



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISCELLANEOUS APPLICATION NO. E005OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW

PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26, THE LAND ADJUDICATION ACT,

CAP 284, THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015 LAWS OF KENYA

AND ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE PROCEEDINGS, FINDINGS AND

DECISION MADE ON 18.03.2021 IN APPEAL NO.93/2018 OVER

PARCEL OF LAND NO.1233 SITUATE IN KAMANYAKI KAMARANDI

ADJUDICATION SECTION WITHIN THARAKA SOUTH SUBCOUNTY

BETWEEN

ROSCO KIBARA MANGAARA.....EX-PARTE APPLICANT

THE DEPUTY COUNTY COMMISSIONER THARAKA SOUTH SUBCOUNTY.....1ST RESPONDENT

THARAKA SOUTH SUBCOUNTY LAND ADJUDICATION.....2ND RESPONDENT

AND SETTLEMENT OFFICER.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

PAUL KIRIMI KIRIA.....INTERESTED PARTY

RULING

1. The matter was brought pursuant to a notice of motion application dated 24th August 2021 seeking for orders:

i. That this Honourable court be pleased to extend the order for leave issued on 19.04.2021 to apply for a writ of certiorari to call into the High court and quash the proceedings, findings and decision made by the 1st respondent on 18.03.2021 in objection Appeal No.93 of 2018 over land parcel No.1233 situate in Kamanyaki/Kamarandi Adjudication section.

ii. That this Honourable court be pleased to grant the applicant leave to file a further affidavit verifying the statement of facts in order to place the impugned decision and proceedings now available to the Honourable court.

iii. That upon grant of orders (i) &(ii) above the main motion and the further affidavits verifying the statement of facts be deemed as duly filed.

2. The application is grounded upon the annexed affidavit of Rosco Kibara Mangaara who contends that the exparte applicant instituted this suit on 21.04-2021 seeking leave to institute judicial review proceedings for orders of certiorari, prohibition, mandamus and to compel the 1st and 2nd respondents to supply the applicant with the impugned decision and proceedings thereof.

3. The applicant was to file the main motion within 21 days and the said 21 days have lapsed.

4. The applicant avers that at the time he sought leave to institute the judicial review proceedings,he did not have a copy of the impugned decision and proceedings because the 1st and 2nd respondents had refused to supply him with the same.

5. The applicant avers that together with the leave granted on 21.04-2021 the court granted an order to compel the 1st and 2nd respondents to supply the applicant with the impugned decision and proceedings which were supplied in late July 2021.

6. The applicant explains that that the delay was not deliberate but was occasioned by the reasons that the impugned decision and proceedings were not supplied in time which delay was not in the control of the applicant.

7. The applicant apologises for the delay and seeks the Honourable court to exercise its discretion and extend the order to allow the applicant file the main motion and any other supporting documents.

8. The applicant contends that his request for leave to file a further affidavit verifying the statement of facts is necessary in order to place the impugned decision and proceedings before the honourable court.

9. The applicant avers that the respondents delayed in supplying him with the proceedings till July 2021 hence leave of the same is necessary.

10. The applicant reiterates that other than the ex parte applicant none of the other parties will suffer any prejudice.

11. The application was not opposed by the Respondents and the interested party.

ISSUES FOR DETERMINATION.

i. Whether the court has discretion to extend the order for leave issued on 19.04.2021 to apply for a writ of certiorari.

ii. Whether the court has discretion to allow for filing of judicial review motion out of time.

ANALYSIS & DETERMINATION

12. The application is in respect for extension of time to institute judicial review proceedings.

13. The applicant contends that leave was granted but the statutory 21 days to file the main motion lapsed before the applicant could do so.

14. The applicant avers that failure to file the application within the said period was because there was also an order issued to compel 1st and 2nd respondents to supply the applicant with the impugned decision and proceedings. He further alleges that the respondents delayed in supplying of the proceedings till July 2021.

15. Order 53 Rule 3 (1) of the civil procedure rules,2010 provides that: -

“When leave has been granted to apply for an order of Mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the high court, and there shall, unless the judge granting leave otherwise directed, be at least eight clear days between service of the notice of motion and the day named therein for the hearing.”

