Chelanga v Rotich & another (Environment and Land Miscellaneous Application 10 of 2022) [2022] KEELC 14942 (KLR) (22 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14942 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 10 OF 2022

FO NYAGAKA, J

NOVEMBER 22, 2022

BETWEEN

ELIAS KAMELI CHELANGA ..... APPLICANT

AND

JOEL ROTICH ..... 1ST RESPONDENT

REUBEN KIPTOO ROTICH ..... 2ND RESPONDENT

RULING

1. Before me is an application for enlargement of time to file an Appeal against a decision that was made on 24/11/2009, approximately 13 years ago, as at the time if determining it, and 12½ years as at the time it was brought to Court. In brief, the allegations were that the decision sought to be appealed against was biased, harsh and unjust, and the applicant was warned and cautioned against appealing it. He therefore thought, he did not have a right to appeal but only realized at a time he did not specify that he could appeal. By then, the time of appealing had since lapsed hence the instant application. One more point is that the application pits a brother and his two brothers and what is sought to be appealed from was the then Provincial Land Disputes Tribunal Award which was made pursuant to a challenge against their father in his lifetime against his decision to distribute his land to his children in the manner he did. That is snapshot of the seriously contested application which I now embark on to determine.

2. Thus, by a Notice of Motion dated 05/05/2022, the Applicant moved this Court under Section 79G of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules* 2010, and all enabling provisions of the law. It is my view that the phrase "all provisions of the law" is meaningless here and is not worthy considering as the legal basis of this or indeed any other application. The Application sought the following orders:

    a. ...spent

b. That this Honourable Court be pleased to grant leave and/or extend/enlarge the time within which and/or enable the Applicant to lodge an appeal against the judgment and or/or verdict of the Provincial Land Dispute Tribunal Appeal No. 38/2008 issued on 24th November 2009.

c. That pursuant to prayer (b) above being granted, the annexed memorandum of appeal filed herewith be deemed as properly and duly filed and subsequently served upon the Respondents herein.

d. That the costs of this application be provided for.

3. That application was based on a number of grounds which were on the face thereof. In brief the grounds were that the Applicant was ambushed and forced to appear before the Provincial Land Disputes Tribunal (PLDT) which he attended but his grievances were not heard; the PLDT went against the decree issued on 07/10/2008 in Kitale Chief Magistrate's Court; the Respondents were given (30) thirty days from the date of issue to appeal to the Provincial Land Disputes Tribunal (PLDT) which they did not, but instead appealed after the decree was issued a year after; the applicant was warned and barred without any justifiable reasons to appeal to the High Court, which caused him to remain silent without knowing that he had a right to appeal; the PLDT Appeals Committee were very and arrogant to the extent that they failed their duty to advise but they became biased in their decision; the applicant came to learn later about the Verdict of the PLDT Appeals Committee and he wishes to appeal against the decision; by the time the applicant came to learn of the verdict, his right to lodge an appeal had lapsed; this Court is vested with the discretion and powers to extend or enlarge time as prayed and the delay is not inordinate, is excusable and not prejudicial to the Respondents in any way; and the Application was brought in good faith and in the interest of justice and fairness.

4. The Application was supported by the Affidavit of Elias Kimeli Chelanga. It was sworn on 05/06/2022. The contents of the depositions in the Affidavit followed almost word for word the contents of the grounds in support of the Application. However, the Applicant added that being the son of the 3rd wife of his father, he defended the matter before the Tribunal in his own capacity as the beneficiary of the estate of his late father Chelanga Kipsang. He annexed to the Application and marked EKC1 a copy of the letter from the Area Chief. He deponed that the PLDT made a decision and advised him not to appeal against it but he came to learn of the right to appeal recently. He annexed and marked EKC2 a copy of the decision. He further deponed that the PLDT Appeal Committee took advantage of his ignorance and delivered a biased and discriminatory verdict against him. He annexed to the Affidavit a copy of the decision and marked it as EKC3. He then annexed and marked as EKC4 a copy of the mutation form that emanated from the decision of the PLDT Appeals Committee. He also annexed and marked EKC5 a copy of the memorandum of appeal.

5. He deponed that he only realized that the time to appeal had elapsed and wished to move the Court to grant the orders sought. He then swore that the delay was not adverted to, intentional or inordinate.

