



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E004 OF 2021.

GLADYS OBILIKA WANDABUSI – (DECEASED) PLAINTIFF

VERSUS

MARY NALIKA MAFURA 1ST DEFENDANT/RESPONDENT

JACKSON O. MWENYA 2ND DEFENDANT/RESPONDENT

PROTUS W. WEKESA 3RD DEFENDANT/RESPONDENT

ESTHER KAGAI 4TH DEFENDANT/RESPONDENT

AND

ALLAN SITATI APPLICANT

RULING

ALLAN SITATI (the Applicant herein) moved to this Court vide his Notice of Motion dated 28th June 2021 and premised under **Section 79 G** of the **Civil Procedure Act** seeking the following reliefs: -

- (a) Spent**
- (b) Leave to appeal out of time be granted.**
- (c) Spent**
- (d) That there be a stay of execution of all orders made in LDT CASE No 1 of 2010 pending the hearing of the appeal.**
- (e) The appeal be deemed as properly filed and served upon payment of the requisite Court fees.**
- (f) Costs be in the cause.**

The application is based on the grounds set out therein and is supported by the Applicant's affidavit dated 30th June 2021.

The Applicant has approached this Court on behalf of the Estate of **GLADYS OBILIKA WANDABUSI** who was his mother who passed away on 28th August 2011. That prior to her demise the deceased did not inform her about the existence of **LDT CASE No 1 of 2010** and he only became aware about it when he was served on 2nd May 2021. That upon perusal of the file relating to **LDT CASE No 1 of 2010**, he discovered that the Panel of Elders had made a decision on 3rd September 2009 in a matter that it did not have the requisite jurisdiction. That the deceased was terminally ill and had filed her grounds of objection which were dismissed. That there was a Notice of Motion purportedly served upon the deceased when she had already passed away on 28th August 2011. That the appeal has strong grounds of success as the Panel of Elder's jurisdiction was limited to boundary disputes yet it illegally determined a dispute involving ownership and transfer of title deeds. That this application has been made expeditiously.

Annexed to the application are the following documents: -

1. Memorandum of Appeal dated 28th June 2021.
2. Certificate of Death of GLADYS OBILIKA WANDABUSI.
3. Hearing Notice dated 2nd May 2021 issued in CHIEF MAGISTRATE'S COURT BUNGOMA LAND CASE No 1 of 2010.
4. Order dated 8th July 2014 issued in CHIEF MAGISTRATE'S COURT BUNGOMA LAND CASE No 1 of 2010.
5. Order dated 9th October 2015 issued in CHIEF MAGISTRATE'S COURT BUNGOMA LAND CASE No 1 of 2010.
6. Decree dated 1st March 2010 issued in CHIEF MAGISTRATE'S COURT BUNGOMA LAND CASE No 1 of 2010.
7. Proceedings in KANDUYI LAND DISPUTES TRIBUNAL CASE No 7 of 2009.

In opposing the application, the Respondents filed grounds of opposition dated 8th October 2021 raising the following: -

1. The application lacks merit, is frivolous and an afterthought.
2. The Applicant is guilty of laches and the period of over 10 years is inexcusable and fatally unreasonable.
3. The Applicant has not even explained or offered any cogent reasons why he did not act within the period provided and a delay of 10 years is incomprehensible.

The application was first placed before me on 14th July 2021 when I directed that it be served on the Respondents together with written submissions within 14 days after which the Respondents would also have 14 days after service to respond. It would then be mentioned on 18th August 2021 to confirm compliance and take a date for ruling. However, by 28th September 2021, the Applicant was yet to personally serve all the Respondents and I directed that they be served. A ruling date was then taken for 4th November 2021.

Submissions were filed subsequently by MS L. NANZUSHI instructed by the firm of LUCY NANZUSHI AND COMPANY ADVOCATES for the Applicant and by MR J. SICHANGI instructed by the firm of J. W. SICHANGI AND COMPANY ADVOCATES for the Respondents.

