



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT CHUKA
CHUKA MISC. ELC CASE NO 19 OF 2017
FORMERLY CHUKA HIGH COURT MISC. 9 OF 2016
JOHN MBAE TINGIWAS.....APPLICANT
VERSUS
ROSE IGOKI.....1ST RESPONDENT
SERA MUKWANYAGA JOSIA.....2ND RESPONDENT
NEHEMIAH NJERU M'IMWITHA.....3RD RESPONDENT

RULING

1. This miscellaneous application was brought to court by way of a Notice of Motion dated 19th December, 2016.

It seeks the following orders:-

1.That this honourable court be pleased to issue stay of further execution of the orders issued in Chuka L.D.T. Case No. 42 of 2010 and in respect of LR. MUTHAMBI/EREGA/71, pending the hearing and final determination of the instant application and or until further orders of this honourable court.

2.That this honourable court be pleased to grant leave for the applicant to file appeal out of time against the judgment, decrees and all consequential orders issued in Chuka Land Dispute Case No. 42 of 2010 and in respect of LR. MUTHAMBI/EREGA/71.

3.That the cost of this application be provided for.

2. The application has the following **grounds**:

a. That the respondents secretly filed and prosecuted Chuka Land Dispute Tribunal Case No. 42 of 2010 and deliberately failed and or ignored to inform the applicant despite the applicant residing on LR. MUTHAMBI/EREGA/71, the subject of their Chuka Land Dispute Tribunal Case No. 42 of 2010.

b. That LR. MUTHAMBI/EREGA/71 originally registered in the name of the deceased had been

successfully arbitrated in Chuka Principal Magistrate Court Succession Cause No. 11 of 2001 and no appeal was preferred against the confirmation of grant orders.

c. That the Land Dispute Tribunal cannot purport to arbitrate on a matter which a court of competent jurisdiction had arbitrated upon in Chuka Principal Magistrate Court Succession Cause No. 11 of 2001, and therefore the Tribunal acted ultra-vires their jurisdiction.

d. That the delay to file appeal out of time by the applicant is excusable on account that the applicant was not a party in Land Dispute Tribunal Case No. 42 of 2010 although residing on LR. MUTHAMBI/EREGA/71.

e. That unless the applicant is granted leave to file appeal out of time against the judgment, Decrees and consequential orders issued in Land Dispute Tribunal Case No. 42 of 2010, the applicant stands to suffer irreparable loss and damage.

3. The application is supported by the supporting affidavit of John Mbae Tingiwas, the applicant. The affidavit states as follows:

1.That I am the applicant hence competent to make and swear this affidavit.

2.That at material times, I have been residing on LR. MUTHAMBI/EREGA/71 registered in my deceased father's name and on a portion of land measuring 4.00Acres or thereabout, and it is the said land I call my home with my family.

3.That Chuka Principal Magistrate's Court Succession Cause No. 11 of 2001, decreed that LR. MUTHAMBI/EREGA/71 be inherited as evidenced on the amended certificate of confirmation of grant issued on 20th January, 2016. (Annexed find a copy of the amended certificate of confirmation of grant and marked "JMT 1".

4.That the 1st, 2nd and 3rd respondents filed and prosecuted Chuka L.D.T. Case No. 42 of 2010, despite the existence of Chuka Principal Magistrate's Court Succession Cause No. 11 of 2001. (Annexed find copies of the Decrees/Orders and marked "JMT 2(a) and (b) respectively).

5.That the orders issued in L.D.T. Case No. 42 of 2010 are in total conflict with the confirmation of grant orders issued in Chuka Principal Magistrate's Court Succession Cause NO. 11 of 2001.

6.That the Tribunal ultra-vires (sic) their jurisdiction, when dealing with LR. MUTHAMBI/EREGA/71 and which was registered in the name of a deceased person.

7.That I was not a party in Chuka L.D.T. Case No. 42 of 2010, hence these proceedings.

8.That unless the orders sought are granted, I am bound to suffer irreparable loss and damage.

9.That the contents of my affidavit are true to the best of my knowledge, believe (sic) and information.