6. The Application was opposed through the Replying Affidavit of one Joel Rotich who swore it on 27/06/2022. He deponed that he was the owner of the suit land and that his father had passed away 8 years before the instant application. He stated that the Application lacked merits and was only meant to waste the Court's time and abuse its process. He deponed that 13 years had elapsed since the Provincial Land Disputes Tribunal Award and that the decision was in favour of both he and his father. He also stated that there had been no substitution of the deceased done.

7. His further deposition was that the 2nd Respondent was not a party to the Appeal in the Tribunal hence making him a party in the present Application was illegal, irregular and unsound. He then deponed that the Memorandum of Appeal annexed had no merits and the Applicant had not disclosed

who warned against and barred him from appealing the appeal Tribunal's decision. Furthermore, the applicant had not explained when he got to learn of the Ruling sought to be appealed from and who locked him out of the appeal process.

8. He deponed that the applicant was a busy body and stumbling block to the deceased's family as a whole. Additionally, the land had since been subdivided and titles issued by the time the dispute was placed before the Divisional Land Disputes Tribunal, and that was done by the Applicant and the Respondent's himself who was the registered owner. His lament was that the application was made with unexplained extreme inordinate delay and the period of 13 years was inexcusable in law.

9. His deposition was that the Applicant was being untruthful since he had concealed a material fact of him having filed Kitale High Court Civil Case No. 7 of 2015 (OS) which was later turned to Kitale ELC No. 15 of 2016 and was dismissed on 08/09/2019. He annexed and marked as JR 2 (a), (b) and (c) copies of the documents of pleading and dismissal thereto. He then stated that no material had been placed before the Court to warrant the grant of the orders sought. He termed the application as an afterthought which was meant to mislead the Court and which if granted would open flood gates of similar cases.

10. Lastly, he deponed that after the delivery of the Ruling sought to be appealed against, the Applicant took possession, occupation and use of his 11 acres on which he had put major developments. He swore that the Applicant had unclean hands. He stated further that the Applicant and Respondent had no capacity to sue or be sued. He then deponed that what was left of the parties herein was to follow the succession of their deceased parent's estates and distribute what was left of them.

Submissions

11. When this matter came up for inter partes hearing, the Court directed that parties file submissions thereon before the Court would determine it. The Applicant filed his dated 18/07/2022 on 19/07/2022 while the Respondents filed theirs dated 15/07/2022 on 19/07/2022 on and Supplementary one dated 09/09/2022 on 14/09/2022.

12. The Applicant's submissions restated the prayers sought in the Applicant and summarized the contents of the Respondents' replying Affidavit sworn on 27/06/2022. Commenting on them he submitted that most of the issues raised were better to be dealt with in the appeal than in the Application. He stated that this Court had jurisdiction to hear and determine the application. He relied on the cases of the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Supreme Court decision of *Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others*, Civil Appl. No. 2 of 2011, and the Court of Appeal one of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR.

13. The last of the authorities held that the power of the Court to extend time is discretionary and is exercising the same the Court should consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is granted. He then submitted that Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* empowered this Court to exercise jurisdiction over such matters as the present one and Article 159 (2)(d) of the *Constitution* of Kenya 2010 mandates the Court not to determine matters not basing reasoning on procedural technicalities.

14. He also submitted that the inherent right to be heard as set forth in the grounds in the Supporting Affidavit and that he came to realize that the period allowed for one to lodge an appeal had already but the delay was not inordinate and can be excused. He reminded the Court that the right to be heard was a principle of natural justice and one of fair trial which cannot be limited under Article 25 of the

Constitution and he cited Article 51. To support this proposition, he cited the Court of Appeal case of *M. Mwenesi v Shirley Luchhurst & Another* Civil Application No. Nairobi 170 of 2000, whose holding was to the effect that a court of justice has no jurisdiction to do injustice therefore it is under a duty to exercise its inherent power to prevent injustice. He also relied on Lord Diplock's dictum in *Bremier Schiffbar and Maschinen Fabrick vs South Indian Shipping Corporation* Ltd [1981] (sic).

