



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION JR NO.242 OF 2017**

**(FORMERLY MACHAKOS MISC. NO. 39 OF 2012)**

**IN THE MATTER OF AN APPLICATION BY JACKSON KARANJA MUHIA FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300) LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....1<sup>ST</sup> RESPONDENT**

**VERSUS**

**THE COUNTY GOVERNMENT OF KAJIADO.....2<sup>ND</sup> RESPONDENT**

**CHAIRMAN NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR, KAJIADO NORTH SUBCOUNTY.....4<sup>TH</sup> RESPONDENT**

**JOHN SILAS PULEIY.....INTERESTED PARTY/APPLICANT**

**JACKSON KARANJA MUHIA.....5<sup>TH</sup> RESPONDENT/EX PARTE APPLICANT**

**RULING**

What is before Court for determination is the 5<sup>th</sup> Respondent’s Notice of Motion dated the 6<sup>th</sup> May, 2016 brought pursuant to sections 3, 3A and 95 of the Civil Procedure Act as well as Order 42 of the Civil Procedure Rules including all the other enabling provisions of the law. It seeks the following orders:

1. Spent
2. That pending the hearing and determination of the Notice of Motion, there be a temporary stay of the Order of the Honourable Court made on the 25<sup>th</sup> day of April, 2012 and all consequential orders thereto;
3. That pending the filing and determination of the intended Appeal, there be a stay of the order made on 25<sup>th</sup> day of April, 2012 and all consequential orders thereto;
4. That the Honourable Court be pleased to enlarge time within which the interested party/applicant is to file Notice and Memorandum of Appeal and serve.
5. That pending the hearing and determination of the intended Appeal, the 5<sup>th</sup> Respondent be and is hereby restrained either by himself, agents, servants or whosoever acting under his instructions from trespassing into, selling, charging, leasing or dealing with LR No. NGONG/NGONG TOWNSHIP 2/ 350 in whatsoever manner;
6. That the costs of this application be to the Applicant.

The application is premised on the following grounds:

- a. That the court delivered an ex parte order on 25<sup>th</sup> April, 2012 transferring LR No. NGONG/ NGONG TOWNSHIP BLOCK 2/350 to the 5<sup>th</sup> Respondent from the Applicant against the rules of natural justice.
- b. The 5<sup>th</sup> Respondent/Ex parte Applicant deliberately omitted to sue the applicant in the case, yet the gazetteement sought to be quashed clearly states that John Ole Puley was the registered lessee of the said parcel of land from 1<sup>st</sup> April, 1996.
- c. On 5<sup>th</sup> April, 2008 the County Government of Ol Kejuado wrote to the Commissioner of Lands reconfirming that LR No. NGONG/ NGONG TOWNSHIP BLOCK 2/350 belongs to the Applicant/Interested party.
- d. That as early as 13<sup>th</sup> December, 2007, the County of Ol Kejuado wrote to the Commissioner of Lands stating that Jackson Karanja Muhia had encroached on the Applicant/Interested party's parcel of land.
- e. That the process leading to the cancellation of the lease certificate issued to Jackson Karanja and the issuing of a new lease to the Applicant herein were not availed to the Court by the Ex parte Applicant/5<sup>th</sup> Respondent.
- f. That on 12<sup>th</sup> October, 2011, the Commissioner of Lands forwarded to the District Land Registrar, Kajiado, a lease in triplicate duly signed and stamped for registration in the Applicant's Name, yet the decision was made without reference to the said authority.

