



Kiboga & 8 others (Suing on their own behalf and on behalf of 156 members of the family of Mbari ya Karigi and Karigi Welfare Group) v Attorney General & 5 others (Environment & Land Petition 12 of 2015) [2023] KEELC 552 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 552 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND PETITION 12 OF 2015
JO OLOLA, J
FEBRUARY 2, 2023
IN THE MATTER OF
ARTICLES 11(1), (2) AND 23(1), (3) OF
THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF
ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 40(3) OF
THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF
THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES 2013

BETWEEN

JOHN NDIRANGU KIBOGA 1ST PETITIONER
PAL GACHENGO WACHIRA 2ND PETITIONER
JAMES KARIMI MUIRU 3RD PETITIONER
JAMES GITATA HIRAM 4TH PETITIONER
DAVID GACHIGI WACHIRA 5TH PETITIONER
JOHNSTONE NDIRANGU WAIGWA 6TH PETITIONER



JOHN MOYO MUGAMBI 7TH PETITIONER
FRANCIS MWANGI MATHENGE 8TH PETITIONER
JACOB GAKOBO RUNANO 9TH PETITIONER
SUING ON THEIR OWN BEHALF AND ON BEHALF OF 156 MEMBERS OF
THE FAMILY OF MBARI YA KARIGI AND KARIGI WELFARE GROUP

AND

ATTORNEY GENERAL 1ST RESPONDENT
MINISTRY OF EDUCATION SCIENCE & TECHNOLOGY BOARD OF
MANAGEMENT 2ND RESPONDENT
KAGUMO TEACHERS COLLEGE 3RD RESPONDENT
NATIONAL LAND COMMISSION 4TH RESPONDENT
COUNTY GOVERNMENT OF NYERI 5TH RESPONDENT
MINERVA NOMINEE LIMITED 6TH RESPONDENT

RULING

1. By the Notice of Motion dated June 7, 2019, the Nine (9) Petitioners pray for orders:
 1. That the determination by the National Land Commission dated February 7, 2019 be adopted as a Judgment of this Honourable Court;
 2. That leave be granted by this Honourable Court to the Petitioners/Applicants to file an appeal out of time against the said determination; and
 3. That the costs of this application be provided for.
2. The said application is supported by an Affidavit sworn by the 1st Petitioner John Ndirangu Kiboga and is premised on the grounds that:
 - (i) By its determination dated February 7, 2019 the National Land Commission (NLC) dismissed the Petitioner's claim;
 - (ii) The Petitioners are dissatisfied with the said determination and more so the reason(s) thereof because the same amounts to a factual absurdity;
 - (iii) The said determination was not and has not been formally transmitted to this Court and therefore has never been adopted as a Judgment of this Honourable Court and the Petitioners could not therefore file an appeal against the same;
 - (iv) That on May 2, 2019 this Court merely gave directions but did not adopt the said determination as its own;
 - (v) The Petitioners are desirous of appealing against the entire determination and hence the prayers sought herein.



3. The application is opposed by the County Government of Nyeri (the 5th Respondent). By their Grounds of Opposition dated July 3, 2019, the 5th Respondent is opposed to the application on the single ground stated as follows:
 1. That the application lacks any legal basis and it is indeed an abuse of the Court process. There is clear procedure for appealing decisions of the National Land Commission provided for under the National Land Commission (Investigation of Historical Land Injustices Regulations) 2017.
4. I have carefully perused both the application and the ground of opposition thereto. I have similarly perused and considered the written submissions as placed before the Court by the Petitioners and the 5th Respondent. The Honourable the Attorney General appearing for the 1st to 4th Respondents did not participate in the application.
5. By their application herein the Nine (9) Petitioners suing on their own behalf and on behalf of the 156 members of the family of Mbari ya Karigi and Karigi Welfare Group urge the Court to have the determination issued by the National Land Commission (NLC) dated February 7, 2019 adopted as a Judgment of this Honourable Court. In the same breadth the Petitioners pray that they be granted leave by the Court to file an appeal out of time against the said determination.
6. It is the Petitioners case that even though the determination was delivered on February 7, 2019 and gazetted on March 1, 2019, the same was never formally transmitted to this Court and has never been adopted as a Judgment of this Court to enable them to appeal the same.
7. When the matter came up for hearing before the Honourable Justice M Oundo on July 4, 2019, Counsel for the Petitioners informed the Court that his clients were no longer interested in pursuing Prayer No 1 of the application. The prayer to have the determination issued by the Commission on February 7, 2019 adopted as an order of this Honourable Court was therefore abandoned and all that remains for determination by the Court is the prayer for leave to be granted to the Petitioners to file an appeal out of time.
8. As it were, the Petition herein was initially filed in this Court on June 8, 2015. However by a consent order recorded in Court on November 7, 2017, the Parties agreed that the National Land Commission which was said to have taken cognizance of the matter as a historical injustice should proceed and hear the matter for purposes of compensation. Accordingly this matter was referred to the Commission for hearing and determination.
9. Having heard the matter and in the determination issued on February 7, 2019, the Commission dismissed the Petitioners' claim to the land having determined that the Petitioners had not demonstrated any locus to substantially and materially link them to the suit land. The Petitioners are aggrieved by the said determination and have by this application sought leave to file an appeal out of time.
10. For purposes of an Appeal, Rule 29 of the National Land Commission (Investigation of Historical Land Injustice Regulations) 2017 provides as follows:

' A person aggrieved by the decision of the Commission may within 28 days of the publication of the decision, appeal to the Court.'



11. As the Supreme Court stated in *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR*:

- ' (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 time, is a consideration to be made on a case to case basis.
- (4) Whether there is reasonable explanation 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, and
- (6) Whether the application has been brought without undue delay.'

12. In the matter before me, the determination by the NLC was gazetted on March 1, 2019 and the Petitioners were therefore required to file an Appeal within 28 days from that date. From a perusal of the Supporting Affidavit of John Ndirangu Kabogo, it is apparent that the Petitioners were labouring under the notion that the determination by the Commission ought to have been first transmitted to this Court to be formally adopted as a Judgment of the Court before they could appeal the same.

13. That notion as pointed out by the 5th Respondent was as wrongful as it was erroneous. The Parties having opted to subject themselves to the jurisdiction of the National Land Commission had by that fact subjected themselves to the Rules and Regulations guiding the determinations made by that Commission and there was no longer any requirement for the decisions of the Commission to be first adopted by this Court.

14. Following the consent order that referred the matter for hearing and determination before the Commission on November 7, 2017, this suit was discontinued and no application as the one before me could be filed therein. While the Petitioners were at liberty to seek extension of time within which an Appeal could be brought to this Court, it was clear to me that it was completely irregular and unprocedural for such an application to be made in this matter.

15. The upshot is that the Motion dated June 7, 2019 is misconceived and incompetent. The same is struck out with costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 2ND DAY OF FEBRUARY, 2023.**

In the presence of:

Mr. Macharia for the 5th Respondent

No appearance for the Petitioners

No appearance for the Attorney General

Court assistant – Kendi

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J. O. OLOLA
JUDGE