15. The Respondent started their submissions by summarizing the prayers of the application and giving four principles that should guide the Court in deciding such as application. These were that extension of time is not a right of a party but a discretionary one to a deserving party; the party seeking for extension of time has the burden of laying the basis for it to the satisfaction of the court; where there is delay, it should be explained to the satisfaction of the court; and whether the application has been brought without undue delay. They then submitted that prolonged delay disentitles an applicant such leave. They relied on the case of A*ndrew Kiplagat Chemaringo v Paul Kipkorir Kibet* (2018) eKLR where the Court held that a "plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favor. There has to be valid and clear reasons upon which discretion can be favorably exercisable." They stated that the Applicant had not done this given that 13 years had since elapsed from the time of the decision sought to be appealed against. They also relied on *Kiptoo arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR and that of *Rufus Muriithi Nyaga v Juliet Wanja Ireri* (208) eKLR.

16. Further they submitted that the applicant was cherry picking with the court process with the hope of finding justice and that litigation must always come to an end especially when a party was indolent. They then submitted that the registered owner of the suit land, one Chelanga Kisago passed on, on 21/8/2014 and no succession proceedings had been taken on his estate and the applicant did not apply to substitute before filing the present application. They cited Order 24 Rule 4 (1), (2) of the *Civil Procedure Rules*.

17. The also filed supplementary submissions in which they stated that the submission on the jurisdiction of the Court was irrelevant. They stated that the Applicant was out to mislead the court into making orders contrary to law and that his application lacked merit and should be dismissed.

Issues, Analysis and Determination

18. I have considered the application and the law under which it is brought. I have also taken into account the submissions by the parties and I arrive at the following three issues for determination: -

    a. What is the law applicable in an application of this nature?

    b. Whether the application is merited on not

    c. Who should bear the costs of the application.

19. I begin with looking at the first issue. This is because I have already laid down the issues before me. Using the Issue, Rule, Application and Conclusion (IRAC) method then it behooves me to get into the law applicable as the next segment of the analysis herein.

a) What is the law applicable in an application of this nature?

20. The Applicant seeks extension of time to file an appeal against a decision by the Provincial Land Disputes Tribunal Appeals Committee which was made on 24/11/2009. The decision was made pursuant to the procedure laid down in the then *Land Disputes Tribunal Act*, Chapter 303A of the Laws of Kenya, now repealed. In the Act, Section 8(8) provided that the decision of the Appeals Committee would be final regarding any question of law and no appeal would lie therefrom to the High

Court. Under Section 8(10), questions of customary law were deemed questions of fact. Section 8(9) of the Act provided that a party aggrieved by the decision of the Appeals Committee would lie to the High Court only on points of law within sixty (60) days of the decision, and no appeal would be admitted to hearing by the High Court unless the Judge certified that a question of law (other than customary law) was involved. Thus, what is clear was that issues of customary law were expressly excluded from forming points of appeal to the High Court. Secondly, even when a party wished to appeal to the High Court, he had to move the Court to certify that the Appeal was on a point of law only.

21. For purposes of the instant application, since the promulgation of the 2010 Constitution and the establishment of the Environment and Land Court (ELC) under the *ELC Act*, Act No. 19 of 2011, it is clear that the appeals from the decisions of the Committee would lie to this Court, which is the successor of the High Court in terms of jurisdiction as given under Article 162(2)(b) of the *Constitution* 2010 and the provisions of the Parent statute of this Court. Thus, as per Sections 13, 30 and 31 of the *Act* which deal with the jurisdiction of this Court, Transitional Provisions and the Repeal of the Land Disputes Tribunal Act respectively, as read together, there is no doubt that after the establishment of this Court as a Court of Equal Status with the High Court, all appeals relating to the aspects of jurisdiction provided for in regard to this Court fall squarely before this Court.

22. Having said that, it is my humble view therefore that the law as at the time of the decision impugned was that if one was aggrieved with the decision of the Land Disputes Appeals Committee, he had time up to sixty (60) days to appeal therefrom. Where a party did not appeal in time, there was no provision for extension of time to appeal or enlargement of time for the same, in the Act. It therefore leaves this Court with the question as to where the power to enlarge time would be derived from.

