



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC APPEAL NO 2 OF 2018**

**SALOME WAIRIMU MIANO (Suing as the Administrator of the Estate of)**

**ABDALLA MIANO.....APPLICANT/APPELLANT**

**VERSUS**

**MARIGA NJUGUNA.....RESPONDENT**

*Being an Appeal arising from the Award Registered to become orders of the court issued by*

*Hon P.O Muholi the Resident Magistrate and delivered at*

*the senior Principal Magistrate's Court at Nyahururu on 3<sup>rd</sup> March 2015.*

**BETWEEN**

**ABDALLA MIANO'S FAMILY.....1<sup>st</sup> RESPONDENT/DEFENDANT**

**VICTOR MAINGI'S FAMILY.....2<sup>nd</sup> RESPONDENT/DEFENDANT**

**EPHANTAS KABIRU'S FAMILY.....3<sup>rd</sup> RESPONDENT/DEFENDANT**

**GEORGR WANDERI'S FAMILY.....4<sup>th</sup> RESPONDENT/DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 25<sup>th</sup> January 2018 wherein the Applicant/Appellant has sought for the admission/enlargement of time to enable her file their Appeal after the expiry of the statutory period. The Applicant further seeks for orders of stay of execution of the decree dated the 27<sup>th</sup> April 2016 raising out of an award issued by the North Kinagop Tribunal and registered in court on the 3<sup>rd</sup> March 2015.
2. Lastly the Applicant prayed for orders of injunction against the Registrar of Lands Nyahururu, to stop any sub-divisions of land Ref Nyandarua/Nandarasi 95 registered in the name of Abdullah Ali Miano.
3. The applicant further sought for injunctive orders against any transactions, sale, trespass, and transfer of any plot arising out of the sub-division of the parcel of land.
4. This application was premised on the grounds on the face of it as well on the supporting affidavit sworn on the 25<sup>th</sup> January 2018 by Salome Wairimu Miano wherein it was prosecuted on the 18<sup>th</sup> April 2018
5. I have considered the Applicant's submission and application herein. In summary the Applicant's application is to the effect that during the subsistence of the Applicant's deceased husband, the Respondent herein had filed suit against him at the Naivasha Magistrates Court being No. 77 of 1984. That the parties had subsequently agreed to refer the matter for arbitration which was done and the award adopted as an order of the court on the 22<sup>nd</sup> March 1986 declaring the Applicant's husband as proprietor of the suit land No. Nyandarua/Nandarasi 95. The Respondent did not challenge the award by the Arbitration.
6. The Applicant's submission is to the effect that after the death of her husband Mr. Abdullah Ali Miano in 1995, the Respondent, decided to file a Land dispute at the Kinagop Land Disputes Tribunal in 2008 approximately 22 years later.

7. That by the time they were filing the said dispute, the law of limitation had caught up with them as the limitation period for recovery of land was 12 years. They however managed to obtain an award fraudulently without disclosing material facts. That based in that award and /or orders, they now sought to take possession and sub-divide her land. That further, as at the time the Respondent sought the said orders, the Applicant had not obtained letters of Administration.

8. That the proceedings at the land disputes Tribunal being No. 33 of 2008 proceeded ex-parte without her knowledge as she had not been served with any papers and further that the parties therein had no locus standi to be sued or to defend the case. The Applicant submitted that parties who had been sued in those proceedings had been families instead of personalities, some of whom had died long ago.

9. That before the Applicant herein could obtain the letters of administration which she did in the year 2012, she was informed that a decree had been awarded wherein the Respondent had now purported to take possession and subdivide her land.

10. That since she had now obtained the letters of administration, she wished to appeal, out of time, against the decree issued on the 27<sup>th</sup> April 2016. She The Applicant's submission was that her inability to file the Appeal on time was because she lacked the capacity to do so.

