



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 437 OF 2016

**IN THE MATTER OF AN APPLICATION BY BLACK TRAP PRODUCTS LIMITED FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF MANDAMUS DIRECTED TO THE
CHIEF LAND REGISTRAR AND THE CHAIRMAN NATIONAL LAND COMMISSION**

BETWEEN

BLACK TRAP PRODUCTS LIMITEDAPPLICANT

VERSUS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE CHAIRMAN NATIONAL

LAND COMMISSION2ND RESPONDENT

JUDGMENT

1. On 7th November 2016 when the chamber summons dated 20th September 2016 was first brought before the duty Judge for consideration, the court after hearing the exparte applicant's counsel Miss Makanga, exparte, granted to the exparte applicant **Black Trap Products Limited** leave of court to commence Judicial Review proceedings of mandamus to issue compelling the Chief Land Registrar and the Chairman National Land Commission to reconstruct the Deed file IR 55345 in respect to LR 11895/12.

2. In the same order for leave, and pursuant to the provisions of Order 53 of the Civil Procedure Rules, the court ordered that the substantive notice of motion be filed and served upon the respondent within 14 days from the date thereof together with skeletal submissions, and further directed the matter to be mentioned on 5th December 2016 for directions.

3. On 5th December 2016 both parties' advocates appeared in court and the respondent's counsel asked for more time to file a response to the motion and the court granted the respondent 14 more days to file a response and encouraged parties to engage in amicable resolution of the matter as the orders sought would not adversely affect the respondent in any way.

4. By 23rd January 2017 when the matter came up for directions, the applicant's counsel Miss Koki reported to court that there was no progress on negotiations hence she sought for a hearing date which the court granted and further directed parties' advocates to appear on 6th March 2017 to highlight their

submissions.

5. On 6th March 2017 parties' advocates appeared to be engaged in other courts and the court was compelled to fix another hearing date after failing to raise counsels even after allocating time for the hearing of the application.

6. Came 11th May 2017 and only the applicant's counsel attended court. Miss Koki argued her client's application urging the court to grant orders sought in the substantive notice of motion dated 18th November 2016 compelling the Chief Land Registrar and Chairman National Land Commission to reconstruct the Deed File No. IR 55345 in respect of LR 11895/12 which was said to be missing.

7. As I retired to write this judgment for delivery today, I had to embark on my first task of perusing the court record. I came across the sustentative notice of motion dated 18th November 2016 which was filed on 23rd November 2016 pursuant to the leave granted on 7th November 2017. On calculating the days within which the motion was to be filed after grant of leave, and which were 14 days, the calendar tells me that the 14 days ended on 21st November 2016 and not 23rd November 2016.

8. In other words, the exparte applicant filed the notice of motion and served it out of the order stipulated time frame within which the motion was to be filed and served.

9. That being the case, the question that this court must determine at a preliminary stage is whether the motion dated 18th November 2016 and filed on 23rd November 2016 is competently before this court, for its determination on the merits thereof.

10. Order 53 Rules 1(1) and (3) of the Civil Procedure Rules stipulate that: 1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore had been granted in accordance with this rule. 2) The leave once granted to apply for Judicial Review orders of certiorari, prohibition or mandamus, the substantive motion shall be filed within 21 days of the date of leave.

11. Nonetheless, this court having granted leave and a shorter period than the 21 days, it was upon the applicant to file the motion within the time frame granted by the court, and if such time was considered to be insufficient, to seek for its enlargement.

12. In this case, the notice of motion was filed out of time. The Court of Appeal in **United Housing Estate Limited Vs Nyali (Kenya) Limited Civil Application No. Nairobi 84/1996** stated:

“ A party who obtains an order of the court on certain specified conditions can only continue enjoying the benefits of that order if the condition attaching to it are scrupulously honoured and in the event of a proved failure to comply with the attached condition, the court has inherent power to recall or vacate such an order.”

13. This court followed the above Court of Appeal decision in many of its recent decisions including **JR 130/2016 Edna Mwende Kavindu vs The Kenya Medical Laboratory Technicians and Technologists Board** decided on 17th January 2017 and **JR 97/2016 Linda Okello vs Inspector General of Police of the National Police Service & Others**, wherein the applicants, after obtaining leave to institute Judicial Review proceedings, went to slumber and filed the motions out of the stipulated period. The court struck out those motions for being a nullity *ab initio*.

14. It therefore follows that a precedent has been set that a party cannot unilaterally choose not to comply with conditions attached to the exercise of the court's discretion in his or her favour on the ground that he or she ought to access justice.

15. The exparte applicant who was ably represented in court by counsel had the option of seeking for enlargement of the 14 days to the period covering the filing of the notice of motion. There was

no such application for enlargement of time and as the court does not prosecute cases for parties and neither can it decide a case on the basis of sympathy for parties, the applicant having effectively disintitiled itself of the favourable exercise of this court's judicial discretion, it only has its counsel to blame.

16. In **Wilson Osolo v John Ojiambo Ochola & Another CA 6 of 1995**, the Court of Appeal while appreciating that Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya quite clearly stipulates that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order or decision to be quashed and that as there is no provision for extending the time prescribed there under, the court was nevertheless of the view that:

“ 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 file d within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days of 15th February 1982, 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. There was no such application save the one dated 28th April 1994. That came too late in the day in any event and the learned judge erred in even considering the extension of time some 12 years after the event.”

17. In the instant case, the provisions that allow enlargement of time is Order 50 Rule 6 of the Civil procedure Rules and even if such provision were inapplicable, the court would be moved to consider the application for enlargement of time, having regard to the circumstances of each case.

18. Again in **John Onger Mariaria & 2 Others V Paul Matundura Civil Application No. Nairobi 301/2003[2004] 2 EA 163**, the Court of Appeal stated:

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work....must fall on their shoulders...whereas it is true that the court has unfettered discretion, like all judicial discretions must be exercised upon reason not capriciously or sympathy alone.....justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.”

19. Failure to comply with stipulated time lines cannot be a procedural technicality curable by application of Article 159 (2)(c)of the Constitution where there is no application for enlargement of the said period.

20. As was held by Odunga J in **Republic vs Cabinet Secretary, Information, Communication & Technology & Another Exparte Celestine Okuta & Others [2016] e KLR**, and I agree, where an applicants failed to file their substantive notice of motion within the stipulated time lines as per the order of leave, the learned judge stated:

“ In my view, court orders are serious decisions that can only be exercised based on material placed before the court and cannot be ignored on the ground that they are technicalities. In my view, the law is that technicalities of procedure ought not to automatically lead to termination of proceedings and that the court must have the power to save the same where material exist before the court to justify non –compliance. However, where there is none, and where in fact the applicant adopts an incorrect position of the law to justify his inaction, such omission cannot be exercised.”

21. It is for the above reasons that I hold and find the motion dated 18th November 2016 and filed in court on 23rd November 2016, incompetent and therefore there would be no point wasting precious judicial time delving into its merits. I proceed to strike it out and as the respondents never raised the issue which this court gathered from the record and as the court had to as it is deemed to know the law and exists to apply the law, I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 16th day of May 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Mutahi H/B for Koki for the exparte applicant

Mr Mutiso H/b for Masaka for the 2nd Respondent

N/A for 1st Respondent

CA: GEORGE