23. The Applicant in this case brought the instant application under Section 79G of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*, 2010. Section 79G of the *Act* deals with the time for filing appeals from the subordinate Courts to this Court. It provides that that has to be done within 30 days of the decision. However, it also provides for the exception of filing the appeal out of time, as long as it is done in the within the requirements of the Proviso thereto. The Proviso reads, that "Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time." Since the Article 169(1)(d) of the *Constitution* 2010 provides for the local tribunals established under any Act of parliament as being one of the subordinate entities to this Court, I treat the Land Disputes Appeals Committee as established under Section 8 of the *Land Disputes Tribunal Act* of 1990 (now repealed) as one of the organs subordinate hereto, and its decisions, for appeal purposes, would fall among those the Proviso on admission of appeals out of time applies to. For that reason, the application of Section 79G to the instant application is relevant.

24. Order 50 Rule 6 of the *Civil Procedure Rules* provides that:

> "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"(emphasis mine by way of underline).

25. The Rules of the Civil Procedure apply to this Court by virtue of Section 19 of the *ELC Act*. My understanding of the provision in the Rules is that Order 50 Rule 6 applies only in three instances, namely, in a situation where the Rules provide for the doing of an act within a certain time and the act is not done within that time, or where a summary notice is given or where the court orders for the doing of a certain act within a given period of time. While I do not see anything making the instant application fall within the confines of the Rule, I am prepared, under Article 159(2)(d) of the *Constitution* 2010,

and given the findings above about the application of Section 79G herein, to exercise my discretion to treat the Directions given on 24/11/2009 as a summary notice and therefore consider Order 50 Rule 6 as applicable herein. Therefore, I am of the view that I have the jurisdiction to consider the instant application.

(b) Whether the Application is merited on not

26. I begin the analysis of this issue with the dissection of very salient points of the contention in this application. First, from the reading of annextures EKC2, 3 and 7 of the supporting Affidavit and annextures JR1 of the Replying Affidavit, the applicant is the son of the late Chelang'a Kisang who died on 21/08/2014. The Respondents too are the children of the deceased. Further, from annextures EKC2 and 3 the 1st Respondent and the late Chelang'a Kisang were the Respondents and Defendants respectively in the dispute at the Land Disputes Tribunal and the Appeals Committee, and the Court case in Kitale Chief Magistrate's Land Case No. 40 of 2006. It is also clear from the two annextures that the decision Land Disputes Tribunal Award which was purportedly adopted as the judgment of the Court and a decree issued thereto was the one which was appealed against in the Land Disputes Appeals Committee and the decision for which leave is sought herein for extension of time was made. Secondly, it is important to note that the said Chelang'a Kisang, having died, it was not demonstrated that the personal representative of his estate has been sued or substituted legally in the instant application for it to be competently filed against the estate. Lastly, the Applicant joined one Reuben Kitpoo Rotich, to the instant Applicant yet he was a stranger to the proceedings, that were before both Land Disputes Tribunal levels and the Court.

27. The totality of the above features would have made me dismiss the Application herein for incompetency but I need to say more. The law regarding an application for extension of time for leave to file an appeal out of time is now settled. The power of the Court to extend time is discretionary but the discretion as usually is required of the law should be exercised judiciously.

28. And as was stated in *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi*, Civil Application No. NAI 255 of 1997 (unreported) it held was that:

> "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."

29. This Court will exercise discretion as required by law. And as it does it, it will consider a number of principles courts recognize in considering applications of this nature. In *Aviation And Allied Workers Union V Kq Ltd & 3 Others* [2015] eKLR, the Supreme Court laid down the principles a court should take into account when a request to extend time is made. They are:

    (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 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 time, is a consideration to be made on a case to case basis:

(4) Where there is (good) 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's if the extension is granted:

(6) Whether the application has been brought without undue delay: and

(7) Whether in certain cases, like election, petitions, the public interest should be a consideration for extending time."

30. Also, in *Kiptoo arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR the court held:

> "...it is clear that discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. We derive the following as the underlying principles that a court should consider in exercising such discretion; 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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; whether the courts should exercise the discretion to extend time; is a consideration to be made on a case to case basis; where there is a reasonable (cause) for delay, the same should be expressed to the satisfaction of the court; whether there would be any prejudice suffered by the respondent if extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time."

