



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**JUDICIAL REVIEW CAUSE NO. 38 OF 2011**

**IN THE MATTER OF PROCEEDINGS FOR ORDERS OF CERIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF KENYA GAZETTE NOTICE NO. 4974 OF 6<sup>TH</sup> MAY 2011**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DISTRICT LAND REGISTRAR UASIN GISHU**

**DISTRICT THROUGH THE ATTORNEY GENERAL...RESPONDENT**

**EXPARTE**

**SALLY J. KIBET**

**ESTHER J. KURUI**

**AND**

**JOSEPH OUMA RASAWO**

**MAURICE OMONDI AKECH**

**PASCHALIA OPANY AKECH**

**PHILIP RABURU**

**MURIGI WANYOIKE..... INTERESTED PARTIES**

**RULING**

The applicant filed an application dated 8<sup>th</sup> March 2017 seeking orders for review of the orders made by the court on 21<sup>st</sup> February 2017 and reinstatement of the substantive motion. He also sought orders for extension of time for prosecution of the main judicial review motion and directions on the same.

The application, in a nutshell, is based on the following grounds; that there were sufficient reasons to grant a review, the time accorded to the ex parte applicants ran out owing to factors beyond their control, justice will be served by determination of the cause on merit, the matter involves land rights which is an emotive issue and that the interested parties would not be prejudiced beyond atonement by costs.

The said application was dismissed for want of prosecution.

#### **APPLICANT'S CASE**

The applicant submitted that the order for prosecution within one year was made on 10<sup>th</sup> April 2015 and the 1<sup>st</sup> to 4<sup>th</sup> interested parties were unavailable for personal service. The ex parte applicants filed for leave to serve by

substituted service on 15<sup>th</sup> April 2015. The court directed that the application be fixed for hearing but dates were unavailable. The applicants fixed it for hearing on 23<sup>rd</sup> February 2016 and leave was granted. The applicants were given 21<sup>st</sup> June 2016 for hearing of the main application. The matter did not proceed on the said date as the court was not sitting. The applicant annexed the cause list as annexure C and the notice that the judge was not sitting as annexure D. The applicants fixed 21<sup>st</sup> February 2017 as the date for the hearing of the application. On the said date the matter was dismissed for failure to prosecute within one year.

The applicant further submitted that the events that rendered non-prosecution within one year were beyond their control. The attorney general and other interested parties were served with the application and pleadings in 2011 and the affidavit of service is marked as E. Further, they have not entered appearance or filed any responses and thus no prejudice shall attend them with the disposal of the matter on merit. In any event the application has already been conceded to by the Attorney General.

The matters raised in the judicial review proceedings relate to ownership of land which is a very emotive issue and by dismissal for want of prosecution it renders the title of the land parcel liable to be cancelled and exposing the applicants to the peril of losing the property.

In response to the objection raised by the 5<sup>th</sup> Interested party the applicants submit that the motion is competent and tenable as per *Order 45 Rule 1*.

The applicants submit that the order confirming dismissal cannot bar the right to apply for review or enlargement of time as the court only confirmed the dismissal of the matter. The court had to be moved to extend time to comply with orders for prosecution within the limited time which the applicants have done in the present motion. The applicants relied on the case of *Caltex Oil (K) Limited v Rono Limited – Civil Appeal/Application No. 97 of 2008* on this point. The applicants also relied on the case of *Musalia Mwenesi v Shirley Luckhurst & Another, Civil Application No. NAI 170 OF 2000*.

The applicants submitted that the argument of non-applicability of the civil procedure rules to judicial review proceedings was spent. That the Civil Procedure Act and the Civil Procedure Rules apply in full to this application. The applicants relied on the case of *Deynes Muriithi & 4 others v Law Society of Kenya & Another [2016] eKLR*.

The applicants submitted that judicial review matters can be revisited even when orders for dismissal are made and are amenable to review and extension of time to prosecute. They relied on the case of *Syombua Muli Mutuva v Charles A.K. Mulela (2014) eKLR* where the court held while applying *Section 59 of the Interpretation and General Provisions Act* that the court has power to extend time notwithstanding the wording of the default clause. The applicants further submitted that the applicant who raised the matter of the suit having been dismissed for want of prosecution has conceded to reinstatement and enlargement of time. They cited the case of *Republic v Public Procurement Administrative Review Board Ex parte Syner-Chemie limited (2016) eKLR*.