The application is supported by the affidavit of JOHN OLE PULEY where he reiterated his claim and deposes that on 3<sup>rd</sup> September, 2009 the Commissioner of Lands wrote to the Director of Surveys alerting him on a false PDP that was being used to grab his land. He claims on 23<sup>rd</sup> February, 2011 the Commissioner of lands wrote to the Director of Surveys informing him that documents used by the 5<sup>th</sup> Respondent to grab his land were false and had been expunged from the record. He contends that on 8<sup>th</sup> February, 2011 the Commissioner of Lands wrote to the District Land Registrar Kajiado County to carry out a comprehensive investigation on the authenticity of the title deed allegedly registered in the registry and recommend a way forward. Further, that the said letter directed the District Land Registrar to ask the registered proprietor to provide them with records leading to the cancellation of the lease certificate issued to Jackson Karanja and the issuing of a new lease to the Applicant herein. He claims on 12<sup>th</sup> October, 2011 the Commissioner of Lands forwarded to the District Land Registrar, Kajiado a lease in triplicate duly signed and stamped for registration in his name. He deposes that on the 5<sup>th</sup> March, 2008 the Commissioner of Lands wrote to the Director of Survey requesting for index map for LR No. NGONG/ NGONG TOWNSHIP BLOCK 2/ 350. Further that on 12<sup>th</sup> February, 2010 the District Land Registrar Kajiado, asked the 5<sup>th</sup> Respondent to appear before him on 24<sup>th</sup> February, 2011 in connection with ownership of LR No. NGONG/ NGONG TOWNSHIP BLOCK 2/350. He reaffirms that on 6<sup>th</sup> May, 2011, the Director of Survey wrote to the Commissioner of Lands that the registry index map be amended as per F/R261/33 and contends that he has paid all the land rates to the County government of Kajiado to date.

The 5<sup>th</sup> Respondent/Ex parte Applicant opposed the application and filed Grounds of Opposition dated the 3<sup>rd</sup> June, 2016 where he stated as follows:

- i. That the Applicant's said application is incompetent, misconceived, mischievous, bad in law and is an abuse of the court process as this proceedings were concluded way back in 2012;
- ii. That the said application is frivolous, vexatious and brought in bad faith, and as a pure afterthought, filed after dismissal of the Applicant suit filed at the ELC Court in Nairobi.
- iii. The said application is fatally and hopelessly defective and thus, should be struck out in limine and be dismissed with costs.
- iv. The said application has been filed after an inordinate delay, which has not been explained.

The 5<sup>th</sup> Respondent JACKSON KARANJA MUHIA further filed a replying affidavit where he confirmed that he is the one who instituted the instant suit in 2012 seeking orders to quash a Gazette Notice by the 4<sup>th</sup> Respondent purporting to cancel his title over land parcel number NGONG TOWNSHIP/BLOCK 2/ 350 and the orders were granted by Justice M.S. A Makhandia on 25<sup>th</sup> April, 2012. He avers that the Interested Party/Applicant sought to challenge this order, filed an application, which was never heard and determined. He claims that the Interested party in a classic case of forum shopping abandoned this suit and instituted a fresh suit being **Nairobi ELC No. 1102 of 2014 John Silas Puley Vs Jackson Karanja Muhia** where he was seeking to restrain the 5<sup>th</sup> Respondent from trespassing on LR No. NGONG/TOWNSHIP/ BLOCK 2/350, which suit was struck out vide a ruling delivered on 18<sup>th</sup> March, 2016. He contends that the instant application seeking to enlarge time has been filed after an inordinate delay of over 4 years, and as an afterthought, which has been necessitated by the fact that the Interested Party/ Applicant's suit in the ELC Court in Nairobi was dismissed with costs. He reiterates that the Applicant has not demonstrated that the Appeal, which he intends to lodge, is merited or has any chances of success to warrant the grant of the orders sought.

Both the Applicant and the 5<sup>th</sup> Respondent filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon perusal of materials presented in respect of the Notice of Motion dated the 6<sup>th</sup> May, 2016, including the submissions filed herein, the only issue for determination is whether the Court should enlarge time within which to allow the Applicant to file a Notice and Memorandum

of Appeal and Serve the same.