I have considered the application, the supporting affidavit and annexures as well as the grounds of opposition.

Section 79 G of the Civil Procedure Act provides that: -

“Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

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.” Emphasis added.

Order 50 Rule 6 of the Civil Procedure Rules empowers the Court to enlarge time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. That power is discretionary. In LEO SILA MUTISO .V. ROSE HELLEN WANGARI MWANGI C.A CIVIL APPLICATION No 255 of 1997 it was held 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.”

In NICHOLAS KIPTOO arap KORIR SALAT .V. I.E.B.C & OTHERS 2014 eKLR, the SUPREME COURT laid down the following principles to guide a Court considering an application such as this one. These are: -

- (a) 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.
- (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 its discretion to extend time is a consideration to be made on a case to case basis.
- (d) Where there is a reason for delay, it 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 delay.

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

It is clear therefore that whether or not to extend time to file an appeal is at the discretion of the Court. As always, such discretion must be exercised judiciously, on sound reasons but not on caprice, whim, like or dislikes.

From the annexures herein, this suit was commenced at the then **KANDUYI LAND DISPUTES TRIBUNAL** (the **TRIBUNAL**) where the Respondents were the claimants and the Applicant's late mother **GLADYS OBILIKA WANDABUSI** (the deceased) was one of the six (6) objectors. The dispute involved the land parcels **NO EAST BUKUSU/NORTH KANDUYI/1996** and **1997** and after hearing the parties, the **TRIBUNAL** rendered its decision on 3rd September 2009. It is not clear how the **TRIBUNAL**'s award affected the deceased's property. The salient part of that award reads as follows in paragraph 1: -

"The Panel of Elders unanimously awards the three (3) claimants their parcels of land parcels of land bought from different sellers namely: -

1: MARY NALIKA MAFURA land measuring two (2) acres from NYONGESA WEKESA SIARA.

2: JACK OBILO MWENYA land measuring one (1) acre from FREDRICK KUNDU SIARA.

3: ESTHER KAGAI WANYONYI land measuring ¼ an acre from FREDERICK KUNDU WEKESA."

From my perusal of the whole award, I could not see any reference to the deceased. If it affected her property, that has not come out clearly from the Applicant's affidavit. Indeed, the Applicant appears to suggest that the award did not touch on the deceased's property. In paragraphs 4 and 5 of the said affidavit, he has deponed as follows: -

4: "That on going to the award filed in Court on the 3.9.2009, I noticed the same could not be awarded by the Panel of Elders for they touched on the issue of transfer of land instead of boundaries of land (see Len 4)."

5: "That I noticed in the award that my late mother's property i.e. E. BUKUSU/N. KANDUYI/1997 was not reflected."

It is not clear therefore why the Applicant would have an issue with that award. Having said so, however, and for reasons which will soon be clear, the import of that award is really not relevant for purposes of this ruling.

What is important is that the dispute having been heard by the Panel of Elders under the provisions of the repealed **LAND DISPUTES TRIBUNALS ACT**, the deceased had the right under **Section 8(1)** thereof to file an appeal at the **PROVINCIAL APPEALS COMMITTEE** within thirty (30) days. That appears not to have been done or if an appeal was filed, this Court has not been informed. Consequently, the said award was filed at the **CHIEF MAGISTRATE'S COURT BUNGOMA** as **LDT CASE No 1 of 2010**. On 3rd September 2010, the award was adopted as a Judgment of the Court by **HON J. K. NG'ARNG'AR (PRINCIPAL MAGISTRATE)**. The record shows that all the parties involved in the dispute, including the deceased, were present in Court when the **TRIBUNAL**'s award was adopted as a Judgment of the Court. That was some eleven (11) years before this application was filed. The fact that the deceased did not appeal the **TRIBUNAL**'s award as far back as the year 2009 can only lead to the inevitable conclusion that she did not wish to appeal the decision.