31. In *Republic v Land Dispute Tribunal, Bahati& another; Peter Karani Nduku (Interested Party) Ex parte Jacob KipkuruiKonga& Another* [2020] eKLR, where pretty similar unexplained circumstances were brought before the Court, it was held: -

> "It is evident that the Tribunal heard and determined the dispute in 2006 and that the Magistrates Court adopted the award as judgment in 2008 while the Appeals Committee dismissed the applicants Appeal in 2009. Up to the time the appeal was dismissed the Land Disputes Tribunals Act (Repealed), had not been repealed and was in force. Hence the procedure that ought to have been followed in resolving the dispute was the one laid out under the Act.....if he was not satisfied with the decision of the Appeals Committee, he ought to have filed an appeal against the committee's decision if a point of Law was involved in the High Court. He did not and although the decision in the appeal was given on 17th November 2009 the applicant only initiated these proceedings on 27th March 2019 when he filed the application for leave. It was not explained why it took the applicant over 9 years from the date the appeal to the Provincial Appeals Committee was dismissed to seek to bring these proceedings. The delay was inordinate and could only have been an afterthought. I view these proceedings as a fishing expedition on the part of the applicant in the hope that he could somehow make a catch. The Courts do not work in that manner as their solemn duty is to interpret and apply the law the quest of doing justice to the parties who come before them".

32. In the instant case the Applicant argued that he was warned and cautioned not to appeal against the decision of the Appeals Committee. He did not produce any evidence to that effect. The fact that

Annexture EKC 2 contained a comment that there was no recommendation of the right of appeal of 60 days to the High Court did not of itself mean that he was not permitted or barred to appeal. All that the Tribunal stated was that their decision could as well be given immediate effect. But nowhere in the proceedings or decision was there a caution against appeal. Also, there was no evidence of harshness by the Appeals Committee or ambush on the applicant as he swore in the supporting Affidavit. Moreover, the Applicant did not disclose that he has been pursuing the issues in this matter before the High Court in Kitale High Court Civil Case No. 7 of 2015 (OS) which became Kitale ELC No 15 of 2016, which was later dismissed on 08/09/2019.

33. Again, the Applicant did not explain why it took him almost 13 years to move the Court for the extension of time. He also did not show the court when and how he came to realize that time to appeal against the decision of 24/11/2009 had elapsed. This is an applicant who is keen to abuse the process of the Court by moving it in one forum or other and when the prayers he seeks are not granted he moves another Court in another matter, as exemplified by the instant application after the dismissal of Kitale ELC. No. 15 of 2016. I therefore find that the delay in bringing the instant application has not been explained to the satisfaction of the Court so as to avail the applicant of the orders sought. Granting the instant application will occasion more prejudice to the Respondents and others than refusing it.

34. Additionally, as stated at the opening paragraphs of the determination of this issue, to grant the application will end up irregularly adding into the proceedings that commenced at the Tribunal stage an individual who was not a participant therein hence indirectly condemning him unheard by attaching him to the decisions that were made earlier in his absence. Lastly, no substitution was made of the late Chelang'a Kisang against whom orders of extension of time sought herein would be made. Thus, the application herein is not merited absolutely.

(c) Who should bear the costs of the application

35. Costs follow the event but the Court has discretion under Section 27 of the *Civil Procedure Act* to decide otherwise. However, this application was absolutely baseless, uncalled for and unmeritorious. It pitted brother against brothers as respondents: respondents who are innocently in occupation of parcels of land gifted to them by their late father during his life time. Greed should not to be encouraged by this or any other judicial forum. Children should strive to acquire wealth of their own. They should not die of thirst and lust for their parents' hard gained properties: properties they (children) did not participate in acquisition, and when the parents decide to gift to whomsoever they will the (children) greedily question the discretion and wisdom of those who solely struggled to acquire the wealth and vex legal beneficiaries thereof. It is time our legislators thought of enacting laws that re-order the thinking and flow of property from parent to child in such a manner as not to encourage young lazy minds that are 'sitted' around waiting for their parents to "go" and leave their properties to them in the name of heirs. Ordinarily, this Court would not award costs as between siblings. But for the reasons stated above, the applicants shall bear the costs of this application.

36. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 22ND DAY OF NOVEMBER, 2022.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE