



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC MISC. NO. 19 OF 2015**

**CHARLES KARIUKI MURUTHI ..... APPLICANT**

**-VERSUS-**

**TITO THEURI GAITA ..... RESPONDENT**

**RULING**

1. This ruling relates to two applications. One application is by the plaintiff and the other by the defendant. For ease of reference, I shall refer to the parties by their surnames.
2. **Charles Kariuki Muruthi (Muruthi)** filed a Notice of Motion dated **13<sup>th</sup> August, 2015** praying that he be allowed to file his appeal out of time against the judgment in Nyeri CMCC No 286 of 2007; that he be granted an order for stay of execution of the decree issued on 10<sup>th</sup> July 2015, and an order restraining the respondents, their agents/servants or anyone acting under them from interfering with **Nyeri/Watuka/1769** pending the hearing and determination of the application.
3. The application is premised on the grounds on its face, and is supported by the affidavit sworn by him on **13<sup>th</sup> August, 2015**. He depones that failure to file his appeal on time was caused by his being incapacitated due to a debilitating illness. (copies of his medical records are attached in support).
4. This application is opposed. Tito Theuri Gaita (Gaita) filed a replying affidavit on **30<sup>th</sup> September, 2015**. In that affidavit, he lays down the facts surrounding the instant application. He depones that he bought the suit property from Muruthi, but the deal went sour after Muruthi refused to transfer the property to him and instead decided to sell the suit property to other persons. This led him to file suit No. CMCC No 286 of 2007 in Nyeri, the outcome of which Muruthi was ordered to either refund the full purchase price (plus interest) paid to him by Gaita, failure of which, the suit property be sold by way of public auction.
5. Muruthi did not refund the money and Gaita applied for execution of the decree that the suit property be sold by way of public auction. Gaita purchased the suit property in the public auction and applied to have the Executive Officer of the court execute all necessary documents and transfer the suit property to him which was done.
6. Gaita disputes the contention that Muruthi has been in occupation of the suit property and has instead stated that it is him (Gaita) who is in occupation.

7. In a further affidavit sworn by Muruthi on **21<sup>st</sup> December, 2015** he depones that there was never any agreement between him and Gaita over the sale of the suit property and in any case, even if one existed, it was invalid as no Land Control Board consent had been obtained. According to him, the suit before the lower court was for a debt and not for sale of land.

8. In the second application filed by Gaita dated **29<sup>th</sup> January, 2016**, Gaita seeks that the court dismisses Muruthi's application as it lacks merit and prays that the restriction placed on the suit property be removed. In support, he has sworn an affidavit of even date. In that affidavit, he has deponed that as a result of the restriction placed by Muruthi, he is unable to deal with the suit property. He further depones that Mr. Muruthi's application has been overtaken by events as execution and eviction of the persons who had been in occupation of the suit property has already taken place.

9. Both applications were heard orally on 9<sup>th</sup> November, 2016 with both parties representing themselves. Both of them chose to rely on their pleadings and urged the court to grant their prayers as sought.

10. The principles that guide a court in considering an application for leave to file an appeal out of time were laid down by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

**“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:**

**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. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**

**iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to 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 suffered by the respondents if the extension is granted;**

**vi. Whether the application has been brought without undue delay; and**

**vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

11. In the motion dated 13<sup>th</sup> August, 2015 Muruthi seeks leave to file his appeal out of time. The appeal relates to the judgment in Nyeri CMCC No 286 of 2007 delivered on 18<sup>th</sup> June, 2007 over 9 years ago. Muruthi's reason for the long delay is that he has been sick for a very long time and he has only recently begun to feel better. While the court sympathises with Muruthi's predicament, it must be said that he has not satisfied the principles laid out in the aforesaid case to enable the court exercise its discretion in his favour. 9 years is indeed too long a time to claim an entirely discretionary relief without giving a compelling reason. Although the applicant has attached medical records, none of those records bear the applicant's name. The records are in the name of Joyce Nyarwai. For this reason, I decline to grant the orders sought in the application dated 13<sup>th</sup> August, 2015 and I dismiss the same with costs to the respondent.

12. The second application relates to the lifting of the restriction registered against the title for the suit property. Section 78 (2) of the Land Registration Act, 2012 gives this court power to lift such a

restriction. According to the certificate of official search dated 13th January, 2016 the remarks entered by the Registrar against the title are as follows: **“no dealings until Civil Suit No 286 of 2007 ELC Application No 19 of 2015 is determined.”**

13. The matter before the lower court CMCC No 286 of 2007 was concluded in 2009. There was no reason why the restriction was not removed after the matter was concluded and before this application was filed in 2015. **Section 76 (2)** of the Land Registration Act, 2012 provides that a restriction may exist as follows:

**“(a) for a particular period;**

**(b) until the occurrence of a particular event; or**

**(c) until the making of a further order.”**

A restriction does not endure for eternity as observed by my sister **Gitumbi J** in the case of **Peter Gichia Nyanjui v Simon Kibe Muriithi & 3 others [2016] eKLR.**

14. Both CMCC No. 286 of 2017 and ELC Misc. 19 of 2015 having been concluded, I order the Land Registrar to remove the restriction registered against the title for Nyeri/Watuka/1769.

15. Costs of the application are awarded to the applicant.

**Dated, signed and delivered in open court at Nyeri this 16th day of December, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Charles Kariuki Muruthi – applicant

Tito Theuri Gaita – respondent

Court clerk - Esther