#### **5<sup>TH</sup> INTERESTED PARTY'S CASE**

The 5<sup>th</sup> interested party filed a replying affidavit stating that the application was incompetent and untenable as the orders were issued in the presence and with the participation of the applicant's advocate. That the applicants' only remedy would be to file separate proceedings.

Further, he stated that there was nothing new in the application and that the conditions precedent for the grant of review have not been met. He also stated that the civil procedure and rules do not apply to judicial review matters and that once orders have been made in court on a judicial review matter they cannot be revisited.

He maintained that the remedy lies in an appeal and the court and the parties were aware that the dispute related to real property and that the orders were not issued ex parte. He further reiterated that the court cannot grant the orders sought in the application.

#### **ISSUES FOR DETERMINATION**

- a) Whether the court can enlarge time in Judicial Review
- b) Whether the court should enlarge time

#### **WHETHER THE COURT CAN ENLARGE TIME IN JUDICIAL REVIEW**

The respondent did not file submissions, he merely stated that the application is not competent in his replying affidavit. He has not specified in what manner the application is incompetent and what provisions of the law it breaches.

In Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited [2016] eKLR the court held, at paragraph 86;

***“In my humble view, although Order 53 of the Civil Procedure Rules which relates to the procedure for the filing of Judicial Review proceedings does not specifically provide for enlargement of time, the fact that the Order and Rules thereunder are made under the Civil Procedure Act and Rules and that Order 50 Rule 6 of the Civil procedure Rules does not exclude the application of Order 53 thereof, the court is given latitude to either invoke its inherent jurisdiction to prevent an injustice or hardship being occasioned to the parties, or to apply order 50 Rule 6 of the Civil Procedure Rules and Sections 95 of the Civil Procedure Act, section 63(e) of the Civil Procedure Act and Section 59 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya and more importantly, Article 159(2)(d) of the Constitution in order to prevent an injustice being occasioned to an innocent party.”***

The Court of Appeal in Caltex Oil (K) Limited v Rono Limited - Civil Appeal/Application No. 97 of 2008 (unreported) stated in part that:

***“However the fact that a default clause has been imposed by a court does not necessarily deprive a court of its jurisdiction to extend time. As a general principle, where the court fixes time for doing a thing it always retains power to extend time for doing the act until it has made an order finally disposing of the proceedings before it. It seems that the main test is whether the Court still retains control of the order, notwithstanding that there has been default. That would necessarily depend on the true construction of the default clause.”***

In Symbua Muli Mutuva v Charles A.K. Mulela [2014] eKLR the court held:

***“It follows that the Court still retains control of the dispute until the appeal is finally determined. Thus the Court is not functus officio as regards the default clause and therefore, has power to extend time notwithstanding the wording of the default clause.”***

This therefore makes it vivid that the court has the jurisdiction to extend timelines it has set itself.

#### **WHETHER THE COURT SHOULD ENLARGE TIME**

In Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited (supra) the court stated that

***“In addition, for the court to consider whether or not to enlarge the stringent specific timeline provided for in the rule, what it needs is to satisfy itself that there is no demonstrable prejudice caused to the adverse party because of delay, and whether refusal to enlarge time will occasion hardship and result in an injustice to the applicant.”***

The court further cited with approval the case of M. MWENESI v. SHIRLEY LUCKHURST & ANOTHER, Civil Application No. NAI 170 of 2000, where the Court of Appeal held that:

***“A Court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent a court of law is under a duty to exercise its inherent power to prevent injustice.....”***

The applicants have explained the delay and it is evident that it was not of

their own making. The failure to prosecute within a year was due to issues to do with the court diary and the availability of the judge. The dismissal will occasion injustice to the applicants and filing a separate suit will delay the matter further.

For the reason I do find the application merited and is allowed as prayed.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 10<sup>th</sup> day of April, 2019.**

In the absence of:-

The plaintiff/Applicant

And in the presence of Mr. Kuria for Defendant/Respondent

Mr. Mwelem - Court clerk