16. It is important to point out that the provisions of order 50 Rule 6 of the Civil Procedure Rules 2010 which grant the court power to enlarge time cannot override the express provisions of the statute, namely, section 9(3) of the Law Reform Act. In this regard, I find useful guidance in **Re an application by Gideon Waweru Githunguri whereby the colonial supreme** court held that the said section imposes an absolute period of limitation and **Raila Odinga & others v Nairobi City Council** in which it was held that (i)the Rules under the Act cannot override the clear provisions of section 9(2) of the Act.

17. Article 159 (2) (d) of the Constitution of Kenya 2010 enjoins courts to determine cases without undue regard to technicalities. I Must however point out that Article 159 of the Constitution is not a panacea for all problems. It is not lost to this court that the provisions of order 53 rule 3 (1) of the Civil Procedure Rules,2010 are couched in Mandatory terms. The applicant therefore cannot seek refuge under Article 159 (2) (d) of the Constitution under the present circumstances in view of the mandatory and express provision cited above.

18. In the ruling dated 21st April 2021 Justice Njoroge observed that the 1st and the 2nd respondents had refused to avail the proceedings which spawned the impugned decision. He also noted that although the applicant had his home on the suit land, the interested party was threatening to evict him from the land and hence there was need for the leave granted in this matter to operate as a stay of execution of the impugned decision.

19. The grant of the extension of time is discretionary. The court is entitled to take into account the nature of the process against which the extension is sought and satisfy itself that there is reasonable basis to justify the orders sought. This was held so by Justice J.Matavo in the case **Republic v Public Administrative Review Board & Another (2019)eKLR**.

20. It is well settled that whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary and capricious manner. The classic definition of discretion by Lord Mansfield in R.vs,Wilkens(1770)4 Burr 2527,2539:98ER was that discretion when applied to courts of justice, means sound discretion guided by Law. It must be governed by rule, not by humor: it must not be arbitrary, vague, and fanciful but legal and regular.

21. Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit. Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in Rookey's Case stated as follows: -

“Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigor of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, acting in a judicial capacity is by the constitution entrusted with.”

22. Article 159 of the Constitution vests judicial authority in the courts to be exercised in accordance with the principles enumerated therein. These principles include protecting purposes and principles of the constitution and administering justice without undue regard to technicalities. Writing on judicial power, Chief justice John Marshall of the United States supreme court wrote the following on the subject:

Judicial power as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law: and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature: or in other words to the will of the Law.

23. In addition, the discretionary powers of the court are constrained by the objectives of the Constitution to grant access to justice. Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard- which calls for an overall assessment in the light of the factors mentioned in (the constitution or a statutory provision) each of which in turn calls for an assessment of circumstances.

24. It is therefore my conclusion that in an application for extension of time such as the one before me, all that an applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay.

25. The applicant was candid and he explained that the delay was not deliberate but was occasioned by the reasons that the impugned decision and proceedings were not supplied in time which delay was not in the control of the applicant. The delay is not inordinate. I am persuaded that he has established sufficient cause. It is difficult to attempt to define the meaning of the words sufficient cause. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence or inaction or want of bonafides, is imputed to the applicant.

26. The right to access the court is now constitutionally guaranteed. It would require a compelling reason that would pass analysis test to deny a litigant the right to approach the court. Where a party applies for extension of time as in this case, the court should exercise its discretion and examine the period of the delay and the reasons offered for the delay.

27. In conclusion, it is my finding that the applicant has sufficiently explained the delay and has established sufficient cause for this court to grant the extension of time sought. Accordingly, I allow the application dated 24th August 2021 and filed on the same date and hereby admit it out of time. The same is hereby deemed to have been duly and properly filed, Subject to payment of the requisite court fees.

28. Orders accordingly.

SIGNED, DATED AND DELIVERED AT CHUKA THIS 23RD DAY OF NOVEMBER 2021 IN THE PRESENCE OF:

C/A: Ndegwa

N/A for Applicant

N/A for Respondents

N/A for Interested Party

C. K. YANO,

JUDGE.