11. The Applicant submitted that unless her application was granted, the Respondent would proceed with the execution and the Appeal will be rendered nugatory thus exposing her to suffer when she loses her family property without being accorded fair hearing. It was further submitted that this application was filed without undue delay and that the Applicant had an arguable Appeal with a high probability of success and

12. The Respondent herein opposed the Applicant's application vide their replying affidavit filed on the 9<sup>th</sup> March 2018. In their oral submissions on the 26<sup>th</sup> June 2018, they were categorical that the Applicants application must fail for reasons that, a decree had been issued by the Magistrates Court on the 3<sup>rd</sup> March 2015 which decree was not appealed against.

13. That the Applicant had come to court three years later seeking to appeal against the said decree which time and/or delay, they submitted was inordinate.

14. The Respondent further submitted that the application for stay of execution pending the filing of the appeal had already been overtaken by events as the decree had already been executed.

15. That the present matter originated from the award that was issued on the 30<sup>th</sup> September 2008 by the Kinangop Disputes Land Tribunal. That before the said matter was adopted as an award by the court, the Applicant herein had moved to court vide a Judicial Review No 8 of 2009 seeking to have the said award quashed. That although the Applicant was granted leave to file the said proceedings in the judicial Review, she however withdrew the application whereby the Respondent moved to have the award adopted.

16. That at the time, the Respondent's father had passed on and had been substituted. The award was subsequently adopted on the 13<sup>th</sup> March 2015 which decree the Applicant now wished to appeal against.

17. That in the said award, land parcel No. Nyandarua/Nandarasi 95 was shared into half wherein the Respondent were given and the Applicant got half her share. The requisite documents were executed by the executive officer of the court. Subsequently the land was subdivided as per their attached annexure marked as NM4 and a title deed issued as per annexure 5, vesting 8.25 hectares to the Respondent on the 11<sup>th</sup> August 2017 who took possession of the same.

18. That pursuant to these developments, the Applicant had filed another Judicial Review Application at the Nakuru High Court being Judicial Review No. 32 of 2016 which was transferred to this court and issued a new number, Nyahururu High Court Judicial Review No 6 of 2017. The matter was heard and determined wherein the court dismissed the application on the basis that it was time barred and un-procedural.

19. The Respondent further submitted that it was upon the two applications in the High Court being unsuccessful that the Applicant herein has now filed the present application seeking for leave to file her appeal out of time. That the Applicant has come to court with unclean hands having not disclosed the fact that she had filed two other suits prior. That it was not true that she was not aware of the decree as she had all along participated in the proceedings.

20. That the Applicant had not shown a good cause for the delay to warrant a stay pending appeal. Further no appeal has been filed and as such the court cannot order for stay. That litigation had to come to an end and the Applicant has to be stopped from filing suit after suit as this was an abuse of the court process.

21. That in regard to the Application pending before the Magistrate's Court, being land dispute No.33 of 2008, now No. 20 of 2018, the Respondent therein had sought for the Applicant to remove her green house from their piece of land and there were no orders staying the said proceedings which are totally different from the present proceedings.

22. Having heard submissions by both sides as well as having regard to the annexures filed herein, consequently the pending issue for determination is whether this court should grant the Applicant the orders sought for being;

i. Enlargement of time to enable her file her Appeal after the expiry of the statutory period.

ii. Orders of stay of execution of the decree dated the 27<sup>th</sup> April 2016 raising out of an award issued by the North Kinangop Tribunal and registered in court on the 3<sup>rd</sup> March 2015.

iii. Orders of injunction against the Registrar of lands Nyahururu to stop any sub-divisions of land Ref Nyandarua/ Nandarasi 95 registered in the name of Abdullah Ali Miano.

iv. That there be injunction against any transactions, sale, trespass, and transfer of any plot arising out of the sub-division of the parcel of land.

### **Leave to appeal out of time**

23. Section 79G of the Civil Procedure Act which gives an appellate court discretion to extend time for filing an appeal from the subordinate Court to the High Court.(read Land and Environment Court) stipulates 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 good and sufficient cause for not filing the appeal in time.*

24. In the case of **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others** [2014] eKLR the court held that:

*“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.*

*“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:*

- 1. 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;*
- 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*
- 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
- 5. whether there will be any prejudice suffered by the Respondent, if extension is granted;*
- 6. whether the application has been brought without undue delay; and*
- 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].*

25. Has the Applicant fulfilled the above requirements so as to be granted leave to file her appeal out of time?

26. The gist of the matter in question is that on the 30<sup>th</sup> September 2008, the North Kinagop Land Dispute Tribunal passed an award that saw land parcel No. Nyandarua/ Nandarasi 95, which the Applicant herein alleges was registered in the name of her deceased husband Mr. Abdullah Ali Miano, divided into two equal portions of 8.25 hectares each wherein the Applicant was to get one portion, while the other portion was given to the Respondent herein.

27. That before the said matter was adopted as an award by the court, the applicant herein moved to court vide a Judicial Review No 8 of 2009 seeking to have the said award quashed, but withdrew the application on the 5<sup>th</sup> November 2014.

28. It is further not in contention that the upon withdrawal of the Judicial Review, the Respondent herein moved to have the award adopted and on the 13<sup>th</sup> March 2015, the said award was adopted in the Senior Principal Magistrates Court at Nyahururu.

29. Following the said adoption, the Applicant again filed another application at the Nakuru High court being Judicial Review No. 32 of 2016 which was transferred to this court and issued a new number Nyahururu High Court Judicial Review No 6 of 2017.

30. Before proceeding further, let me delve into what befell Nyahururu High Court Judicial Review No 6 of 2017 because the same was before myself.

31. In the said Application, the Applicant had sued the Nyahururu Chief Magistrate as the 1<sup>st</sup> Respondent while the Land Registrar, County Government of Nyahururu had been sued as the 2<sup>nd</sup> Respondent. The Applicant herein was the Plaintiff. Alongside the said application for Judicial Review, the Applicant had filed a notice of motion vide a certificate of urgency wherein her counsel had appeared before the Deputy Registrar sitting at Nakuru High Court on 17<sup>th</sup> November 2017 and obtained interim orders pending the determination of the matter. The

matter was subsequently transferred to this court upon its establishment.

32. Upon perusal of the same, the court noted that the North Kinangop Division Land Dispute tribunal had delivered its decision on the 30<sup>th</sup> September 2008. On the 27<sup>th</sup> April 2016 the award was adopted at the Nyahururu Chief Magistrate's Court and the decree subsequently issued to the Land Registrar to execute.

33. The Applicant had then filed her application dated 17<sup>th</sup> November 2016 in the Environment and Land Court- Nakuru beyond the time limit provided for under Order 53 Rule 2 of the Civil Procedure Rules which provides that applications of Certiorari should not to be filed later than six months after the date of the proceedings. The adoption of the award was on 27<sup>th</sup> April 2016. Six months lapsed on 27<sup>th</sup> October 2016 the Applicant had filed her application for Certiorari on the 17<sup>th</sup> November 2016 which was therefore out of time.

34. The court further found that the Applicant had obtained orders before the Deputy Registrar which was in contravention of Order 53 rule 2 which is specific that such applications shall be made ex-parte to judge in chambers. The orders issued by the Deputy Registrar were set aside suo moto whereby the court then directed the Applicant's Counsel to address it court afresh.

35. The court gave dates for hearing of the Application afresh wherein on all the three occasions when the matter was set down for mention, and despite service having been effected, there was neither appearance by the Applicant nor her Counsel. The court thus directed for the execution of the decree issued in the Chief Magistrate's Court and marked the matter as finalized.

36. Pursuant to the said orders the Applicant has now filed the present Application seeking to file her appeal out of time giving her main reason for not filing the Appeal on time as being her lack of locus standi since she had not obtained the letters of Administration to enable her sue on behalf of her deceased husband's estate.

