



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

JUDICIAL REVIEW NO. 14 OF 2013

IN THE MATTER OF THE LAND DISPUTE TRIBUNAL ACT NO. 18 OF 1990

**IN THE MATTER OF THE LAND PARCEL NO. NGIRIAMA/THIRIKWA/758 AND LAND
PARCEL NO. BARAGWE/KARIRU/1600**

REPUBLICAPPLICANT

VERSUS

GICHUGU LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE’S

COURT GICHUGU.....2ND RESPONDENT

AND

JANE WANGECI KIURA.....INTERESTED PARTY

SAMUEL GAKONO NGARI.....EX-PARTE APPLICANT

RULING

I have before me two applications for determination.

The first application is dated 22nd January 2014 filed by the Ex-parte Applicant **SAMUEL GAKONO NGARI** and it seeks the following orders:-

1. That the limited time of 21 days for the filing of the main Notice of Motion Application granted by this Honourable Court on 9th December 2013 be enlarged upon such terms as the justice of the case may require.

2. That the costs of this application be provided for in any event.

The said application is supported by the Ex-parte Applicant’s affidavit in which he has deponed, inter alia, that he is the registered proprietor of the land parcel No. NGIRIAMA/THIRIKWA/758 and had instructed the firm of **FATUMA WANJIKU** Advocate to file an application seeking leave to file these Judicial Review Proceedings. That the said application was filed and orders given that the main Notice of Motion be filed within 21 days. However, differences arose between him and his then advocate who did not file the Notice of Motion That necessitated the filing of this application to extend time.

The Interested party **JANE WANGECI KIURA** filed a replying affidavit in opposition to the said application and deponed, inter alia, that the original application dated 30th August 2011 was an abuse of the Court process as it was brought outside the statutory period of six (6) months since it sought to quash the decision of the Gichugu Land Disputes Tribunal read on 5th November 2009 and adopted by the Court at Gichugu as a judgment on 6th July 2011. Therefore, the Ex-parte Applicant took almost three (3) years to file the Chamber Summons dated 30th August 2011 and filed herein on 2nd September 2011. That this application is therefore res-judicata since leave had already been given but the Ex-parte Applicant took another 46 days to file this application and the failure to do so was occasioned by himself after he failed to pay his former advocate Ksh. 156,495 or give them instructions to file the Notice of Motion in time.

The Interested party also filed a Preliminary Objection on the ground, inter alia, that the award of the Gichugu Land Disputes Tribunal was delivered on 5th November 2009 and adopted by the Gichugu Court on 6th July 2010 which was beyond the six (6) months statutory period for an application for certiorari to be filed.

The second application is dated 19th May 2015 and filed by the Interested party and seeks the following orders:-

1. That the Honourable Court be pleased to vacate its orders dated 9th December 2013 for non execution.

2. Costs of the application be provided for.

That application is premised on the grounds set out therein and supported by the Interested party's affidavit in which she depones, inter alia, that the Ex-parte Applicant was on 9th December 2013 given leave to file the substantive motion but instead took 46 days to file the Notice of Motion dated 22nd June 2014 seeking extension of time to file the substantive Notice of Motion. That the delay is in-ordinate and un-explained and in any event, the Ex-parte Applicant has been dragging her to Court for several cases including:-

1. Gichugu Senior Resident Magistrate Court Civil Case No. 13 of 2009.

2. Kerugoya ELC Case No. 260 of 2013.

I do not find from the record the Ex-parte Applicant's response to that application. However, the gist of that application is that it seeks a review of this Court's orders issued on 9th December 2013 and it can easily be disposed of by looking at the record herein.

I shall therefore commence with the Interested party's Notice of Motion dated 19th May 2015 which seeks that this Court vacates its earlier orders dated 9th December 2013.

As I have already indicated above, the orders sought to be reviewed or vacated were issued on 9th December 2013. A copy of the said order has been annexed to the Ex-parte Applicant's Notice of Motion dated 22nd January 2014 and marked as annexure **SGN2**. That order was in response to an application for leave to file Judicial Review proceedings and I stated as follows:-

“By his Chamber Summons dated 30th August 2011 and filed herein on 2nd September 2011 vide certificate of urgency, the Ex-parte Applicant SAMUEL GAKONO NGARI seeks leave to apply for an order of certiorari to remove into this Court and quash the decision of the Gichugu Land Disputes Tribunal dated 5th November 2009 and adopted as a Court judgment on 6th July 2011 awarding the Interested party 1¼ acre out of land parcel No. NGARIAMA/THIRIKWA/758 and also DANIEL NGARI MURIUKI and JACKSON NJERU MURIUKI 1 ¼ and ½ acre respectively out of the said land”

I then proceeded to grant the leave sought and directed that the Notice of Motion be filed within 21 days

of the delivery of the ruling.

