



Rutto (Suing as a Grandson on behalf of the Estate of Teriki Chepkunur (Deceased) v Estate of Kibiego Cherugut (Deceased) & 7 others (Environment and Land Miscellaneous Application E004 of 2023) [2023] KEELC 21357 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2023
EO OBAGA, J
NOVEMBER 9, 2023**

BETWEEN

KIPCHUMBA RUTTO (SUING AS A GRANDSON ON BEHALF OF THE ESTATE OF TERIKI CHEPKUNUR (DECEASED)) APPLICANT

AND

**ESTATE OF KIBIEGO CHERUGUT (DECEASED) 1ST RESPONDENT
BENJAMIN KIMUTAI CHEBIEGO 2ND RESPONDENT
THOMAS KIPTOO CHERUTICH 3RD RESPONDENT
FRANCIS KIPKORIR BETT 4TH RESPONDENT
DANIEL ROTICH CHEBIEGO 5TH RESPONDENT
ESTATE OF KOSGEI KIBET 6TH RESPONDENT
ESTATE OF MOSES KIBIWOTT BETT (DECEASED) 7TH RESPONDENT
MICHAEL KIBULBUL CHERUBET 8TH RESPONDENT**

RULING

1. This is a ruling in respect of a notice of motion dated 1.8. 2023 in which the Applicant seeks extension of time to file an appeal against the decision of the National Land Commission (NLC) which was delivered on 10.5.2023. The Applicant had filed a complaint before the NLC based on historical injustice. The Commission rendered its decision on 10.5.2023 in which the Applicant's claim was dismissed.
2. The Applicant contends that he was not notified of the date of delivery of ruling by the NLC and therefore he could not file an appeal against the decision of NLC in time. He states that he kept



inquiring about the fate of the decision until he decided to contact one of the Commissioners of NLC who informed him that the decision had been rendered and that the same had been posted at the NLC website.

3. The Applicant contends that NLC had his email address and cellphone number but he was not contacted and that he did not access the NLC website in time to see the verdict.
4. The Applicant's application was opposed by the 5th and 6th Respondents based on a relying affidavit sworn on 6/10/2023. The Respondents contend that the Applicant has brought these proceedings against persons who are deceased and that the application was brought 90 days after the verdict of NLC.
5. The Respondents further contend that he parties were notified of the decision by NLC through letter dated 21.8.2023. They further argue that granting the extension of time will prejudice the Respondents as the property which was the subject of the historical claim has been subdivided severally and the Applicant has always known this fact as the Respondents are staying on their respective portions with their families.
6. The Respondents also state that the Applicant has no arguable appeal and that the application is incompetent, frivolous, vexatious and amounts to an abuse of the process of the court.
7. I have considered the Applicant's application, the opposition to the same by the Respondents as well as the submissions by the parties. The first issue for determination is whether proceedings can be brought against a deceased person. The second issue is whether the Applicant has met the threshold for grant of extension of time. The third issue is on which order should be made on costs.
8. On the first issue, the Applicant has admitted that at least two of the Respondents are deceased. These are the 1st and 7th Respondents. He has purported to sue the Estate of the two deceased persons without suing their personal representatives. The Respondents have demonstrated that the 8th Respondent died on 11.6.2022, the 4th Respondent died on 31.5.2021 and the 3rd Respondent died on 9.5.2023.
9. It is therefore clear that the proceedings against the 1st, 3rd, 4th, 7th and 8th Respondents are a nullity. In Machakos High Court Civil Case No. 362 of 2011, *Rodah Wangikuyu Mutunga & 4 others – Vs- Kitole Mutinda & another (sued as the widows & personal Representatives of William Mutinda Kabahi, deceased)* (2012) eKLR, the court held as follows:-

“In law a suit cannot be maintained against a dead person and his estate unless a personal representative or executor has been appointed. These are the people that whoever cares to mount the suit against the dead must sue.”

10. The principles to be considered in an application for extension of time were set out by the Supreme Court of Kenya in the case of *Nicholas Kiptoo Korir ARap Salat –Vs- IEBC & 7 others* (2014) eKLR where the Supreme Court judges stated as follows:-

“The underlying principles a court should consider in exercise of such discretion should include: -

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
11. In the case of *John Musili Wambua -vs- Attorney General & 2 others* (2015) eKLR, the Court of Appeal stated as follows:-

“...it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted.”

12. It is in light of the principles set out in the two cases hereinabove that I will decide the Applicant’s application. The ruling by NLC was delivered on 10.5.2023. the application for extension of time was filed on 3.8.2023. This is a period of almost 3 months. The Applicant claims that he was not aware of delivery of ruling. The ruling was published in the NLC website. The parties were later sent a copy of the verdict on 21.8.2023. As at this time the Applicant had been informed by one of the Commissioners that the verdict had been sent to Baringo NLC offices. The Applicant has not therefore given a satisfactory explanation why he did not appeal in time.
13. If extension of time was to be granted, it will greatly prejudice the Respondents who were purchasers of the land in issue. The 5th Respondent obtained his title on 9.8.2012. The 6th Respondent obtained his title on 20.1.2015. The 3rd Respondent who is deceased obtained his title on 10.2.1994. The 8th Respondent who is also deceased obtained his title on 13.11.2007. The 7th Respondent who is also deceased got his title on 7.10.1999. The 4th Respondent who is equally deceased obtained his title on 4.2.2005.
14. I have gone through the verdict of NLC. The Applicant’s grandmother has her own land being Lembus/Torongo/32. He is seeking to have Lembus/Torongo/33 which was given to family of Kibiego Cherugut. During the hearing before NLC, one Chesire who was a member of the adjudication committee testified that no one family was entitled to more than one parcel. The Applicant in his memorandum of appeal claims that this Chesire was biased. I do not see any arguable appeal in the circumstances. I proceed to dismiss the Applicant’s application with costs to the 5th and 6th Respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 9th day of NOVEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;



Mr. Okutta for Applicant.

Mr. Kibii for 5th and 6th Respondents.

Court Assistant –Laban

