



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C MISC APP. NO. 1 OF 2017**

**JOSEPH NJUGUNA NJURU**

**APPLICANT**

**VS**

**JASON NJURU MWANGI**

**RESPONDENT**

**RULING**

1. This case arises from the order made on the 15<sup>th</sup> November 2000 by the Senior Resident Magistrates' Court at Kangema in SRMCC NO. 1 of 1996 – Jason Njuru Mwangi Vs Elizabeth Wanjiru Njuru. In this said case, the Honourable Magistrate Abdul Elkindy SRM (as he then was) adopted the award of the Provincial Land Tribunal as the judgement of the Court and *in-te-ralia*, made the following orders;

- a). The Land parcel in dispute i.e Loc 12 /sub-Loc 1/255 (6.4 Acres) be distributed as follows;
  - i). Elizabeth Wanjiru Njuru – the defendant and her children to get 3.2 acres.
  - ii). Jason Njuru Mwangi – the plaintiff, Mrs Jane Wanjiku Njuguna, Nyambura Mwangi and Kariuku Mwangi (all family of Samuel Mwangi Waweru) be registered as proprietors of 3.2 acres severally and jointly.
- b). The portions awarded to each family not to be sold to anybody and should remain the family property.
- c). Caution if any applied by any member of the family be removed.
- d). The Executive officer -Kangema SRM's Court to sign the relevant documents to effect transfer/change as the case may be to facilitate issue of Title deeds as aforesaid.
- e). Any aggrieved party may appeal to the High Court before expiry of 60 days on point of law.

2. Aggrieved by the order No. 1a) (i) and (ii) above, the Applicant filed a Notice of Motion dated the 15<sup>th</sup> December 2015 and sought the following orders; -

- a). that there be stay of execution in relation to land parcel Loc12/sub Loc 1/2622 as ordered in Kangema Civil Case No. 1 of 1996 pending the hearing of this application.
- b). the Applicant be granted leave to appeal out of time and the leave do operate as stay in Kangema proceedings Civil Case No. 1 of 1996 until further orders.

c). further directions do issue by this Court. An order that the hearing and all proceedings heard by the Resident Magistrate Kangema Civil Case No. 1 of 1996 be brought before this Court and be quashed and hearing be ordered afresh in this Court.

d). any other relief this honourable Court may deem fit to grant.

3. The application is supported by an affidavit sworn by the Applicant on the 15<sup>th</sup> December 2015 together with the annexures thereto. He deponed that he is the son of Elizabeth Wanjiru Njuru who acquired ownership of Land parcel 255 through Succession Cause No 194 of 1987. In the grant of representation issued in the said Succession Cause No 194 of 1987, it appears that Samuel Mwangi Jotham died intestate and Gerishon Njuru Waweru, (the husband of Elizabeth Wanjiru Njuru) was appointed as Administrator of the estate of the deceased, namely Samuel Mwangi Jotham. The Applicant depones that upon the death of Gerishon Njuru Waweru, ( the administrator of the estate of Samuel Mwangi Jotham), his Mother namely Elizabeth Wanjiru Njuru succeeded him. The Applicant further alleges that sometime in 1992, one Jane Wanjiku Njuguna instigated a criminal case wherein his (Applicants') Mother was charged and sentenced to a 3 months' imprisonment in Criminal Case No. 622 of 2005 at Kangema Court. The Applicant adds that due to his Mother being in custody she was unable to participate in the prosecution of Case No 1 of 1996, as a result of which the case was concluded without her being heard at Kangema Law Courts which led to her losing land parcel Loc 12/sub loc1/2622 to Jane Wanjiku Njuguna. He claims that the reason for the delay in filing the appeal against the order of the SRM Court in Case No 1 of 1996 is the trauma he suffered after his mother's death. It is not on record when his Mother, Elizabeth Wanjiru Njuru died.

4. The application is opposed by the Respondent on the following grounds; -

a). that the Applicant is guilty of laches.

b). that the orders sought are not capable of being granted since execution has taken place and Land Parcel No Loc 12/sub-loc 1/2622 subdivided and does not exist.

c). That the Applicant's application is Res judicata.

d). That the application is otherwise a non-starter, a gross abuse of the Court process and ought to be dismissed with costs to the Respondent.

5. The grounds of opposition were supported by the replying affidavit sworn by the Respondent on 1<sup>st</sup> November 2016 along with the annexures thereto. He deponed that the land Loc 12/sub -loc1/255 was registered in the name of Samuel Mwangi Waweru who held it in trust for his family and that of Gerishon Njuru Waweru, both being brothers. That following the Court's decision at Kangema Senior Resident Magistrate's Court on 15<sup>th</sup> November 2000 aforesaid, the suit land measuring 6.4 acres was subdivided into two portions to wit; Loc 12 /sub-Loc 1/2621 and Loc 12/sub-Loc 1/2622. Parcel No 2621 went to the family of the late Gerishon Njuru Waweru (represented by his wife Elizabeth Wanjiru Njuru) which was registered in the name of Elizabeth Wanjiru Njuru. Parcel No. 2622 went to the family of Samuel Mwangi Waweru (represented by his four children which was sub-divided and registered separately in the names of the children namely, Jason Njuru Mwangi, Jane Wanjiku Njuguna, Nyambura Mwangi and Kariuki Mwangi.

