



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

MISC. CIVIL APP. NO. 3 OF 2012 (JR)

**IN THE MATTER OF AN APPLICATION BY MICHAEL THIONGO GATETE FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

AND

**IN THE MATTER OF LANDS DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (NOW
REPEALED)**

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF KIOGORO LAND DISPUTES TRIBUNAL (KEUMBU DIVISION)

AND

IN THE MATTER OF KISII CMCC MISC. APP. NO. 120 OF 2011

BETWEEN

MICHAEL THIONGO GATETEAPPLICANT

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

KIOGORO LAND DISPUTES TRIBUNAL 2ND RESPONDENT

THE CHIEF MAGISTRATE COURT – KISII 3RD RESPONDENT

AND

DAVID MACHUKA ONTONYI 1ST INTERESTED PARTY

NAFTAL MABEYA ONTONYI 2ND INTERESTED PARTY

JUDGMENT

1. The applicant, the said Michael Thiongo Gatete (hereinafter referred to only as “the applicant”) was granted leave to apply for orders of certiorari and prohibition on 31st January 2012 by **Sitati, J.** on condition that he deposited a sum of kshs. 100,000/= as security for costs within 10 days from the date of grant of the order for leave. Following an application by the applicant to have the condition requiring the placing of a security deposit reviewed, **Okong’o, J.** by a ruling delivered on 17th April 2015 ordered the order reviewed to the extent that the applicant was now required to place a deposit of kshs. 50,000/= as security for costs within 30 days and to further deposit in court the original title deeds for **LR Nos. Nyaribari Chache/B/B/Boburia/9633 and 9634.** Failure to comply with the order as reviewed by Okong’o, J. would render the leave granted on 31st January 2012 together with the order of stay of proceedings discharged and the application for judicial review if any had been filed was to stand dismissed with costs to the interested parties.

2. The applicant’s application dated 13th February 2012 which is the subject of this ruling/judgment was filed pursuant to the leave granted by **Sitati, J.** on 31st January 2012. The application was filed by the applicant before the conditions upon which leave was granted were satisfied. Notably the condition that required the applicant to deposit into court a sum of kshs. 100,000/= as security for costs within ten (10) days of the date leave was granted had not been met. The application by chamber summons dated 7th February, 2012 by the applicant which sought the variation or review of the condition requiring the deposit of security for costs was however pending hearing and determination. By the application the applicant interalia sought an order:-

“That the honourable court be pleased to vary its orders made on the 31st day of January 2012 particularly Order 5 requiring the applicant to deposit Kshs. 100,000/= being security for costs. That instead the honourable court be pleased to order that the applicant herein do give an undertaking as to costs, or security to be deposited in court of equivalent amount.”

3. **Hon. Justice Okong’o** heard the application for review and while appreciating that the application seeking leave was heard ex parte and granted on terms without the applicant being heard on the conditions imposed he took the position that insisting on the conditions being satisfied may well lead to denying the applicant access to justice which would run counter to Article 48 of the Constitution which enjoins the state to facilitate access to justice for all persons. The judge agreed that an order for security for costs was an order that the court can properly make save that such an order should not be such that it could be construed as impeding access to justice. The judge having considered all the circumstances giving rise to the order for security for costs by **Sitati, J.** resolved to vary and review the order and in doing so he stated as follows:-

“12. For the foregoing reasons, I will allow the applicant’s application dated 7th February, 2012 and set aside part of the order made on 31st January, 2012 relating to furnishing of security. In place thereof, I order the applicant shall deposit in court within thirty (30) days from the date hereof a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000) and the original title deeds for LR Nos. Nyaribari/Chache/B/B/ Boburia/9633 and 9634 as security for costs failure to which the leave that was granted conditionally on 31st January, 2012 together with the order of stay of proceedings shall stand discharged. The application for judicial review if any has been filed shall also stand dismissed with costs to the interested parties...” (emphasis mine).

4. Honourable **Justice Okong’o** delivered his ruling on 17th April 2015 in the presence of Mr. Moracha advocate who held brief for Mr. Mokuia advocate for the applicant and Mr. Omwega advocate was present for the interested parties. The applicant hence had upto 16th May 2015 to satisfy the conditions as varied by the court failing which the leave granted would stand discharged and the judicial review application filed on 13th February 2012 would likewise stand dismissed with costs to the interested parties. **So, did the applicant meet the varied conditions as varied by the court?**

5. A perusal of the court record reveals that the applicant made a deposit of kshs. 50,000/= vide receipt

No. 0148906 into court on 1st July 2015 nearly 2 ½ months (75 days) after the order for the deposit was made on 17th April 2015. On the same date 1st July 2015 the applicant as per a note made on the record deposited land title number **Nyaribari Chache/B/B/ Boburia/9634** with the court Executive Officer. There is no indication that title number **Nyaribari Chache/B/B/Boburia/9633** was deposited as ordered by the court. The import of this revelation is that the applicant did not comply with the court's order of 17th April 2015 which expressly required that the applicant complies within 30 days of the date of the order. Courts make orders with the intent that the parties affected by the same will comply. The administration of justice is predicated on the basis that court orders will be obeyed and/or complied with by the parties who come before the court in pursuit of justice. A party cannot choose when and which order of the court to comply with. To allow such a situation to persist would be a recipe for the breakdown and erosion of the rule of law as parties might feel that they are not obliged to comply with any orders and/or directions given by the court and/or that they can unilaterally choose which orders to abide by when and how. That would not be an acceptable position.

6. In the present case the order by **Okong'o, J.** of 17th April 2015 was specific and clear that the applicant had to comply with the same within 30 days and failure to do so would invite consequences. The consequences for non compliance within the set period was that the leave granted by **Sitati, J.** on 31st January 2012 would lapse and if any judicial review application had been filed pursuant to such leave the same would stand dismissed with costs to the interested parties. Thus in my view as at 1st July 2015 when the applicant paid the deposit of kshs. 50,000/= as ordered and deposited one of the land titles as ordered, the default clause on the order had taken effect there having been no compliance as ordered within 30 days from the date the order was made. The leave granted had been discharged and the judicial review application dated 13th February 2012 stood dismissed in terms of the default clause in the order of 17th April 2015. Therefore on 10th September 2015 when the applicant purported to fix the judicial review application dated 13th February 2012 for hearing there was no such application the same having been dismissed consequent to the default in complying with the order of 17th April 2015.

7. The order of 17th April 2015 was self executing such that if there was no compliance with the terms of the order the default clause automatically kicked in and there was no requirement for any party to take any action in case there was non-compliance. Thus although the parties filed written submissions to argue the judicial review application consequent to the directions of the court the same were to no effect because the application they relate to had already been dismissed. Unless the applicant had sought for extension of the period to comply with the order of 17th April 2015 which he did not do there was no application to be heard as the same stood dismissed on the expiry of 30 days from the date of the order. The court does not act in vain and as per **Okong'o, J's** order of 17th April 2015 the judicial review application dated 13th February 2012 stands dismissed with costs to the interested party.

Judgment dated, signed and delivered at Kisii this 30th day of September, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Moguche for Mr. Mokuu for the applicant

N/A for the respondents

Mr. Otieno for Omwega for the interested parties

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE