 2010 at Kiambu Joseph Warungu Kariuki vs Muthee Kariuki.”

17. It is clear from the above plea that the applicant seeks leave to file an appeal out of time in respect of the adoption order made by the Magistrate Court under Section 7 of the repealed Act. The repealed Act expressly divested jurisdiction from the magistrate court in relation to the disputes defined in the Act. All that the magistrate court was required to do under Section 7 of the repealed Act was to confirm that the Tribunal had duly made and rendered an award as stipulated; that the time stipulated for an appeal had lapsed; and that there was no subsisting appeal to the Provincial Appeals Committee. Upon satisfying himself on the above, the magistrate court would proceed to adopt the award and issue a decree. The magistrate court did not have jurisdiction to consider the merits of the Tribunal’s award. It is for this reason that our courts have in a line of decisions held that adoption orders made under Section 7 of the repealed Act were not appealable. If a party felt aggrieved by the adoption order, the redress mechanism available was a judicial review motion and not an appeal. That in my view is the position of this court on the second issue. Put differently, an adoption order made by a magistrate court under Section 7 of the repealed Land Disputes Tribunal Act is not appealable to this court.
18. The third issue is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to enlarge time. The relevant criteria upon which our courts exercise jurisdiction to enlarge time was outlined by the Supreme Court of Kenya in [*Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*](#), (2014) eKLR as follows:

- “(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- (3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;
- (4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- (5) Whether there will be any prejudice suffered by the respondent if the extension is granted;
- (6) Whether the application has been brought without undue delay;
- and
- (7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

19. Secondly, it is settled law that jurisdiction to extend limitation period is to be specifically provided for under the relevant limitation instrument. Whenever [*the Constitution*](#), statute or rule has specified



a limitation period and has not given the courts discretionary jurisdiction to enlarge the limitation period, the court has no jurisdiction to enlarge the prescribed limitation period. The Supreme Court of Kenya rendered itself on the centrality of jurisdiction in the adjudication of disputes by our courts in the case of *Samuel Kamau Macharia & Another vs KCB Ltd & 2 others* (2012)eKLR, the Supreme Court held that: -

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

20. In the present application, the applicant has not cited any statute which gives this court powers to exercise the jurisdiction he has invited the court to exercise. Secondly, I have made a finding to the effect that an adoption order made under Section 7 of the repealed Act is not appealable to this court. Even assuming that there was room for an appeal at the time when the award was rendered and subsequently adopted, no proper explanation has been tendered to explain why the late Muthee Kariuki did not pursue and complete the appeal mechanism during his lifetime. The proceedings which the applicant exhibited show that the late Muthee Kariuki participated in the proceedings of the Tribunal and was present when the award was read and adopted. The right to appeal within 30 days was explained to him. The decree of the magistrate court similarly reveals that the late Muthee Kariuki was present when the award was adopted. The Tribunal’s award was rendered on 30/4/2010. Reading of the award for adoption purposes was done in the magistrate court on 22/7/2010, more than seventy [70] days from the date when it was rendered by the Tribunal. The late Muthee Kariuki neither objected to the adoption nor raised any issue relating to a pending appeal. The two brothers accepted the outcome and lived as neighbours until 2013 when both of them died. The late Muthee Kariuki did not contemplate nor envisage the present application from April 2010 to the time he died in September 2013.
21. In my view, given the above circumstances, I do not think the applicant has met the criteria upon which our courts exercise jurisdiction to enlarge time. It is clear from the evidence presented to the court that this application was contemplated after the applicant’s scheme to use the succession court to acquire the late Joseph Warungu Kariuki’s one half portion of the suit land aborted. The late Muthee Kariuki and his personal representatives have all along been aware of the award of the Tribunal rendered in April 2010 and the decree issued in July 2010. They did nothing to challenge the award and decree. There is no proper basis upon which to resurrect the dispute that was resolved in 2010 when the two brothers were alive. Consequently, my finding on the third issue is that the applicant has not satisfied the criteria upon which our courts exercise jurisdiction to enlarge time.
22. Having come to the above findings, the appropriate disposal order to make is to dismiss the present application for lack of merit. The applicant shall bear costs of the application.
23. In summary, the court makes the following findings:
 - (i) The applicant as co-administrator has no locus standi to alone initiate proceedings on behalf of the estate of the late Muthee Kariuki.
 - (ii) An adoption order made by the Magistrate Court under Section 7 of the repealed Land Disputes Tribunal Act is not appealable to this court.
 - (iii) The applicant has not satisfied the criteria upon which our courts exercise jurisdiction to enlarge time.
 - (iv) The application herein is dismissed and the applicant shall bear costs of the suit.



Disposal Orders

24. In the end, the application dated 1/12/2020 is dismissed for being unmerited. The applicant shall bear costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 31ST DAY OF MAY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Kiarie holding brief for Mr Njuguna for the Respondents

Court Assistant: Ms Lucy Muthoni

