REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 13 OF 2021

ALMER FARM LIMITED.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1st RESPONDENT

THE CHIEF LAND REGISTRAR.....2nd RESPONDENT

BETTY RONO.....3rd RESPONDENT

(Sued as Executrix of the estate of the late DAVID RONO)

RULING

Introduction

1. The Applicant herein, Almer Farm Limited, brought before this Court a Notice of Motion dated **26/07/2021**. The Motion sought the enlargement of time within which to file an appeal against the decision of the National Land Commission dated **7/2/2019.** It also sought an order that the draft Memorandum of Appeal annexed be deemed to have been properly filed (which cannot be unless and until, if this Court grants the order, it is paid for) and that the court be pleased to grant any further orders it may deem just and fair in the circumstances.

2. A brief history of the events that transpired before the instant application would be appropriate to be given at this point before much is discussed. On **7/2/2019** the National Land Commission (**the Commission**) delivered its decision in relation to the issues herein. The decision was rendered in cause number **NLC/HLI/112/2019** before the Commission wherein Betty Rono (as the Administrator of the Estate of the late David Rono) sued Almer Farm Limited. The decision was published on **01/03/2019** vide **Gazette Notice Vol. CXXI-No.27**. The Applicant herein was dissatisfied with that decision. It filed immediately before this Court an Application dated **9/4/2019** for Judicial Review proceedings. That was in **Kitale ELC JR. No. 4 of 2019: Almer Farms Limited v National Lands Commission.** The Applicant challenged the decision. In the application, the applicant sought to quash the decision of the National Land Commission.

3. Judgment on the Judicial Review application was delivered on **1/12/2020**. By it, the Judge struck out the application because it was improperly before the court. Being dissatisfied with the determination, the Applicant, under the guidance of its able counsel decided to appeal therefrom and "applied for injunction" against the decision of this Court. On **9/07/2021**, a three-judge Bench of the Court of Appeal comprising of **R. N. Nambuye, JA, Hannah Okwengu JA and S. Ole Kantai JA** dismissed the Application. Their Lordships based their decision on the grounds that the Applicant was by law required to file an appeal against the decision of the Commission within the timeline prescribed in law instead of filing judicial review. Again, being dissatisfied, the Applicant moved this Court by the present Application on **26/07/2021** seeking for enlargement of time to enable it file an appeal against the decision of the Commission of **7/2/2019.**

4. In the Notice of Motion dated the same day, the Applicant invoked **Order 50 Rule 6** of the **Civil Procedure Rules, Sections 95, 3A** and **B** of the **Civil Procedure Act.** The Application was based on the grounds on the face of it and the Affidavit sworn by one **Joseph Yego** on **26/7/2021.** The said **Mr. Yego** alluded to having been authorized by the Applicant's Board of Directors to plead on its behalf. He annexed to his Affidavit the Company's resolution dated **12/03/2021** to that effect.

5. The grounds the Applicant relies on are reiterated in the Supporting Affidavit. In it Mr. Yego depones that the Applicant received the determination of the Commission on the **7/2/2019.** He then applied for Judicial Review in Kitale **ELC JR. No. 4 of 2019** within the requisite **28 days**. But what I see from the record is that the Notice of Motion for Judicial Review was filed on **9/04/2019**. It was leave to file the Judicial Review that he made by **27/3/2019**. That notwithstanding, the short period beyond the **28 days** to appeal will not impact the decision of this Court.

