



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT SIAYA**

**ELC JUDICIAL REVIEW CASE NO. E002 OF 2021**

**IN THE MATTER OF: AN APPLICATION BY SIMON PETER OTIENO OKONG’O FOR ORDERS OF CERTORARI,  
PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTIONS 8 & 9 OF THE LAW REFORMS  
ACT, CHAPTER 26, LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES & ARTICLES 40, 47, 48  
& 50 OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF GAZETTE NOTICE NO.5399 DATED 30/7/2020 BY THE DISTRICT LAND REGISTRAR, SIAYA  
REVOKING THE EXPARTE APPLICANTS TITLE TO TITLE NO. EAST GEM/ANYIKO/1769**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA AND THE LAND REGISTRATION ACT, NO.3 OF 2012**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE DISTRICT LAND REGISTRAR, SIAYA.....RESPONDENT**

**SIMON PETER OTIENO OKONG’O.....EX PARTE APPLICANT**

**RULING**

**Ex parte applicant’s case**

1. Pursuant to the provisions of **Order 53 Rule 1** of the **Civil Procedure Rules** and **Section 8(2)** of the **Law Reform Act**, the *ex parte* applicant filed a chamber summons application dated 20/09/2021 against the respondent seeking the following main verbatim reliefs:

**a) Spent**

**b) That the ex parte applicant be granted leave to commence ELC judicial review proceedings to apply for orders of certiorari to**

**quash the gazette notice no. 5399 dated 30/7/2020 reference MR/0783530, a decision of the respondent to revoke the ex parte applicant's registration as the proprietor of all that piece of land containing 0.17 HA known as EAST GEM/ANYIKO/1769.**

**c) That the grant of leave to operate as a stay to stop the implementation of the decision contained in the gazette notice no. 5399 dated 30/07/2020 referenced MR/0783520.**

2. The summons is supported by a statement of facts and an affidavit verifying the facts both dated 20/9/2021 and annexures thereto. The summons is grounded on the following main grounds; (i) He is the registered owner of land parcel number EAST GEM/ANYIKO/1769 **[the suit land]** and, (ii) in contravention with **Articles 10 and 47 of the Constitution**, the respondent revoked the *ex parte* applicant's title deed to the suit land.

#### **The applicant and respondent's case**

3. The applicant and respondent have neither filed a response to the summons nor filed written submissions and in essence the summons is unopposed. However, this court is called upon to determine the motion on its own merits.

#### **The ex parte applicant's submissions**

4. The *ex parte* applicant filed written submissions dated 5/11/2021. He contended that his case is merited and that he had an arguable case and consequently, his summons for leave to commence judicial review should be allowed. He submitted that the actions of the respondent revoking his title to the suit land was illegal, unreasonable, openly biased, unjustifiable, unlawful and *ultra vires*.

#### **Analysis and determination**

5. Having considered the application, statement of facts, affidavit verifying the facts and annexures thereto, these are the issues for determination; (i) whether the *ex parte* applicant has established grounds for the court to grant the leave sought, and (ii) if the answer to issue (i) is in the affirmative, whether the leave shall operate as a stay of the implementation of the decisions of the respondent.

I will proceed to analyze the legal and jurisprudential framework on the issues in a sequential manner.

6. **Article 47 of the Constitution and Section 13 (7) of the Environment and Land Court Act** clothes this court with jurisdiction to preside over judicial review cases. The procedure for moving the court in an application for judicial review is governed by **Order 53 of the Civil Procedure Rules**.

7. The intent of leave before filing a substantive notice of motion is to ensure frivolous and vexatious applications that are an abuse of the court are weeded out by the courts. This was the position held in the case of **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows;

***“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration... It is an exercise of the court's discretion but as always it has to be exercised judicially.”***

8. Has the *ex parte* applicant established grounds for the court to grant the leave sought? The answer lies in establishing whether an *ex parte* applicant has established a prima facie case. This was settled by the Court of Appeal in the case of **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** where the court held as follows:

***“If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave”***

9. This court has analyzed the pleadings filed by the *ex parte* applicant and it is the considered view of this court that he has an arguable case and it is the finding of the court that the *ex parte* applicant has established a prima facie case.

10. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision and the factors to be taken into account by the Courts in this regard have been settled in a line of court decisions including; **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**. It has been held that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

11. In the present summons, the decision cancelling the title deed to the suit land will require certain actions of a continuing nature to be carried out by the respondent and these actions are therefore capable of being stayed. In addition, the *ex parte* applicant's summons will also be rendered nugatory if the stay order is not granted. The stay order is therefore merited.

12. Ultimately, I make the following disposal orders;

- a) The *ex parte* applicant's summons is granted in terms of prayers (2) and (3).
- b) Costs of the summons shall be in the cause.
- c) The *ex parte* applicant shall file and serve the respondent with the substantive Notice of Motion and submissions thereon and shall also serve the respondent with a copy of this ruling and a mention notice within 21 days from today's date.
- d) Upon being served with the said pleadings and documents, the respondent shall be required to file its response to the substantive Notice of Motion and submissions thereon within 21 days from the date of service by the *ex parte* applicant.
- e) This matter shall be mentioned for directions on 7/3/2022.
- f) An affidavit of service shall be filed 3 days prior to the mention date.
- g) Parties shall be at liberty to apply.

13. It is so ordered.

**Ruling delivered virtually.**

**In the Presence of:**

Parties – N/A

Court assistant: Sarah Ooro

**HON. A. Y. KOROSS**

**JUDGE**

**20/1/2022**