4. The application was slated to be heard on 20.10.2017. The applicant served the date upon the respondents but did not come to court to prosecute his application.

5. The 1st and 2nd respondents opposed the application through an affidavit sworn by the 2nd respondent, SERA MUKWANYAGA JOSIA on 22nd August, 2017. The affidavit states as follows:

I, SERA MUKWANYAGA JOSIA of P. O. Box 91 CHUKA in the Republic of Kenya make oath and states as follows:

1.That I am the 1st respondent herein and hence competent to make this oath.

2.That I have full authority from the 1st respondent to make and swear this affidavit for and on her behave. (sic)

3.That I have read and understood the applicants grounds in support of his application together with its supporting affidavit sworn and dated 19th December, 2016. And having understood the content therein I wish to respond as follows.

4.That from the on-set I wish to aver that the applicants application is bad in law incompetent abo-natio (sic) misplaced and an abuse of court process for the following reasons,

i. The 1st and 2nd respondent (sic), were not party to LDT MUTHAMBI 42 OF 2010.

ii. That the 1st and 2nd respondent (sic) to there (sic) best of their knowledge were the claimant in LDT MUTHAMBI 48 of 2010.

iii. The applicants (sic) was not a party to either LDT MUTHAMBI 42 OF 2010 or LDT MUTHAMBI 48 OF 2010 and the applicant as (sic) never sort to be enjoined in any of the LDT cases aforesaid.

iv. That the applicants as (sic) no locus stadii to bring this application under LDT MUTHAMBI 42 of 2010 or LDT MUTHAMBI 48 OF 2010 granted that he is not a party to any of the dispute (sic).

v. That the prayer sort (sic) under the repealed land dispute tribunal there was no room for extension of time to appeal out of time and therefore the 2nd prayer the applicant (sic) seeking for extension of time cannot and is not available.

vi. That the 1st prayer of stay of execution of the applicant cannot be obtain (sic) by a person who is not a party to the suit under which the orders were issued and this applies to the applicant.

vii. The whole application by the applicant is an abuse of the court process and more so granted that he has not been enjoined as a party to either LDT MUTHAMBI 42 of 2010 OR LDT MUTHAMBI 48 OF 2010 as the case may be.

5.The content (sic) of paragraph 1 and 2 of supporting affidavit raises no canvassed issues between the 1st and 2nd respondent ad the applicants save to qualify that although the applicant is residing on LR MUTHAMBI/EREGA/71 is no longer in the name of the applicant (sic) father curtsey (sic) of the 3rd respondent succession cause in respect of the estate of M'IMWITHA M'ITHANGA, where the said land was distributed as per original grant before rectification (and the applicant is the beneficiary) (annexed and marked S. M. M. 1 is a certificate of a confirmation of grant).

6.That despite the 1st ad 2nd respondent being stake holders, and beneficiaries of the estate of M'IMWITHA M'ITHANGA, the 3rd respondent (administrator) secretly and stealthily obtain (sic) letters of administration in respect of the estate of M'IMITHA M'ITHANGA without involving or engaging them in CHUKA P. M. SUCCESSION CUASE (sic) NO. 11 OF 2001 and the succession cause is a subject of litigation for revocation or annulment of the said grant (annexed and marked S.M. J. 2 are summons for revocation of grant by the 1st applicant 2nd applicant and CIANJOKA NJOKA which is listed for hearing on 17th October, 2017).

7.That it is true that 1 the 1st respondent and one CIANJOKA NJOKA, filed LDT MUTHAMBI 48 of 2010 (and not LDT MUTHAMBI 42 of 2010) claiming from the 3rd respondent in his capacity

as the administrator of the estate of M'IMWITHA M'ITHANGA and this was proper (sic) and correct in law in that a succession court deliberate (sic) on estate of deceased person and those who are beneficiaries, and any person who as (sic) interest of estate of the deceased person and does not qualify to be a (sic) beneficiary as (sic) a right to go to an ordinary court and champion one (sic) right otherwise the 1st and 2nd respondent and CIANJOKA NJOKA had all the right to file LDT MUTHAMBI 48 of 2010, and not LDT MUTHAMBI 42 of 2010 as pleaded by the applicant.

