



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 54 OF 2015

ANTHONY OTIENDE OTIENDE.....PETITIONER

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

SARAH NJUHI MWENDA.....2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

HOUSING, LAND & URBAN DEVELOPMENT.....3RD RESPONDENT

RULING

1. This is a Notice of motion dated 14th December 2017 and filed in court on the same day. It is supported by the affidavit of **Prof. Jacob T Kaimenyi** Cabinet Secretary, Ministry of land, and Physical Planning sworn on the same day, and the grounds on the face of the motion. The application seeks an order from this Court to vary and grant extension for the time within which the Ministry was to promulgate regulations and land registration forms including forms for Title Deeds and Leases in compliance with the judgment and Decree of the Court (**Onguto J**) dated 19th December 2016.

2. In that Judgment, the Court declared the registration forms, forms for Title Deeds including those of leases, grants and Certificates of Titles which had been promulgated without the input of the National Land commission in valid and unlawful. The Court however suspended the declaration of invalidity for twelve months to give the 3rd respondent/ Applicant time to take steps and promulgate regulations and forms in compliance with the law section 110(2) of the Land Registration Act.

3. In his depositions in support of the application, **Prof Kaimenyi** stated that a task force was appointed to consult and come up with draft regulations, which was done. He deposed that various stakeholders were consulted and included in the Task Force. It undertook its duties and handed in a final report which he forwarded to the Office of the Attorney General for formal drafting.

4. According to **Prof. Kaimenyi**, the regulations were eventually done and he signed them after which they were forwarded for publication at the Government printer. He deposed that the regulations were published variously as Legal Notice Nos 277 and 278 of November 2014, 279 and 280 of 24th November 2014 and 281, 282, 283 and 284 of 1st December 2017.

5. **Prof. Kaimenyi** further deposed that the regulations were transmitted to Parliament and are now in the hands of the two Houses awaiting approval as ordered by the Court. According to **Prof Kaimenyi**, the 3rd respondent has done all that was within its powers and is now awaiting Parliamentary action. He prays that the Court allows time for full compliance.

Response

6. **Anthony Otiende Otiende**, the respondent filed a replying affidavit sworn on 19th December and filed in Court on the same day opposing the application **Mr. Otiende** deposed that the application is an afterthought, that it is incompetent having been brought too late in the day, and that it cannot be used as a vehicle for extension of time.

7. According to the respondent,, time within which the order was to be implemented was 365 day which lapsed on 18th December 2017. He deposed that despite the invalidation of registration forms and titled deed forms, the 3rd respondent continues to use them in flagrant violation of the judgment of the Court. He deposed that his reading of the judgement was that the Court saved what had been done but did not allow continued use of the forms which is an illegality. He went on to depose that the regulations tabled before Court to show substantial compliance will not cure the violations committed after the judgment. He further deposed that the Court has inherent powers to protect its integrity and prevent abuse of its process.

Submissions

8. **Mr. Mutinda**, learned Counsel for the applicant, submitted that the 3rd respondent in order to comply with the Court's judgment appointed a **Task force** to undertake the process of consultation and come up with draft regulations which it accomplished in June 2017. Counsel submitted that the report was sent to the Office of the Attorney General for proper drafting and approval. After that the Cabinet Secretary of the parent Ministry signed and sent them for publication in the Kenya Gazette which was done between 22nd November and 1st December 2017. Learned Counsel referred to annexures 1 to 5 in the supporting affidavit to show the process, and 6 to 15 to show the published regulations and subsequent transmission to Parliament.

9. **Mr. Mutinda** concluded therefore, that the 3rd respondent having done all that was within its power, has no control over Parliamentary process hence urged the court to extend the compliance period by another 6 months to enable Parliament conclude its work on the remaining process.

