



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**MISC. CIVIL APPLICATION NO. 46 OF 2013**

SARAH AKOLA NANDWA .....APPLICANT

VERSUS

1. MATETE LIKATA MULI )

2. RODGERS AMUNGA TINDI) .....RESPONDENTS

**RULING**

Before me is an application by way of Notice of Motion dated 2<sup>nd</sup> May 2013 filed by Sarah Akola Nandwa. It was filed under **Order 50 Rule 5** and **Order 24 Rule 3** of the **Civil Procedure Rules**. It seeks the following orders -

1. **That the court be pleased to grant leave to applicant to file judicial review out of time on the decision of Lurambi Land Disputes Tribunal dated 7<sup>th</sup> April 1999 and adopted vide Kakamega CMCC Award No. 68 of 1999.**
2. **That the applicant be the legal representative of the deceased ELPHAS ORUKO KOMBO and proceed with this matter.**
3. **That the costs herein be in the cause.**

The application has grounds on the face of the Notice of Motion, which are –

- a. **That the intended judicial review has high chances of success.**
- b. **That the delay in lodging the judicial review is excusable.**
- c. **That it has taken more time to obtain the grant of Letters of Administration of the late father's estate.**

A copy of Letters of Administration issued jointly to the applicant and Perry Embola Mwaviki in the estate of Elphas Oruko Kombo on 27<sup>th</sup> October 2008, was filed. A supporting affidavit was filed with the application. No statutory statement was however filed.

The application is opposed. A replying affidavit sworn by Rodgers Amunga Tindi, the 2<sup>nd</sup> respondent on 31/3/2014 was filed. Also filed was a Notice of Preliminary Objection dated 31<sup>st</sup> March filed by C. O. Samba & Company advocates on behalf of the said 2<sup>nd</sup> respondent. The Objection is as follows –

***“The applicant’s application is time barred and the orders sought cannot be granted and the same should be dismissed with costs.”***

At the hearing of the application, the applicant stated that she was born in 1963 and that her husband died in 2007. That she came to know about the land dispute after she had buried her husband. She urged the court to assist her.

Mr. Shivega, learned counsel who appeared for the 2<sup>nd</sup> respondent, asked the court to dismiss the application. Counsel submitted that the application was statute barred in terms of Order 53 of the Civil Procedure Rules. The delay herein was not justified. Counsel brought to the attention of the court a ruling of this court in the same land dispute, which was delivered on 16<sup>th</sup> March 2005.

This application for leave to file judicial review proceedings will fail. The first reason is that it is fatally defective. It was brought under Order 50 rule 5 and Order 24 Rule 3 of the Civil Procedure Rules, rather than Order 53 of the Civil Procedure Rules. That was a mistake.

Not only was it brought under the wrong provisions of the law, its substance is also defective. An applicant for leave to file judicial review proceedings has to state whether the leave sought is to commence judicial review proceedings for mandamus, prohibition or certiorari or a combination of these. The law is clear that leave can only be granted to bring judicial review proceedings for any or a combination of the three reliefs. In my view, this is the meaning of rule 1 (1) of Order 53 of the Civil Procedure Rules, which provides as follows –

***“1 (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.***

In my view therefore, the failure by an applicant to state the specific judicial review order for which leave is sought, renders the application for leave fatally defective. This court cannot grant blanket leave to file judicial review proceedings.

In addition to the above, the application was also not filed with a statutory statement as required under Order 53 rule 1 (2) of the Civil Procedure Rules, which provides as follows –

**1 (2) An application for such leave as aforesaid shall**

**be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.**

The above provisions of the law are mandatory. A statement and an affidavit or affidavits must be filed with the application for leave. Rule 4 states that only the reliefs and grounds contained in the statement can be relied upon at the hearing of the main motion. It follows therefore that this court cannot grant leave on the basis of the present application as it does not know the reliefs sought or the grounds upon which that relief, is sought. Such action will contravene the mandatory requirements of the law.

Learned counsel for the 2<sup>nd</sup> respondent Mr. Shivega, has also raised the issue of time bar. Indeed if the application was for leave to file judicial review proceedings for certiorari, the rule 2 provides a time bar of 6 months.

The applicant herein has not only been guilty of long delay, but has also not disclosed the documents and findings which she wants to challenge. That default has clouded her application. It is the 2<sup>nd</sup> respondent, in his replying affidavit, who has annexed the order of the court adopting the award of the Lurambi Land Disputes Tribunal on 2<sup>nd</sup> June 1999. The second respondent also annexed a ruling of the High Court on the same matter dated 16<sup>th</sup> March 2005 in which the attempt by Oruko Kombo to

challenge the decision of the Land Disputes Tribunal was dismissed. The delay of several years by the applicant and non-disclosure of material facts by the applicant is fatal to the application.

In conclusion, I find that the application is misconceived and fatally defective. It cannot stand. I strike out the same, with costs to the 2<sup>nd</sup> respondent, as the 1<sup>st</sup> respondent did not contest the application.

*Dated and delivered at Kakamega this 22<sup>nd</sup> day of May, 2014*

**George Dulu**

**J U D G E**