



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS APPLICATION NO. 47 OF 2020**

**KITUMBUA NJIRA TSANGO & 2 OTHERS.....APPLICANTS**

**VERSUS**

**MBWANA JUMAA MWACHANGOMA & ANOTHER.....RESPONDENTS**

**RULING**

*(Application to file appeal out of time from a decision of the National Land Commission Task Force on Historical Injustices; applicants claiming that they were not aware of the decision; regulations providing that the decision be delivered to the parties within 60 days; no evidence of this having been done; no evidence that the applicants were ever made aware of the decision; applicants cannot therefore be faulted for not filing the appeal within time; application allowed)*

1. The application before me is that dated 29 July 2020 and the principal order sought is for leave to be given to the applicants to file an appeal out of time against the determination of the National Land Commission – Task Force on Historical Land Injustices published in Gazette Notice No. 1995 of 1 March 2019. There was also an order that the National Land Commission (NLC) furnish the applicants with the subject determination. This order is spent as I granted it when the matter first came before me ex parte on 11 August 2020.
2. The application is supported by the affidavit of the 1<sup>st</sup> applicant. He has averred that he and his co-applicants, Mohamed Kalolwa Bekalolwa and Mwachupa Dzimba Bekalolwa are the owners of the land parcels Kwale/Kirazini A/265 and 244 and a land parcel described as P/No. 115. He averred that they inherited the land from one Mr. Betsango (deceased). It is his averment that the father of the respondents, one Mwavumbo Mbwana Changoma, was allowed by the late Betsango, permission to occupy one of the land parcels by virtue of being his son in law. It is claimed that during the adjudication process, the father of the respondents caused the land parcel Kwale/Kirazini A/265 to be registered in his name, and Kwale/Kirazini A/244 to be registered in the name of the 1<sup>st</sup> respondent, and the land P/No. 115 to be registered in the names of himself and four others. They claimed that the Betsango family tried to resolve the dispute when Mr. Changoma was alive but it was never resolved. There were also efforts to resolve the dispute at the Chief's office and the Land Disputes Tribunal which did not bear fruit. The NLC subsequently took up the matter after the applicants lodged a claim with the NLC's Task Force on Historical Injustices registered as NLC/HLI/099/2017 and a hearing was held on 29 August 2018. On 14 March 2019, they instructed M/s Kisiwa Koja & Company Advocates to check on the matter as they had not received any report from the NLC about its decision. They claim that they did not get a report from their appointed counsel, and on 8 June 2020, they appointed M/s Lumatete Muchai & Company Advocates to follow up. It is then that they found out that the NLC had published its decision vide Gazette Notice No. 1995 of 1 March 2019. They basically infer that the failure to file appeal out of time was because they were not aware of the NLC decision as they were never supplied with a copy of the same. They intend to file an appeal against the said decision.
3. The respondents filed Grounds of Opposition to oppose the motion. They contend that this application has been filed after inordinate delay; that there is not attached any draft memorandum of appeal or issues to be raised in the appeal; that the application seeks orders against the NLC which is not a party; and the application is incompetent and unmeritorious.
4. Counsel agreed to argue the application by way of written submissions and I have seen the submissions of both counsel for the applicants and the respondents. I have considered the same in arriving at my decision.
5. This is an application for leave to appeal out of time. The decision sought to be appealed from is the decision of the NLC published in the Kenya Gazette of 1 March 2019. The dispute between the parties appears to have been presented before the NLC based on the claim of historical injustices thus under the National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017. Under regulation 26, after concluding investigations, the decision is supposed to be rendered within 21 days. Under regulation 27, the decision is supposed to be made available to the parties within 60 days of the determination. Regulation 28 provides for the publication of the decision in the Kenya Gazette, and Regulation 29 provides for an appeal before this court within 28 days of the publication of the decision.
6. I have no evidence whether the parties were actually notified of the decision within 60 days as required by Regulation 27. The applicants say that they were not aware of any decision and I have nothing to controvert that position. The respondents themselves have not sworn any affidavit to aver that the requirement for notification was complied with. I cannot therefore blame the applicants for not being aware that the NLC had rendered a decision. Without being informed of the decision, they may not have expected that there will be a publication in the Kenya Gazette. I have seen that they aver that they instructed counsel to follow up on whether the NLC has rendered a decision and it is because of their efforts that they eventually came to know that the NLC had published the decision in the Kenya Gazette of 1 March 2019. Indeed, I mentioned that when they filed this application, they also sought to be supplied with the proceedings and the decision, which shows that they were not notified of it.
7. The main bone of contention of the respondents is that the delay is inordinate. The delay in my view is well explained. The other argument of the respondents is that the NLC is not a party. This argument has no basis because it is an appeal. When presenting an appeal, the body that heard the matter in the first instance is not a necessary party to the appeal. For example, when one files an appeal from a decision of a

Magistrate's Court to the High Court, the Magistrate's Court is never made a party in the appeal. The final argument of the respondents is that there is not annexed a draft Memorandum of Appeal. In my view, it is not mandatory for one to annex a draft Memorandum of Appeal before being allowed leave to file an appeal out of time.

8. I see no reason why I should not allow this application and it is hereby allowed. I order the applicants to file their appeal within 28 days of today.

9. The costs of this application shall be costs in the appeal.

10. Orders accordingly.

**DATED AND DELIVERED THIS 12TH DAY OF NOVEMBER 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**