10. **Anthony Otiende**, the respondent, on his part submitted that the application was brought to late, and cannot be used as a vehicle for extension of the time given to comply with the judgment. According to him the period that was given has lapsed hence time cannot be extended. In his view, the Court cannot breathe life into a dead letter. He argued that even after the forms had been invalidated, the 3rd respondent continued to use the invalidated forms thus committing an illegality which they seek to perpetuate.

11. **Anthony Otiende** contended that there was no consultation in coming up with the regulations hence there was no meaningful compliance with the Court's judgment and decree. He blamed the 3rd respondent for not coming to court early when they realized that they could not meet the deadline. He urged the Court to dismiss the application.

Determination

12. I have considered this application, the response thereto and submissions advanced in support as well as in opposition to the application. In a judgment delivered on 19th December 2016, the Court found various forms and other documents used at the Ministry of Lands and Physical Planning to be invalid and the Court made a declaration of invalidity. However due public interest, the Court suspended that

declaration of invalidity and gave the 3rd respondent twelve months to come up with new forms and regulations to regularize that invalidity. There was a default order to the effect that should the 3rd respondent fail to comply the declaration of invalidity would take effect after those twelve months.

13. The application before Court seeks an order of review extending the compliance period for a further six months, to enable the 3rd respondent fully comply with the judgment and decree. The 3rd respondent has contended that it has done all that was within its powers leaving the matter in the hands of Parliament.

14. The respondent has opposed the application contending that the 3rd respondent has not complied, that it has come to Court late and that the Court cannot extend time since time has already lapsed.

15. This is a straight forward application. The 3rd respondent was given twelve months within which to comply. From the depositions in the affidavit and annexures thereto, the 3rd respondent put in place a Task Force which was to come up with draft regulations after consultations with relevant stakeholders. The Task Force concluded its work in June 2017 and handed in its Report. It is also clear from the annexures, that the 3rd respondent had the regulations signed and published in the Kenya Gazette as Legal Notice Nos, 277, 278, 279, 280, 281, 282, 283 and 284 of between 22nd November 2017 and 1st December 2017.

16. The regulations were their transmitted to parliament between 27th November 2017 and 5th December 2017. It is therefore true that up to that point the 3rd respondent had discharged its mandate requiring it to have regulations in place.

17. There is uncontroverted evidence that the regulations were transmitted to the National Assembly for purposes of approval as required by Section 11 of the Statutory Instruments Act No. 23 of 2013. After that process, the matter was no longer in the hands of the 3rd respondent but the National Assembly. To that extent, therefore, I am satisfied that the 3rd respondent did that which was required of it and within its powers to comply with the judgment and decree of the Court. It is not in a position to dictate to Parliament when it should approve the regulations and forms.

18. Furthermore **Mr. Mutinda** contended, and the Court takes judicial notice that the country was in an election mode and the National Assembly was not in position to take action until after the General Elections of 8th August, 2017, and as at the time of hearing this application, the National Assembly was still constituting its committees, including the Committee that is to deal with Subsidiary Legislations.

19. The respondent also contended that the application was filed late and on that basis, the Court should not extend time. In the respondent's view, the time lapsed on 18th December 2017. With respect, I disagree. The judgment having been delivered on 19th December 2016, the proper position is that in computing time, whether prescribed by law or order of Court, the date of the event or act after which the time begins to run should not be included. In that case therefore, the last date by which the 3rd respondent/applicant was required to have complied with the judgment was 19th December 2017. This is because the 3rd respondent could not have done anything on the date the judgment was delivered. The respondent's argument could only hold if the judgment had been delivered on 18th December 2016.

20. In this regard I am guided by the Court of Appeal decision in ***Mukenya Ndunda v Crater Automobiles Limited*** [2015]eKLR where when computing time for filing an appeal, the Court observed that ***the judgment appealed against having been delivered on 28th September 2012 and the notice of appeal filed on 9th October 2012. Under Rule 82(1) of the Court of Appeal Rules, the appeal should have been instituted within 60 days of the date of the Notice of Appeal. Such period ended on 9th December 2012 unless the proviso to rule 82 (supra) applied.*** It is my finding that there was no delay at all given that the application was filed before expiry of the twelve months.