It is clear from the above that what was sought to be quashed was the decision of the Gichugu Land Disputes Tribunal dated 5th November 2009 and adopted as the Court judgment on 6th July 2011. It must be remembered that under **Section 7 of the repealed Land Disputes Tribunals Act (CAP 303 A)**, a decision of the Tribunal could only be enforceable once it had been adopted as a judgment of the Court. Indeed the parties to the dispute would have no way of knowing about the decision arrived at before it is filed at the Magistrate's Court for adoption. The Tribunal's decision therefore becomes subsumed in the judgment of the Court adopting it. That is why the Ex-parte Applicant sought leave to remove into this Court for quashing the Tribunal's decision "***as adopted as the Court's judgment on 6th July 2011***". Since the Court's judgment was dated 6th July 2011 and the application for leave was filed on 2nd September 2011, the said application was within the six (6) months period for under **Section 9 (3) of the Law Reform Act** and also **Order 53 Rule 2 of the Civil Procedure Rules** which provides that such leave must be sought not later than six (6) months from the date when the judgment, order or decree was made. Counsel for the Interested party Mr. Mwai has in his submissions referred to several judgments including my own judgment in **JUDICIAL REVIEW APPLICATION No. 18 of 2014**. However, in that case, all that was presented to the Court was the award of the Gichugu Land Disputes Tribunal dated 5th November 2009 and which was sought to be quashed by an application filed on 19th December 2014. The judgment of the Court adopting the said award was not availed and the application was dismissed because it was filed some five (5) years later. That case is distinguishable from this one where the application was not only filed within two (2) months of the Court's judgment but also, the Applicant has sought the quashing of the said judgment. Counsel also referred to the judgment of **ALNASHIR VISRAM J.** (as he then was) in **GEORGE AMARA VS THE REGISTRAR OF SOCIETIES H.C.C.C No. 865 of 1999** where again the application was dismissed because it was filed outside the six (6) months period provided for under the law. The other authorities cited by counsel i.e. **CHEBIEGON VS KIPLAGAT MISC APPLICATION No. 533 of 2004 NAKURU** and **MAHAJA VS KHUTWALO 1983 e K.L.R** deal with the issue of extension of time which is not relevant for purposes of an application to review this Court's orders dated 9th December 2014. They may be relevant for an application for extension of time such as the one filed by the Ex-parte Applicant.

It cannot therefore be correct that the application seeking leave to apply for orders of certiorari dated 30th August 2011 and filed in Court on 2nd September 2011 was time barred for being filed outside the six (6) months period. The judgment sought to be quashed was entered by the Gichugu Senior Resident Magistrate's Court on 6th July 2011 and so the application filed on 2nd September 2011 was well within time. The Interested party's Notice of Motion dated 19th May 2015 is therefore devoid of merit and must be dismissed which I hereby do.

Turning now to the Ex-parte Applicant's Notice of Motion dated 22nd January 2014 seeking an extension of the 21 days time within which to file the Notice of Motion, it is clear from paragraph 6 of the Ex-parte Applicant's affidavit that differences arose between him and his then advocate **Ms FATUMA WANJIKU**. That even led to the filing an advocate/client bill of costs on 13th January 2014. It is clear that even as at that time, the 21 days period had not lapsed. This application was filed on 22nd January 2014 and it cannot be said that there has been un-reasonable delay from 9th December 2013 when this Court delivered its ruling granting leave to file the Notice of Motion. It would be harsh to penalize the Ex-parte Applicant in a situation such as this where not only is there no un-reasonable delay but there is also a plausible explanation for the failure to file the Notice of Application as at 22nd January 2014 when this application was filed. I also take the view that the 21 day period provided for the filing of the Notice of Motion is a procedural matter and not a rule of substantive law and is amenable to **Article 159 (2) (d) of the Constitution**. While the six (6) months period provided for under **Section 9 (3) of the Law Reform Act** and **Order 53 Rule 2 of the Civil Procedure Rules** cannot be extended, the 21 days period within which the Notice of Motion must be filed can be extended. In **WILSON OSOLO VS JOHN ODHIAMBO OCHOLA & THE ATTORNEY GENERAL C.A CIVIL APPEAL No. 6 of 1995 (NBI)** the Court of Appeal addressed itself as follows:-

"It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules (and it is now again so) that the Notice of Motion must be filed within 21 days of granting of such leave.

No such Notice of Motion having been apparently filed within 21 days on 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 “emphasis added.

In the circumstances of this case, a reasonable explanation has been given as to why the Notice of Motion is yet to be filed and further, there is no inordinate delay. I am persuaded therefore that I can grant the extension sought by the Ex-parte Applicant in his Notice of Motion dated 22nd January 2014.

In the circumstances therefore and upon considering both applications, I make the following orders:-

- 1. The Interested party’s Notice of Motion dated 19th May 2015 is dismissed.***
- 2. The Ex-parte Applicant’s Notice of Motion dated 22nd January 2014 is allowed.***
- 3. The substantive Notice of Motion be filed within 14 days of the delivery of this ruling and served upon the Respondent, the Interested party and all other such persons as may be affected by it within 14 days of filing.***
- 4. Each party shall meet their own costs of the two applications.***

B.N. OLAO

JUDGE

14TH OCTOBER, 2016

Ruling dated, delivered and signed in open Court this 14th day of October 2016.

Mr. Anampiu for Mr. Ngangah for Applicant present

No appearance by the other parties

Mr. Gichia Court Clerk present.

B.N. OLAO

JUDGE

14TH OCTOBER, 2016