6. I have carefully considered the application, the rival affidavits, annexures and the submissions by both parties. None of the parties relied on any precedent to advance their respective positions.

7. Section 79G of the Civil Procedure Act, Cap 21 of the Laws of Kenya, states as follows;

**“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 a good and sufficient cause for not filing the appeal in time”.**

It then follows that a proper appeal from the decision of the Kangema Senior Resident Magistrate’s Court issued on the 15<sup>th</sup> November 2000 ought to have been filed or on before the 15<sup>th</sup> December 2000. No evidence has been tendered to show that it was, in any event, that is why this instant application is before this Court.

8. This being an application for leave to file appeal out of time, I am guided by the decision of the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, SC App. 16/2014** which laid down the following as the underlying principles that a Court should consider in the exercise of discretion to extend time:-

- 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). The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
- c). As to whether the Court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d). Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e). Whether there will be any prejudice to be suffered by the respondents if the extension is granted;
- f). The application should have been brought without undue delay; and;
- g). In certain cases, like election petitions, public interest should be a consideration for extending time.

9. The following abridged principles that are applicable to the case at hand for consideration are:-

- a). the length of delay
- b). the reason for the delay
- c). the chances of appeal succeeding if the application is granted
- d). the degree of prejudice to the Respondent if the leave to appeal is granted.

10. Applying the above principles, I shall now examine the two critical questions;

- a). whether the applicant has shown good and sufficient cause for not filing the appeal on time.
- b). whether the applicant is entitled to a stay of execution in relation to the land parcel No. Loc/12/subloc1/2622 as ordered in Civil Case No. 1 of 1996.

11. The Applicant is seeking to file an appeal 16 years after the Kangema Senior Resident Magistrate’s Court decision issued on the 15<sup>th</sup> November 2000 and about 20 years after the original decision of Kangema Land Disputes Tribunal. It is not in dispute that the Courts decision stands unchallenged to date. It is not in dispute that the Applicants Mother neither challenged the decision of the Provincial Land Dispute Tribunal nor the decision of the Court within the statutory timelines or at all, either through judicial review or by way of appeal to the High Court. Even if for argument sake it is assumed (which is doubtful) that the matter came to the Applicant’s constructive knowledge in 2012 when he filed a case

against the Respondent on the same grounds as now, he also did nothing to challenge the decision made in 2013 for close to 2 years. No reason has been advanced for this failure. It is noteworthy to state that the applicant's case was dismissed as being an abuse of the process of the Court.

12. It is important to clarify the point of Applicant's alleged mother's incarceration. From the Court proceedings in the Criminal Case no 622 of 2005, the Applicant's Mother was arrested and arraigned in Court in August 2005 and sentenced to 3 months' imprisonment on 29<sup>th</sup> September 2005 or thereabouts. It then follows that she completed serving her custodial sentence around 29<sup>th</sup> December 2005. By then the SRM Court's decision in Case No 1 of 1996 had been delivered way back on 15<sup>th</sup> November 2000, close to 5 years earlier. The record speaks for itself and is testament that she participated in the hearing of Case no 1 of 1996 until the end. There is no evidence on record that there was another subsisting case whilst the Applicant's Mother was in custody that disposed of parcel No. 2262. At this time the decision to distribute the land to the beneficiaries was complete.

13. In any case the order subdivided that land into two portions; parcel No. 2261 and 2262. Parcel 2261 was registered in her name while parcel 2262 went to the Respondent and his siblings in equal shares. It therefore is not true that the land parcel number 2262 was registered in the name of Jane Wanjiku Njuguna solely.

14. I must also point out that during the hearing of the case at the Kangema Land Disputes Tribunal the Applicant's Mother acknowledged that the land parcel 255 was family land. In the proceedings leading to the ruling dated 3<sup>rd</sup> July 2013, the Applicant's Mother again acknowledged that the land is family land and urged the Court that one half of the land should not be given to the Respondent alone as pleaded in his application. This could only be in cognizance of the other family members that were to benefit from the land as ordered by the Court in its order dated the 15<sup>th</sup> November 2000.

15. The Applicant has advanced reasons for the delay in applying for leave to appeal the decision of the Honourable Court dated the 15<sup>th</sup> November 2000 as; that he suffered trauma after the mother's death and also that the file in Kangema was missing. No evidence has been adduced to support the averments and this Court finds the reasons vague, unsupported and unconvincing to say the least.

16. Even if this Court were to entertain this application, it is must be noted that the Applicant has not filed the proposed grounds of appeal to enable this Court to appreciate what is being appealed against so as to determine the chances of success in the event that leave were to be granted. Moreover, the parcel of land parcel 255 has mutated into parcels 2261 and 2262 in compliance with the order dated 15<sup>th</sup> November 2000. Further affidavit evidence has been adduced that parcel 2262 has been subdivided into parcel No.s 2275, 2276, 2277 & 2278 registered in the names of Nyambura Mwangi, Kariuki Mwangi, Jason Njuru Mwangi and Jane Wanjiku Njuguna respectively as shown in the copies of the certificates of official search, all dated the 16<sup>th</sup> April 2015 and annexed to the affidavit of the Respondent. It is evident that titles have been issued to the registered owners.