6. Mr. Yego swore further that intention of filing the Judicial Review Application was to challenge the decision of **07/02/2019**. His further oath was that the filing of the Judicial Review was due to an inadvertent error on the part of counsel who did so rather than filing an appeal. He then swore further that counsel adopted the procedure from the one used against decisions of the Public Procurement Oversight Board. Put in another way, Mr. Yego meant counsel believed that the procedure was the one applicable in the instant circumstances. He indicated that the Judicial Review proceedings were in **Kitale ELC JR. No. 4** of **2019**. It was struck out the suit due to the failure of the applicant to invoke the right procedure. He deponed further that the Applicant filed an appeal against that decision vide **Eldoret Civil Appeal (Application) No. 5 of 2021 Almer Farm Limited -vs- National Lands Commission & 2 Others.** A decision thereon was rendered on the **9/7/2021** dismissing the application. He averred further that the dispute herein still stands and is yet to be determined substantively. He then swore that the 3rd Respondent had moved the court vide **Misc. Application No. 6 of 2019: Betty Rono -vs- Almer Farms Limited** seeking to enforce the decision of the **Commission** despite the fact that the dispute has not been heard and determined on merits. He then stated that the error was inadvertent and not inspired by malice, spite or calculated to delay the expeditious disposal of the proceedings. To demonstrate that the intended appeal was arguable the Applicant prepared and annexed a Memorandum of Appeal to the Supporting Affidavit. He stated that it was meritorious. He then stated that the Application was brought without inordinate delay because it was done soon after receiving the Court of Appeal decision on **9/7/2021**.

The Response

7. The Application is opposed. The 3rd Respondent filed her Replying Affidavit sworn on **13/8/2021.** She deponed that the provisions under which the Motion was brought do not confer jurisdiction upon the Environment and Land Court to deal with it. To her, this is so because **Order 50 (6)** of the **Civil Procedure Rules** relates to enlargement of time by consent without resort to an application to the Court hence totally inapplicable. She stated further that **Section 95** of the **Civil Procedure Act** is inapplicable since the **28 days** for appeal were provided by law and not fixed or granted by Court and that **Section 3B** of the **Civil Procedure Act** is not in existence in the statute. She then swore that **Section 3A** does not address enlargement of time to appeal hence misplaced. Her other deposition was that **Regulation 29** of the **National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017** was not intended to accord jurisdiction to the court to enlarge time. She deponed further that the Applicant's advocate knew the legal position and the steps provided for by **Regulation 29** of the **NLC (IHLI) Regulations, 2017** about filing an appeal rather than an Application for judicial review. She swore further that Applicant had not explained sufficiently the delay in filing this application and that extension of time is a discretionary relief and not a right for a party.

8. It is the Respondent's contention that the application militates against expeditious dispensation of justice to all without undue delay especially to such as the dispute herein which has stretched to over **40 years**. To her the application amounts to gross abuse of the court process and is against the principle of finality in litigation. In her view the appeal that the applicant seeks to file has already been dismissed for lacking in merit by the court of appeal. Of importance was the point that this court does not have the jurisdiction to deem the Memorandum of Appeal properly filed. She prayed for the dismissal of the application with costs. The 2nd Respondent did not file a response but put in written submissions. It submitted at length what amounts to abuse of the Court process. He relied on the case of ***Satya Barma Gandhi v Director of Public Prosecutions and 3 others [2018] eKLR*** wherein the Court stated thus, "*The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party.*"

9. The application was canvassed by way of written submissions as directed by the Court. The Applicant, the 2nd and 3rd Respondents all filed theirs respectively. I will not reproduce the summary of the submissions herein but will refer to them directly or indirectly as I progress with the next segment of this decision.

Issues, Analysis and Determination

10. I have carefully considered the Application, the affidavits in support and in opposition, the statutory and case law cited as well as the submissions on record. I am of the view that the following are the issues for determination herein:

(a) Whether this court has the jurisdiction to entertain this application.

(b) Whether the Application dated 7/2/2019 has merits.

(c) What Orders should issue?

(d) Who bears the cost?

(a) Whether this court has the jurisdiction to entertain this application

11. This Court is to first decide if it has jurisdiction to handle the Application. Since this issue has been raised, I can do no more than resolve before others. This is because jurisdiction goes to the root of every decision of the Court.

12. In the seminal case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR* 1** Nyarangi JA held as follows:-

> ***'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'***

13. Then, in the more recent decision of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, the Supreme Court observed 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings…Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."***

14. From the two authorities cited, it is clear that without jurisdiction, if this court embarks on making any decision it will be engaging in exercise that is a nullity. For that reason, it is vital for the Court satisfy itself that it is seized of jurisdiction.