It is common ground that the deceased died on 28th August 2011. That was two (2) years after the **TRIBUNAL** had rendered its award. The Applicant has deponed in paragraph 3 of his supporting affidavit that he only became aware of the **LDT CASE No 1 of 2010** on 2nd May 2021. That may be so. But the owner of the dispute was well aware of the **TRIBUNAL**'s decision on 3rd September 2009 and decided not to pursue the matter until her demise two (2) years later. The inevitable conclusion is that the Applicant can only be pursuing his own interests in this matter. He is not deserving the exercise of this Court's discretion in his favour bearing in mind that what he seeks is an equitable remedy. I am certainly not satisfied with his explanation.

The Court is also required to consider if any prejudice will be suffered by the Respondents or any other party if the extension is allowed. The record shows that following the adoption of the **TRIBUNAL**'s award as a Judgment of the Court, a Vesting Order was extracted on 9th July 2014 vesting two (2) acres out of the land parcel **NO EAST BUKUSU/NORTH KANDUYI/1997** in the names of **MARY NALIKA MAFURA**. The Certificate of Search in respect of that parcel of land was not availed for perusal by the Court. It may very well be that the said parcel of land has since changed ownership and is now vested in one who was not even a party to proceedings before the **TRIBUNAL**. An extension of time in the circumstances may very well be prejudicial to other parties.

Counsel for the Applicant has in her submissions raised the issue that the **TRIBUNAL** exceeded its jurisdiction because under **Section 3 (1)** of the repealed law, it was only required to determine disputes involving trespass to land, determinations of boundaries and claims to occupy or work land. Looking at the **TRIBUNAL**'s award, there is merit in that observation. In paragraph 3 of the award dated 3rd September 2009, the **TRIBUNAL** made the following order amongst others: -

3 "All the title deeds acquired fraudulently be withdrawn and destroyed to make new ones in the light of fairness to all stake

holders.”

That went well beyond the **TRIBUNAL**'s jurisdiction. The jurisdiction to cancel title deeds was then vested in the High Court or, subject to the value of the land, in the Magistrate's Court by virtue of Section 159 of the now repealed Registered Land Act. However, this Court is not seized of any appeal. The paramount consideration is whether the Applicant has satisfied the Court that there is **“good and sufficient cause for not filing the appeal in time.”** No such **“good and sufficient cause”** has been demonstrated by the Applicant. Instead, from the circumstances of this case, the Court takes the view that the deceased who was the main actor in the dispute opted not to appeal the **TRIBUNAL**'s decision. I am therefore unable to discern what locus the Applicant can possibly have in this matter to warrant the grant of the leave sought.

Having found that the Applicant is not deserving of the order to appeal out of time, it follows that there can be no justification for granting any orders for stay of execution of the decree issued in **LDT CASE No 1 of 2010**. Under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, an order for stay of execution is granted where: -

(a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made.

(b) The application has been made without unreasonable delay.

(c) The Applicant has given security.

Nowhere in his thirteen (13) page affidavit has the Applicant alluded to the substantial loss that he may suffer nor offered any security. Most significantly, the decree sought to be stayed was in fact executed way back on 8th July 2014 when a Vesting Order was made in favour of **MARY NALIKA MAFURA**. That was some seven (7) years before this application was filed. There possibly cannot be anything left to stay. The word **stay** is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

“The postponement or halting of a proceeding, Judgment, or the like, an order to suspend all or part of a Judicial proceeding or a Judgment resulting from that proceedings.”

Given the circumstances of this case, the Court would be acting in vain if it purported to issue any orders of stay given the length of time that has elapsed since the decree was issued. Courts do not act in vain. In any event, having dismissed the prayer for extension of time within which to appeal, an order of stay would have no legs to stand on.

The up – shot of all the above is that the Applicant's Notice of Motion dated 28th June 2021 and filed on 7th July 2021 is devoid of merit. It is accordingly dismissed with costs to the Respondents.

Boaz N. Olao.

J U D G E

30th November 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 30th day of November 2021 by way of electronic mail in keeping with the **COVID – 19** guidelines.

Boaz N. Olao.

J U D G E

30th November 2021.