**Section 95 of the Civil Procedure Act** gives provisions for enlargement of time and stipulates as follows:’ **Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.’**

Order 42 rule 6 (2) of the Civil Procedure Rules provides as follows:’ **No order of stay of execution shall be made unless –**

**a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.’**

The Applicant contends that the order dated the 25<sup>th</sup> April, 2012 was granted ex parte and the request for enlargement of time stems from this fact. It is the applicant’s submission that his application falls within the ambit of Order 43 rule 1 of the Civil Procedure Rules. He relied on various judicial authorities including the case of **Nicholas Kiptoo Arap Salat Vs IEBC & 7 Others SC Application 16/2014; APA Insurance Ltd Vs Michael Kinyanjui Muturi (Civil Appeal No. 354 of 2015); Edward Njane Nganga & Another Vs Damaris Wanjiku Kamau & Another (Civil Appeal No. 8 of 2013) and Kenya Airports Authority & Another Vs Timothy Nduvi Mutungi (Court of Appeal Civil Application No. NAI 165 of 2013 (UR 113/2013) (2014) eKLR)** to support his arguments.

The 5<sup>th</sup> Respondent submitted that the delay to lodge the Appeal is not explained and that the application is an abuse of the process of the court and ought to be dismissed with costs. He relied on the following judicial authorities including: **City Chemist (Nbi) & Another Vs Oriental Bank Limited Civil Application No. Nai 302 of 2008 (UR 199/2008) ; Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR and Aviation Cargo Support Limited Vs St Mark Freight Services Limited (2014) eKLR** to oppose the application for enlargement of time.

I note that the applicant is seeking leave to enlarge time in May 2016 from an order granted more than four years ago in April, 2012. Further, as per the averments in the supporting affidavit, the applicant does not clearly explain what attributed to the delay in filing the appeal but highlights the dispute relating to the ownership of the suit land and how the Commissioner of Lands had directed the District Land Registrar to intervene. Nowhere in the said averments does he offer any explanation on the action he undertook after the order was granted on 25<sup>th</sup> April, 2012. I note the instant application was filed on 6<sup>th</sup> May, 2016 after the **Nairobi ELC No. 1102 of 2014: John Silas Puley Vs Jackson Karanja Muhia** which related to the subject matter herein had been dismissed in March, 2016.

In the case of **Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR** the Court of Appeal cited in approval the case of **Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR** while referring to other authorities and observed as follows:

**“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In Henry Mukora Mwangi -vs- Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004, this Court held:-**

**“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi- Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:-**

**“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 relying on the above case and the facts as presented above, I find that the length of delay in filing this application seeking to extend time is inordinate. As per the averments in the applicant’s affidavit, no proper explanation has been provided to warrant the delay of four years to lodge the Appeal. The Applicant did not inform court of the **Nairobi ELC No. 1102 of 2014 John Silas Puley Vs Jackson Karanja Muhia** which had been dismissed and neither did he controvert it. The question for extending time to lodge an appeal is discretionary but this should only be exercised to secure justice and not to prejudice one party. I note the Judicial Review was actually instituted by the 5<sup>th</sup> respondent and once the order was granted in April, 2012, it is only in May 2016 when the Applicant sought to Appeal against it. I concur with the 5<sup>th</sup> Respondent that this is an afterthought, which has been necessitated by the fact that the Interested Party/ Applicant’s suit in the ELC Court in Nairobi was dismissed with costs. I note that after the orders granted in April, 2012, which quashed the gazettelement of the Applicant as owner of the suit land, the 5<sup>th</sup> Respondent took over possession, and there has been no stay of the said orders nor an Appeal lodged. It is the said circumstances that I find that the 5<sup>th</sup> Respondent would indeed suffer prejudice if the orders sought are granted. I also find that no plausible explanation has been given by the Applicant to demonstrate how the Appeal he intends to lodge is merited or has any chances of success to warrant the grant of the orders sought. Except for the **Nairobi ELC No. 1102 of 2014 John Silas Puley Vs Jackson Karanja Muhia** which was filed and dismissed, the Applicant did not take any steps to safeguard his rights until May, 2016 when he lodged the instant application.*

On the prayer seeking injunctive orders against the 5<sup>th</sup> Respondent pending the outcome of the suit, I note the 5<sup>th</sup> Respondent is the registered proprietor of the suit land, and is in actual possession, which fact is not disputed by the Applicant. It is in the said circumstances that I find this prayer is unwarranted at this juncture.

It is against the foregoing that I find the application dated the 6<sup>th</sup> May, 2016 unmerited and dismiss it with costs.

**Dated signed and delivered in open court at Kajiado this 22nd day of May, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**