15. There is no doubt that the Applicant wishes to appeal against a decision rendered under the provisions of the **National Land Commission Act, Act No. 5** of **2012** and the Regulations made pursuant to **Section 36** of the **Act**. The Regulations were published on **6/10/2017** through **Legal Notice No. 258**. Regulation **3** defines the "Court" to mean the Environment and Land Court (ELC) established under the **Environment and Land Court Act** of **2011** and the courts that have jurisdiction on matters relating to land. The Applicant wishes to appeal against a decision made on **7/2/2019** over a claim registered with the Commission as a historical injustice.

16. What is clear from the decision, annexed as **JY 1** in the Affidavit of Joseph Yego, is that the parties in the Claim participated in its process by giving submissions and a decision was made based on the evidence that was given. That was a decision made on merits. There was no objection to the same being made or the Commission proceeding. The Applicant did not appeal from the decision. It used a wrong procedure to try and overturn the decision. By virtue of **Section 29** of the **Regulations**, the Applicant should have filed its appeal to the ELC. That was to be within **28 days**. Since it did not, it has now moved this Court to extend time to file the Appeal out of time.

17. I do not agree with the Respondents' argument that since the Regulations do not expressly provide for a party to apply for extension of time to appeal, that Parliament intended that once a party fails to appeal within the **28 days** his case is sealed forever. There is no express provision barring a party from applying for enlargement of time to appeal out of time. In my view if Parliament intended that, it would have stated so. After all, since the Regulations do not have that express bar, where would an aggrieved late party seek justice in?

18. As for the Court's jurisdiction or lack of it, the 3rd respondent challenged this. Her contention is that the provisions of the law in which the Application was brought are inapplicable. In particular, the she argued that **Order 50 (6)** of the **Civil Procedure Rules** is not applicable because it relates to enlargement of time where the time has been fixed or by summary notice and order of the court. She further argued that **Section 95** of the **Civil Procedure Act** is inapplicable too.

19. I have analyzed the above-mentioned provisions. First, this Court points out that the Act and procedure that governs majorly the conduct of the proceedings of this Court is the Civil Procedure. The short title of the **Act** provides that it is "*An Act of Parliament to make provision for procedure in civil courts*". Then **Section 1 (2)** stipulates that the Act "*…applies to proceedings in the High Court and… subordinate Courts*." Whereas the provisions refer to the High Court only, **Section 19(2)** of the **ELC Act** provides that the "*…Court shall be bound by the procedure laid down by the Civil Procedure Act*". **Section 95** of the **Civil Procedure Act** then provides that "*Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act…"* And **Order 50 Rule 6** which together with the Rules are designed to give a detailed procedure reads at the relevant part 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…*"

20. Both the **Section** and **Rule** relied on by the Applicant apply to acts whose time for their performance is limited. As to who or what limits the time, the two provisions interpreted purposively point to where the either the law or the Court itself fixes a period for the doing of an act. Where a party fails to do an act within that period fixed, he may move the Court to extend the time on such terms as shall be just.

21. In both instances, this Court has wide and unfettered discretion to enlarge time to enable the filing of the document(s) a party wishes to. But it has been stated times without number in courts of both this and higher levels that the discretion must be exercised judicially. It should not be capricious but based on sound judgment and consideration of the totality of the facts and law. In the case of ***Thuita Mwangi v Kenya Airways Ltd [2003] eKLR*** the Court of Appeal held: -

> **"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."**

22. Given the above thread of connecting provisions I do not agree with the sentiments of learned counsel for the 3rd Respondent that the provisions of law cited are inapplicable in the instant Application. Moreover, this court finds that even if the provisions were to be inapplicable, that would not go the depth or extent of depriving this court the jurisdiction or interfering with its jurisdiction to entertain the Application herein. I find so because Sections **1A, 1B, 3** and **3A** of the **Civil Procedure Act** empower this Court to exercise jurisdiction over such matters as the present one. In any event, such technicalities as this one, which this Court considers to be minor, can be cured by Article **159 (2)(d)** of the **Constitution of Kenya 2010** which requires courts to ensure that suits are heard and determined expeditiously without undue regard to procedural technicalities.