8.That there is no room in law to warrant comparing and contrasting what a court of a (sic) succession has said about the estate of a deceased person and orders issued in a civil court, more over those who benefit from the estate of a deceased person may find themselves being forced to adjust and accommodates (sic) any person like the 1st and 2nd respondent (sic) who in a civil court may articulate their rights over an estate of a deceased person whose estate has already been distributed. Consequently the applicant (sic) averment in paragraph 5 are misleading. Consequently the applicant (sic) averment in paragraph 5 are misleading and made per incurium (sic).

9.The content of paragraph 6 of the supporting affidavit are misleading and I wish to respond as follows. The content therein (sic)

- i. That by 2010 the 3rd respondent had already become the administrator of the late M'IMWITHA M'ITHANGA .
- ii. That the 3rd respondent had already been registered with MUTHAMBI/EREGA/71 2010 when the 1st 2nd respondent (sic) and CIANJOKA NJOKA filed LDT MUTHAMBI 48 OF 2010.
- iii. That the issue of ultra vires by tribunal cannot be raised in this forum but on appeal and as pointed out supra time for appeal lapsed.
- iv. In any case the applicants cannot raise the issue of ultra vires for he is not and he has never been a party to LDT MUTHAMBI 48 of 2010 OR LDT MUTHAMBI 42 of 2010.

10.The applicant (sic) averment in paragraph 7 of supporting affidavit are correct and confirms my averment herein above and this statement put the applicant out of reach of these proceeding (sic) and all what he has done is to confirm that he is incompetently before this court.

11.It is un true (sic) that the applicant stands to suffer any irreparable damage as contended by applicant at paragraph 8 of supporting affidavit granted that under Chuka PM SUCCESSION CAUSE NO. 11 OF 2001 the applicant was given 4 acres and the 1st applicant for example despite being daughter to M'IMWITHA M'ITHANGA was completely disinherited.

12.That I make this oath on my behalf and that of 1st respondent in opposition to the applicant (sic) application and in response to the applicant (sic) supporting affidavit sworn and dated 19th December, 2016.

13.That all which is deponed herein is true to the best of my knowledge believe (sic) and information.

6. Mr. I.C Mugo told the court that the respondent would wholly rely on the replying affidavit sworn on the 2nd August, 2017 by the 2nd Respondent. He told the court that the substantive prayers sought in the application are untenable because, firstly, the applicant was not party to Chuka L.D.T. Case NO. 42 of 2010 or 48 of 2010 and, secondly, the Land Disputes Tribunals Act had no provision for extension of time. He also opined that even if the prayer for extension of time was found tenable, it could not be granted many years later.

7. I have carefully considered the assertions proffered by the parties in their pleadings in support of their

respective positions. I have also considered the oral submissions made by Mr. I. C. Mugo on behalf of the respondents.

8. The hearing date for this application was obtained by the applicant who served it upon the respondents. He, however did not come to court to prosecute his application.

9. I opine that even if the applicant came to prosecute his case, he would not have succeeded as this application veritably lacks merit for the following reasons:

a. He was not party to Chuka L.D.T. case NO. 42 of 2010 or Chuka LDT. NO. 48 OF 2010. He, therefore, has no business to purport to appeal against the award of the Chuka Land Disputes Tribunal.

b. The Land Disputes Tribunals Act (now defunct) has no provision for extension of time for appeal.

c. Should this application succeed, which it has not, there would be no place to appeal to as Appeals Committees contemplated by section 8 of the Land Disputes Tribunals Act are as dead as dodos following the repeal of the Act.

d. I opine that it would be unconscionable to extend time for appeal, even where the law allowed it, which is not the case here, many years after delivery of the impugned decision.

10. In the circumstances, this application is dismissed.

11. Costs are awarded to the respondents.

Delivered in open court at Chuka this **21st day of September, 2017** in the presence of:

CA: Ndegwa

I.C. Mugo for the respondents

P.M. NJOROGE

JUDGE