



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC MISC. APPLICATION NO. 26 OF 2017**

**JACKSON KIEMA MUTETI**

**KAMANTHE KING'OLA.....INTENDED APPELLANTS/APPLICANTS**

**-VERSUS-**

**FRANCIS MUTUA MBISI.....1<sup>ST</sup> RESPONDENT**

**THE MINISTER, MINISTRY OF LANDS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. There is a Notice of Motion application expressed to be brought under Order 40 rules 1, 2 and 4 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling Provisions of the Law for orders that:-

2) *THAT this Honourable Court be pleased to grant the Applicant leave to Appeal out of time.*

3) *THAT the Honourable Court be pleased to allow us finalize the Succession Cause No.113 of 1990 pending before Machakos High Court and which is supposed to be transferred to Makueni Law Courts to enable us faithfully administer the estate as per the law.*

4) *THAT there be a stay of execution of the Land Dispute Tribunal award which was adopted in Makueni LDTC No.33 of 2006 and all related orders until the intended Appeal is heard and determined.*

5) *THAT cost of this application be in the cause.*

Prayer 1 is spent.

2. The application is predicated on the grounds on its face and is supported by the affidavit of Jackson Kiema Muteti sworn on the 6<sup>th</sup> July, 2017.

3. The application is opposed by the respondent's vide the replying affidavit of Francis Mutua Mbisi, the first respondent herein, sworn on the 19<sup>th</sup> October, 2017 and filed in court on even date.

4. On the 25<sup>th</sup> September, 2017, the court directed that the application be disposed off by way of written submissions. The Applicants filed their submissions on 03<sup>rd</sup> October, 2017 the same being dated 2<sup>nd</sup> October, 2017 while the first respondent filed his on 23<sup>rd</sup> October, 2017.

5. The Applicants' Counsel's submissions were that there are three issues for determination. These are:-

*i. Whether there was error in the proceedings of the Land Dispute Tribunal?*

*ii. Whether the Honourable Court has discretion to grant leave to appeal out of time?*

*iii. Whether the Applicants shall suffer any loss as a result of the intended actions.*

6. On the issue of whether or not there was an error in the proceedings of the Land Disputes Tribunal, the Applicants' counsel submitted that the Tribunal did not thoroughly look keenly on all matters **before it** (*emphasis is mine*). The counsel added that the way the proceedings were conducted left many questions unanswered.

7. Regarding the issue of whether or not the court has discretion to grant leave to the Applicants to appeal out of time, the counsel cited the case of **Edward Kamau & James Karanja vs Hannah Mukui Gichuki & Gestetner Limited [2015] eKLR** as well as the **Supreme Court case of Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others SC Appl.16/2014**. The latter case sets out the underlying principles upon which a court should consider in the exercise of its discretion to extend time. The principles are:-

- i. 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;*
- ii. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.*
- iii. As to whether the court should exercise the discretion to extend time, is consideration to be made on a case basis;*
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.*
- v. Whether there will be any prejudice to be suffered by the Respondents if the extension is granted.*
- vi. The application should have been brought without undue delay; and*
- vii. In certain cases, like election petitions, public interest should be a consideration for extending time.*

8. The counsel added that by applying the aforementioned principles, the question therefore will be whether or not the Applicants have shown good and sufficient cause for the filing the appeal out of time.

9. The counsel went on to submit that the Applicants have demonstrated that whatever transpired was not within their knowledge and, therefore, they might not have known whether there was a land dispute at the tribunal pitying their relatives and the first respondent herein.

10. On the issue of whether or not the Applicants will suffer any loss as a result of the intended actions, the counsel submitted that the Applicants have demonstrated to the court that they are on the verge of losing their property if the court does not grant stay. The counsel pointed out that the Applicants will suffer harm and their lifestyle will be greatly impacted by the implementation of the award of the Land Disputes Tribunal. I however do note that the Counsel's submissions that the County Surveyor has already issued notice to subdivide parcel of land number Nzau/Ikangavya/318 is not based on any affidavit evidence and I will, therefore, disregard the same.

11. The counsel further submitted that the issue of succession has not been dealt with conclusively by the court and therefore it would be prudent for the court to grant stay of implementation of the Land Dispute Award pending the intended appeal and the succession cause which is still pending before the High Court. The Notice of Motion application in prayer 3 seeks for time to enable the Applicants to finalise succession cause number Machakos High Court number 113 of 1990. The affidavit in support of the application is silent on this issue and no evidence was tendered as to why it has taken 27 years to conclude the succession cause. I will, therefore, ignore the submissions by the counsel as they amount to tendering evidence from the bar.

12. On the other hand, the respondent's counsel submitted that the application not only lacks merit but is also void and null and therefore it should be dismissed with costs. The counsel pointed out that the Applicants lack capacity to file this application on behalf of the estates of their father and uncles respectively. He further submitted that the Applicants have no capacity to file this application without legal representation of the estates of their father and uncles.

13. Having read the Notice of Motion application together with the supporting affidavit and the replying affidavit and having read the submissions that were filed, I am of the view that the issue for determination is only one namely;

- i. Whether the court should exercise its discretion to grant leave to the Applicants to file appeal out of time?*

I will be guided by principles number 1-6 in the Nicholas Arap Korir's case.

14. Do the Applicants deserve extension of time in order to file appeal out of time at the discretion of this court? My answer is in the negative. The draft memorandum of appeal mentioned in paragraph 13 of the supporting affidavit has not been attached. There is nothing therefore to show that the intended appeal has high probability of success.

15. Regarding principle number 2, my finding is that the Applicants have not laid out the basis for extension of time to the satisfaction of this court. As earlier on noted, the Applicants have not given reasons why Machakos Succession cause No.113 of 1990 has not been determined to-date. Suffice it to say, they have not demonstrated the steps that they have taken to have the Succession cause, if it is still pending, heard and determined. I am of the view that no reasons have been proffered in this case to warrant the court to exercise its discretion in favour of the Applicants.

16. Regarding principle number 4, my finding is that even though the two Applicants were not parties to Makueni Land Tribunal case number 26/2006 and Makueni SRMCC LDTC No.33 of 2006, they have not offered reasonable explanation as to why there has been delay of 12 years since the Tribunal's award was adopted by the court. Notwithstanding the fact that succession cause number 113 of 1990 is said to have not been concluded by now, the Applicants have not demonstrated the efforts, if any, that they have made since 2006 to obtain letters of administration so as to enable them pursue the intended appeal. It is clear that the first respondent who has grant of letters of administration which has not been challenged or revoked will suffer more prejudice if extension is granted in favour of the Applicants. Was the application brought without undue delay? From the supporting affidavit the evidence is scanty and it cannot be said that the application was brought without unreasonable delay. It cannot rely on the submissions by their counsel that the Applicants were notified by the County

Surveyor on the 08<sup>th</sup> June, 2017 about his intention to subdivide the land which is the subject of this application as those submissions amount to evidence from the bar.

17. I am in agreement with the Respondents counsel that the application lacks merit and the Applicants lack capacity to file this application.  
**In the circumstances, I hereby proceed to dismiss it with costs to the respondent.**

**Signed, Dated and Delivered on this 29<sup>th</sup> Day of January, 2018.**

**MBOGO C.G.,**

**JUDGE.**

**In the presence of:**

**Mr. Kisongoa for the Respondent**

**Mr. Mutua holding brief for Mr. Mulandi for the Applicants**

**Mr. Kwemboi – Court Assistant**

**MBOGO C.G.,**

**JUDGE.**