37. I note that unlike the submission by Applicant's Counsel to the effect that she obtained the letters of administration in the year 2012, from the court's record, the Applicant obtained the said letters of Administration on the **22<sup>nd</sup> July 1997**. The same were marked as annexure SWM2 in her supporting affidavit. This means that by the time the North Kinagop Land Dispute Tribunal passed its award on the 30<sup>th</sup> September 2008, and same was slated for adoption before the Magistrate's court, the Applicant had the Locus Standi to Defend the case and/or file an appeal but she did not take any steps, instead she filed an application for Judicial Review No 8 of 2009 seeking to have the said award quashed but withdrew the application on the 5<sup>th</sup> November 2014.

38. She still filed no appeal and when the award was adopted on the 13<sup>th</sup> March 2015, in the Senior Principal Magistrates Court at Nyahururu, she decided to file yet another application for Judicial Review at the Nakuru High court being JR No. 32 of 2016 seeking to have the said award quashed. The court found that the application could not stand as it had been filed out of time, and directed for the execution of the decree issued in the Chief Magistrate's Court thus marking the matter as finalized.

39. The Applicant has now filed the present application seeking to file the Appeal out of time so as to stay of execution of the same decree dated the 27<sup>th</sup> April 2016 raising out of an award issued by the North Kinagop Tribunal.

40. Having considered the application, the supporting affidavit and the oral submissions hereto, I find that the Application dated 25<sup>th</sup> January 2018 herein was not brought without unreasonable/excusable delay the award having been issued on the 30<sup>th</sup> September 2008 and a decree having been issued by the Magistrates Court on the 3<sup>rd</sup> March 2015 which decree was not appealed against but which the Applicant knew about it all this while.

41. The 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, I find that the Applicant has not come to court with clean hands in the circumstance and also find that she has not laid the basis for the extension of time to the courts satisfaction. In the upshot, the Application for enlargement of time to enable the Applicant file their Appeal after the expiry of the statutory period is herein denied.

42. I find that the Applicant chose not to file an appeal against the said award but to go on an application filing spree eventually filing the present application despite the matter having been finalized vide Nyahururu High Court Judicial Review No 6 of 2017 (Previously Nakuru Judicial Review No. 32 of 2016)

43. Section 7 of the Civil Procedure Act provides as follows;

*No court shall try any suit or issue in which the matter directly and 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 court.** (Emphasis added).*

44. The provisions of Section 7 of the Civil Procedure Rules, together with the decisions by the various Courts of concurrent and appellate jurisdiction, calls the principle of *res judicata* into play. The facts upon which the application dated 25<sup>th</sup> January 2018 is sought is substantially the same as the facts in the applications in Nakuru Judicial Review No 8 of 2009 and Nyahururu High Court JR No 6 of 2017 (Previously Nakuru Judicial Review No. 32 of 2016) And although the Applicant has tried to inter change the parties and or the provisions of the law, at the end of the day, A rose flower by any other name will smell the same.

45. It should be noted that although the Plaintiff is been zealous to seek justice, yet the filling of numerous applications seeking the same relief is not an appropriate way of exerting a *bona fide* zeal by a litigant. Such path may be interpreted to be an attempt to confuse the Court and circumvent its clear intellect on justice in this matter. I find the present matter being *res judicata* in terms of Section 7 of the Civil

Procedure Act.

46. As to the Applicant's application for Orders of stay of execution of the decree dated the 27<sup>th</sup> April 2016, and Orders of injunction against the Registrar of lands Nyahururu to stop any sub-divisions of land Ref Nyandarua/ Nandarasi 95, as it had been submitted by the counsel for the Respondent the same have been overtaken by events because the requisite documents to the said land had been executed by the executive officer of the court. Subsequently the land had already been sub-divided and a title deed No Nyandarua/Nandarasi/5224 vesting 8.25 hectares to the Respondent issued on the on the 11<sup>th</sup> August 2017 wherein the Respondent took possession of the same. Issuing the orders so sought would amount to eviction orders which is premature at this stage.

47. In the result, the Applicants' Notice of Motion dated the 25<sup>th</sup> January 2018 and filed on 26<sup>th</sup> January 2018 lacks merit and is hereby dismissed in its entirety with costs to the Respondent.

**Dated and delivered at Nyahururu this 26<sup>th</sup> day of June 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**