23. As regards the contention that **Section 3B** is non-existent in the **Civil Procedure Act** and therefore misplaced, I find the same to be the correct position. Of the cited provisions, **Sections 3A** and **95** exist. For the reasons above, this Court finds that it has jurisdiction to handle this Application. Having said that, I am now tasked to determine the next issue.

(b) Whether or not time within which to file an appeal against the determination of the National Land Commission dated 7/2/2019 should be extended?

24. As stated above, this is an application for extension of time to file an appeal against the determination of the **Commission** dated **7/2/2019. Section 29** of the **National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017** provides for the avenue and timeline within which an aggrieved party dissatisfied by the decision may lodge an appeal. The Regulation provides as follows:

> **"a person aggrieved by the decision of the Commission may, within twenty eight days of the publication of the decisions, appeal to the Court"**

25. It was therefore upon the Applicant herein to file an appeal against that decision in court within **28 days** from the time the decision of **7/2/2019** was published (*emphasis mine*). That means that the Applicant herein should have acted between **1/3/2019** and **29/3/2019.**

26. What is clear is that the Applicant decided to seek a Judicial Review of the decision. That took place from **9/04/2019**. Clearly, that still was out of the time the Applicant could have lodged an appeal. Up to that point there was no explanation as to why there was a delay of one month and ten days. But that period of **ten (10) days** beyond the **28** could not have been inordinate delay had the Applicant sought leave to appeal by the time when it moved the Court, but using a wrong procedure. But there is more to be said of what took place between then and **26/07/2021** when the instant Application was filed.

27. This court has observed that the Applicant herein was represented by counsel all through. Nevertheless, it decided to file an application for Judicial Review instead of an appeal. The Applicant deponed and submitted that the procedure (of Judicial Review Proceedings) adopted by counsel was an inadvertent error. It submitted that the error arose due to its counsel mistakenly using *"…a similar procedure us used in appeals against the decisions of the Public Procurement Oversight Board."* What I understand the Applicant to be saying is that learned counsel did not know the law to use. This is sad! I find that deposition ingenious but of no avail to the Applicant. I remind the Applicant the old maxim: *ignorantia juris non excusat*. Since the shareholders of the Applicant may be laymen in the legal circles, I interpret the maxim for them: ignorance of the law is not an excuse. Even then, there is no single disposition from learned counsel that that was the position. Learned counsel could not have dared to say so.

28. Granted that the learned counsel mistook the procedure as deponed by **Mr. Joseph Yego**, in **paragraph 3** of his Affidavit, the Applicant filed its Application for Judicial Review on **9/04/2019**: It actually applied for leave on **27/03/2019**, as noted from **Annexture JY 3** of the Applicant's Supporting Affidavit. As early as **25/4/2019** when the 3rd Respondent to the said Application filed her documents in opposition to the Judicial Review and served, it was brought to the Applicant's attention that the issue herein being deemed a historical injustice, the procedure it adopted of filing for a Judicial Review was contrary to the law. That notwithstanding, it still persisted to the trajectory as that of a meteor that has lost its path in the orbital circulation and is hurtling and accelerating along a tangent towards its self-destruction eternally. It thus pursued the matter to the end rather than withdrawing the same or at least abandoning it and seeking redemption by moving quickly to file an Application for extension of time to appeal the decision.

29. In that uncontrolled but deliberate lost direction, the Applicant did not give up even when this Court struck out the Application by its judgment of **1/12/2020**. Reference is made here to the Applicant's own **Annexture JY 3** which is the copy of the judgement. The Applicant moved to the Court of Appeal vide through a Motion filed in **Eldoret Court of Appeal Civil Appeal (Application) No. 5 of 2021**. This, in my view, it did with the intention of exploring all the 'available remedies' while knowing what the right one was, as if the counsel had taken the right approach of the matter. Other than urging a wrong point in both this and the Court of Appeal, there is no other reason for delay that has been explained by the Applicant. Was it lost sight of the Applicant all along that it was trudging the forbidden path of urging an illegality? Or was it taking its chances a little bit far?

