



Ngotho & another v County Director of Land Adjudication and Settlement Makueni County; Minister of Housing & Lands Through The Deputy County Commissioner Kilungu Sub-County (Interested Party) (Environment and Land Judicial Review Case E008 of 2022) [2023] KEELC 21681 (KLR) (15 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21681 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E008 OF 2022**

TW MURIGI, J

NOVEMBER 15, 2023

BETWEEN

JULIUS MUTUA NGOTHO 1ST APPLICANT

MARY NDUMI SOMBA 2ND APPLICANT

AND

**THE COUNTY DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT
MAKUENI COUNTY RESPONDENT**

AND

**THE MINISTER OF HOUSING & LANDS THROUGH THE DEPUTY COUNTY
COMMISSIONER KILUNGU SUB-COUNTY INTERESTED PARTY**

RULING

1. Before me for determination is the Notice of Motion dated 14th February, 2023 brought under Articles 47 and 159(2)(d) of *the Constitution* of Kenya, Sections 4, 7, 9(1) and 10 of the *Fair Administrative Action Act* 2015 Laws of Kenya, Sections 95 and 63(e) of the *Civil Procedure Act*, Order 51 Rule 6, Order 53 Rule 1, 2 and 3 of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law in which the Applicants seek the following orders:-
 1. That Leave be granted to the Applicants for extension of time within which to file and serve the substantive application for Judicial Review as per the order of the Honourable court on 29th July, 2022 by Hon. Lady Justice T.Murigi.
 2. That upon grant of extension of time to file the substantive Judicial Review, the Honourable court be pleased to order that the same operates as a stay against the judgment and/or decision



of the Respondent dated 31st May 2022 in Land Case Appeal No. 308 of 2019 with regards to land parcel numbers 3936, 4420, 4421, 4422., 4423 and 3376.

3. That the substantive judicial Review Application annexed hereto be deemed as duly filed and served upon the Respondents upon payment of the requisite fees.
4. That the costs of this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Ben Munyasya sworn on even date.

THE APPLICANTS CASE

3. The deponent averred that on 29/07/2022, the Applicants were granted leave to commence Judicial Review proceedings against the Respondents herein. That while granting leave, the Applicants were directed to file the substantive motion within 21 days from the date thereof. That sometime in October 2022, the Advocate in conduct of the instant matter left the law firm without handing over a report on the matters that he was handling including the directions issued in this matter.
4. It was averred that the law firm representing the Ex-parte Applicant realized that they had not filed the substantive motion when they were served with a Notice of Preliminary objection by the Interested Party. The deponent asserted that the instant application was filed expeditiously after the firm realized the omission.
5. Lastly, it was contended that the Respondent will not suffer any prejudice if the orders sought are granted. The deponent asserted that the Applicant will suffer irreparable loss if the orders sought are not granted.

The Interested Party's Case

6. In opposing the application, the Interested Party vide a replying affidavit sworn on 21st February, 2023 averred that the application is incompetent, bad in law and incapable of being granted. He contended that the allegation that the previous Advocate was to blame for failing to file the substantive motion was a mere allegation since the name of the Advocate is not disclosed nor had the Advocate sworn an affidavit to that effect.
7. The Interested Party maintains that the law does not permit extension of time to file a substantive motion. He argued that the application is an abuse of the court process since the Applicant was using the pendency of these proceedings to destroy his land. He urged the court to dismiss the application with costs.

Analysis And Determination

8. Having considered the application, the respective affidavits and the rival submissions, the only issue for determination is whether the court can enlarge time for filing the substantive motion.
9. The record shows that on 29/07/2022, the Applicants were granted leave to commence Judicial Review proceedings. While granting the leave sought, the Applicants were directed to file the substantive Notice of Motion within 21 days from 29th July, 2022.
10. The matter was then scheduled for mention on 04/05/2023 to confirm compliance and for further directions. When the matter came up for mention on 12/06/2023, the Applicant had not complied by filing the substantive motion as ordered. The Applicants filed the present application which was opposed by the Interested Parties.



11. Counsel informed the court that the Advocate who was in conduct of the matter had left the Law firm without handing over the directions issued in the instant matter. He stated that the firm realized that the previous Advocate had not filed the substantive motion when they were served with a notice of preliminary objection.
12. I have carefully perused the record and I note that the alleged Notice of Preliminary Objection has not been placed on record. Be that as it may I will in the interest of justice proceed to deal with the application at hand.
13. The procedure for filing of the substantive motion within 21 days is set out in Order 53 Rule 3 of the [Civil Procedure Rules](#) which provides as follows;

“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 in the High Court and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the Notice of Motion and the day named therein for the hearing.”
14. It is clear from the above provisions that once leave is granted to apply for Judicial Review orders of Certiorari, Prohibition or Mandamus, the Applicant is expected to file the substantive Notice of Motion within 21 days from the date of such leave. The Applicant is now seeking leave of court to enlarge the time to file the substantive Notice of Motion.
15. The Applicants did not file the substantive Motion within 21 days from 29th July, 2022 as ordered. The Ex-parte Applicants through their Advocate moved the court to extend time to file the Substantive Motion as the time originally granted had lapsed.
16. There is no settled position as to whether the period of 21 days stipulated in Order 53 Rule 3 of the Civil Procedure Rules can be enlarged. It is up to the court’s discretion to either enlarge time or decline to do so. While considering whether the court has jurisdiction to enlarge time stipulated under Order 53 Rule 3 of the [Civil Procedure Rules](#), the Court of Appeal in the case of [Wilson Osolo Vs John Ojiambo Ochola & the Attorney General](#) CA No. 6 Nairobi of 1995 held that;

“As can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the [Law Reform Act](#). Whilst the time limited for doing something under the [Civil Procedure Rules](#) can be extended by an application under Order 49 of the [Civil Procedure Rules](#), the procedure cannot be availed of the extension of time limited by statute, in this case, the [Law Reform Act](#).”
17. In the same judgement, the Court of Appeal stated;

“It was a mandatory requirement of Order 53 Rule 3 (1) of the [Civil Procedure Rules](#) then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15th February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the [Civil Procedure Rules](#).”
18. In the case of [Republic Vs General Manager Moi Int’l Airport & Another, Exparte Jared Adimo Odhiambo & Another](#)(2014)eKLR it was held that the court has power to enlarge the 21 days period stipulated in Order 53 Rule 3 of the [Civil Procedure Rules](#).



19. It is clear from the above authorities that this court has jurisdiction to enlarge time within which an application under Order 53 Rule 3 of the Civil Procedure Rule is to be filed, upon leave of court being granted.
20. Substantive justice requires that a litigant should have his complaint heard on merit unless it can be established that such a litigant is indolent. The Applicants having defaulted to institute the substantive motion within 21 days as stipulated in Order 53 Rule 3 of the Civil Procedure Rules should not be deprived of their cause of action on account of failure to file the motion within 21 days.
21. In the case of Equity Bank Limited Vs West Link MBO Ltd Civil Application (Appeal) No. 78 of 2011, it was held that;

“Courts of law exist to administer justice and in doing so, they must of necessity balance between the competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute.”
22. I find that it will be in the interest of justice to extend the period to file the substantive motion within a reasonable period.
23. In the end, the Applicants are hereby directed to file and serve the substantive motion within 14 days from the date hereof. Costs in the cause.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF NOVEMBER, 2023.

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HON. T. MURIGI

JUDGE

In The Presence Of: -

Munyasya for the Applicant.

Nzilani holding brief for Makundi for the Respondent.