17. Section 26(i) of The Land Registration Act states that;-

**“the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer by the proprietor shall be taken by all Courts as *prima facie* evidence that the person named as proprietor of the land is absolute and indefeasible owner, subject to such other encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;-**

**a). on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b). where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme”.**

No such evidence has been adduced to warrant this Court to disturb the title of the proprietors of land issued in compliance with a valid Court order which remains unchallenged to date. In the circumstances therefore it is clear that allowing the Applicant to file the appeal out of time would cause more prejudice to the Respondent and others claiming under the Court order dated 15<sup>th</sup> November 2000.

18. Section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya states as follows;

**“No Court shall try any suit in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such a Court”.**

I agree with the Respondents learned counsel that the application (Notice of Motion in SRM Court at Kangema SRMCC No 1 of 1996) filed by the Applicant on 25<sup>th</sup> October 2012 seeking to set aside the orders of the Court issued on 15<sup>th</sup> November 2000 is similar to the current application and is res judicata. The application involves the same parties; same subject matter for which dismissed decision was made by a competent Court on 3<sup>rd</sup> July 2013. Reviving the matter therefore has the likely effect of meeting the same fate that the previous case met; dismissal on account of being an abuse of the process of the Court. It also offends the public principle that litigation must come to an end.

19. Without having the benefit of knowing the proposed grounds of appeal, it is important to raise the issue of forgery or otherwise of the grant of succession No 194 of 1987 as alleged by the Respondent in his affidavit dated 1<sup>st</sup> November 2016 on paragraph 18(ii). The Applicant did not controvert the allegations. The Applicant’s Mother Elizabeth Wanjiku Njuru never at any one time refer to the certificate of grant in the various Court cases that she had filed or defended in Court. The Applicant did not take action to correct the allegation of forgery by exhibiting the pleadings in the said succession case. It is curious that the grant appears to have been confirmed and the whole of Land Parcel No 255 given to the Applicant’s Mother when she was not the Administrator of the estate of Samuel Mwangi Waweru. The Applicant’s Mother does not appear to have applied and obtained a confirmed grant of representation in the estate of her deceased husband, Gerishon Njuru Waweru. Similarly, the Applicant does not appear to have applied and obtained a grant of representation in the estate of his alleged deceased Mother Elizabeth Wanjiru Njuru. In the circumstances, the Applicant has not demonstrated that he has the legal authority to file the instant case, he having failed to take out letters of administration in the estate of his late Mother. It is noteworthy that the Applicant’s Mother was a party as well as a beneficiary of the Court order issued on the 15<sup>th</sup> November 2000 which the Applicant seeks to appeal against if leave is granted to appeal out of time. I leave it there and say no more.

20. The circumstances stay of execution pending appeal can be granted by the Court are clearly set out in Order 42 Rule 6 of the Civil Procedure Rules which enact:

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but; the Court appealed from may for sufficient cause order stay of execution of such decree or order.**

**No order of stay of execution shall be made under Sub Rule (1) unless –**

- a). The Court is satisfied that substantial loss may result to the applicant unless the order is made and that**
- b). The application has been made without unreasonable delay; and**
- c). Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

The applicant has not met any of the mandatory provisions of the above procedural rule to be entitled to stay of execution and the Court shall grant none in the circumstances.

21. It is true that Section 19 of the Environment and Land Court Act, 19 of 2011 states as follows;

**“In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure”.**

Even without looking at any technicalities, this application cannot be saved in any other way. There are no grounds to grant leave or extend time to file an appeal against an order issued 16 years ago. In any event Parcel No 2262 does not exist currently and it would be an exercise in futility to grant a stay. Courts do not act in vain. Its orders must not be issued in a vacuum so as to suffer no effect on its target. This Court has found no grounds to quash proceedings heard by the Resident Magistrate Kangema Civil Case No. 1 of 1996 nor order that the matter be heard afresh.

22. In the upshot, this Court makes the following orders;-

**(a) The Notice of Motion dated the 15<sup>th</sup> November 2015 is hereby dismissed.**

**(b) The Applicant to meet the costs of the Respondent.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 7<sup>TH</sup> DAY OF APRIL 2017.**

**J. G. KEMEI**

**JUDGE**

**Coram**

Before Hon. Jemutai G. Kemei

**Court Assistant:** Susan/Maureen

**Plaintiff/Applicant:** N/A

**Defendant/Respondent:** Mr. Ndegwa for the Respondent.

**Court:** Ruling delivered in open court in the presence of Coram as above.

**Mr. Ndegwa:** I apply for copies of the ruling.

**Court:** Copies of ruling to be provided by the Registry subject to the payment of the requisite court fees.

**J. G. KEMEI**

**JUDGE**