30. In essence the question the Court is posing here, in its mind as it considers fact that Mr. Yego swore to is, was it not clear all along from early **2019** that the Applicant should have pursued an Appeal but it chose not to? This conduct of the Applicant is what I weigh against exercising my discretion as I consider the four conditions that the Court of Appeal gave in the case of ***Thuita Mwangi v Kenya Airways Ltd [2003] eKLR***. The reason given by the Applicants for delay in moving this Court is not satisfactory. Moreover, the delay is inexcusable in the circumstances. I am convinced that granting the Application herein will prejudice the respondents who have been dragged through litigation for many years. Needless to say, that looking at the draft Memorandum of Appeal annexed to the Supporting Affidavit, I find in it nothing arguable.

31. I need not overemphasize: most of the issues hereinabove were discussed in the judgment of this Court dated **1/2/2020** as well as that of the Court of appeal dated **9/7/2021** which I need not repeat so as to save this court's precious time.

32. I associate myself to the sentiments of learned Judge Justice Wambuzi as he then was who expressed himself as follows in the case of **AO Menya v Mcreas Ltd [1978] eKLR** where the Court held that :

> **"doing the best I can in the circumstances, I find it difficult to say that sufficient reason has been shown to justify extension of time. In the words of Windham JA, "there was a lack of diligence" on the part of the advocates and their clerk in taking steps to see that the notice of appeal was filed in time. I express my sympathy to the applicant who indicated his desire to appeal at the earliest moment given him, but if a mistake of clear law or of fact without more on the part of the advocate or his clerk will not constitute sufficient reason I fail to see how inadvertence on the part of the either or both as in this case, can. Furthermore there is no element of blame on the part of the court as in some of the cases referred to in this ruling. The application is refused, with costs."**

33. The applicant laid blame on its advocate who took the wrong path for the delay which this Court has found to be inexcusable. This Court is of the view that the Applicant is now cherry picking with the court process with the hope of finding justice. Justice has procedural aspects which need to be followed. These are given by law and regulations or rules made thereunder. These ought not to be ignored or taken lightly.

By the applicant's conduct of deliberately skipping the necessary step which is mandatory amounts to abuse of process of the court and overlooking such in order to grant it one more chance in Court would amount to a miscarriage of justice.

34. In **Kiptoo arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 Others [2014[eKLR** which the Applicant cited, the Court held that:

> **".....it is clear that the 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."**

35. Similarly, in **Rufus Muriithi Nyaga v Juliet Wanja Ireri [2018] eKLR Justice Muchemi** held thus:

> **"when a court is considering delay, the length of delay is a relevant factor. The applicant was required to act within 21 days but he took a whole one (1) year in slumber. It is not too harsh to refer the applicant as an indolent litigant. The limited time of filing the record was not fixed in vain but to serve the purpose of expeditious disposal of cases. Litigation must come to an end.....**
>
> **The discretion of the court to extent time must be exercised judiciously. I find one (1) year delay inexcusable and contrary to the overriding objective in regards to expeditious disposal of cases and in regard to economic use of judicial resource."**

36. In the circumstances this court finds that the reasons advanced for the delay are insufficient, and the delay in the period taken by the Applicant to move this Court for enlargement of time is inexcusably inordinate. Parties should be discouraged from filing frivolous and vexatious applications in court. There comes a time when litigation ought to cease. As the Holy Bible says, "*there is a time for everything under the sun…a time to sow and a time to reap*." (**Eccl. 3: 1-8**). For the Applicant herein, let it be known to it that there is a time to pick up tools of court wars and a time to lay them down, a time to sue and a time to cease litigating. The latter has come.

37. In conclusion, this court finds that it cannot exercise its discretion in favour of the Applicant and consequently the Miscellaneous Application dated **26/7/2021** is dismissed with costs to the 2nd and 3rd Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 9TH DAY OF DECEMBER, 2021.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.