21. The petitioner/respondent submitted that the 3rd respondent continues to use the invalidated form, hence perpetuating an illegality. I must point out here, that this Court is not dealing with contempt proceedings or interpretation of the judgment of the Court, rather it has been asked to consider whether or not to extend time to enable compliance. It is called upon to exercise its discretion and consider extending time to allow the applicant fully comply with its judgment and decree.

22. Rule 30 of the *Mutunga Rules* allows this Court to extend time limited by the rules or by any decision of the Court. On the other hand, both section 80 of the Civil Procedure Act, and Order 45 (1) (b) of the Civil Procedure Rules allow the Court **for sufficient reason to review its judgment decree or order passed in a suit and make such order thereon as it thinks fit.**

23. Appreciating the latitude the Court has when exercising its review jurisdiction, the Court of Appeal stated in **Benjoh Amalgamated Ltd and another v Kenya Commercial Bank Ltd** (2014)eKLR ;

“In the High Court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.”
(Emphasis)

24. The review jurisdiction is given to the Court to ensure that its actions meet the ends of justice, not cause injustice or hardship in situations that can be avoided or corrected. In the case of **Equity Bank v West Link MBO limited** (Civil Application No. 78 of 2011) ,[2013] eKLR, **Musinga JA** observed that Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met.

25. And in **Mukenya Ndunda v Crater Automobiles Limited** (supra), the Court observed that **“Rules of the Court, have conferred on the Court unfettered discretionary power to extend time set by the Rules. The Constitution (in Article 159 (3)(d)) enjoins Courts to do justice to the parties and to avoid undue regard to procedural technicalities where such technicalities stand in the way of justice, and for that reason, courts in paying obedience to the Constitution have inherent jurisdiction to waive the strict application of such rule or rules as may be a hindrance to dispensation of justice.”**

26. The applicant has come to this Court seeking extension of time within which to comply with the judgment and decree of the Court. It has shown that it is not at fault in not complying with the judgment, having done all that was possible within its powers.

27. In his judgment **Onguto J** appreciated the magnitude of the problem he was dealing with and the centrality of the land question in the country when he observed; **“considering the immediate consequences of the above declaration on the registration of titles processes currently ongoing and already undertaken, the above declaration of invalidity is hereby suspended ...”**

28. The decision to suspend the declaration of invalidity of the forms, titles and leases was made with a heavy heart but in public interest. The 3rd respondent has done what it was required to do and the matter now rests with the National Assembly over which the applicant has no control. The respondent’s contention that the regulations were not properly done is not a matter before this Court and the less I say about it, the better.

29. This Court has a duty to act judiciously in balancing rights and interests of parties before it in order to do justice of the case. The respondent has not shown that he will suffer any prejudice if the compliance period is extended albeit for a short time to allow the National Assembly complete the remaining phase of the process.

30. Having considered the material before the Court and submissions by parties, I am satisfied that the

applicant has made a case for extension of time to enable it attain full compliance. Moreover, the applicant is seeking this Court's discretion, and extension of time being an act of exercise of discretion, it must as usual be exercised judicially and under desirable circumstances, I find that those circumstances exist in the present situation, and that the applicant deserves the exercise of this Court's discretion.

31. In the circumstance, therefore, I allow the application dated 14th December, 2017 as follows;

1. The period of twelve months within which the 3rd respondent /Applicant was required to have regulations and forms pursuant to section 110(2) of the LRA and seek Parliamentary approval pursuant to Section 11 of the Statutory Instruments Act, 2013, is hereby reviewed and extended for a further six months from the date of this ruling.

2. Failure to comply with no. 1 above, the default clause in the judgment and decree of 19th December 2016 shall take effect.

3. No order as to costs.

Dated, Signed and Delivered at Nairobi this 31st Day of January 2018

E C MWITA

JUDGE