REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. JUDICIAL REVIEW NO. 20 OF 2013

IN THE MATTER OF AN APPLCATION BY NANCY WATHIBA KIMOO FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW

AND

IN THE MATTER OF CENTRAL LANDS DISPUTE TRIBUNAL

AND

IN THE MATTER OF PROCEEDING IN KERUGOYA PRINCIPAL MAGISTRATE'S COURT L.D.T NO. 16 OF 2010

REPUBLI……..…….. APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE KERUGOYA ……..…….1ST RESPONDENT

THE CENTRAL LAND DISPUTES TRIBUNAL …….…….2ND RESPONDENT

TABITHA W. MURIUKI ……..……. 3RD RESPONDENT

AND

NANCY WATHIBA KIMOO …….EX-PARTE APPLICANT

RULING

The issue for my determination in this application is whether the Court has discretion to extend time within which a party may file the substantive application for Judicial Review beyond the 21 days prescribed under ***Order 53 Rule 3 (1) of the Civil Procedure Rules.***

The Ex-parte applicant herein moved the Court on 15th June 2010 seeking leave to apply for orders of Judicial Review by way of certiorari to remove in to the High Court and quash the award of the Central Lands Dispute Tribunal. The grounds upon which that application was being sought are not relevant for purposes of this application. What is relevant is that the application was placed before W. Karanja J. (as she then was) on 21st June 2010, who made an order on the same day allowing the application and directing that the main application be filed and served within 21 days of the said order. That order was

not made in the presence of the ex-parte applicant or her lawyer and according to the supporting affidavit of her lawyer Mr. Joshua Magee, it was not until 17th October, 2011 that his registry clerk learnt that the ex-parte application had infact been heard in Chambers in his absence and the orders granted. That led to the filing of this application on 8th November, 2011 seeking extension of time to file the substantive application out of time. The same is brought ***under Order 50 Rule 1 of the Civil Procedure Rules*** and ***Section 3A of the Civil Procedure Act.***

The application is opposed by the 3rd respondent who has filed grounds of opposition as follows:-

1. ***That the application dated 8th November, 2011 is incompetent in law and an abuse of the Court process***
2. ***That the delay in filing the application dated 8th November, 2011 is inordinate and not excusable and the same is not merited***
3. ***That the application dated 8th November, 2011 is res-judicata since the same is similar to the earlier application dated 15th June, 2010***
4. ***That the delay in filing the present application is inordinate and not excusable***

There is another application file by the 3rd respondent in this Court and bearing two Court stamps one dated 15th July, 2011 and another 11th June, 2012 seeking the striking out of this suit for non-prosecution. However, when the parties appeared before me on 9th October, 2014, it was clear that the application being canvassed is the ex-parte applicant's application seeking enlargement of time.

Submissions have been filed by both the applicant and the 3rd respondent and I have considered them together with the application, the objection thereto and the other relevant documents. I have of course also looked at the record of this matter and the relevant law.

As stated earlier and that is not in issue, the orders of W. Karanja (as she then was) dated 21st June, 2010 and which granted the ex-parte applicant leave to file the substantive Judicial Review application within 21 days were issued in Chambers in the absence of the applicant and her lawyer. The Court record of that day is clear. It is also not in dispute that the ex-parte applicant through her lawyer Mr. Magee only came to learn about the orders granting her leave on 17th October, 2011 long after the 21 days had expired.

In ground 1, 2 and 3 of the grounds of opposition, the 3rd respondent raises the issue that this application is bad in law, an abuse of the Court process and has delayed inordinately. To answer those objections, the application is properly founded under the relevant law and the same was filed on 8th November, 2011 some three (3) weeks after the ex-parte applicant learnt about the orders. The orders were issued on 21st June, 2011 and the ex-parte applicant only learnt about them on 17th October, 2011. That period cannot be regarded as being an un-reasonable delay. The other ground of opposition is that this application is res-judicata since it is similar to an earlier application dated 15th June, 2010. That cannot be correct. The application dated 15th June, 2010 was seeking leave to institute Judicial Review proceedings. The current application seeks to extend time within which to file those proceedings. Those are two different applications.

In his submissions opposing this application, the 3rd respondent's counsel has referred me to the following cases:-

1. ***GEORGE AMARA VS THE REGISTRAR OF SOCIETIES NBI H.C.C.C MISC NO. 865 of 1999***

2. ***ESTHER TALA CHEBIEGON VS KIPLAGAT ARAP BIATOR NKU H.C.C. MISC APPLICATION NO. 533 OF 2004***
3. ***MAHAJA VS KHUTWALO KISUMU COURT OF APPEAL CIVIL APPEAL NO. 19 OF 1983***

I have looked at these cases and they are clearly not relevant in this case because they were concerned with situations where the application for leave was brought outside the six months period stipulated under ***Section 9 (3) of the Law Reform Act.*** The Courts held that that time cannot be extended. ***Section 9 (3) of the Land Reform Act*** was considered by the Court of Appeal in the case of ***AKO VS SPECIAL DISTRICT COMMISSIONER KISUMU AND ANOTHER 1989 K.L.R 163*** where it said as follows:-

> "***It is plain that under Sub-Section 3 of Section 9 of the Law Reform Act Cap 26, leave shall not be granted unless application for leave is made inside six months after the date of judgment. The prohibition is statutory and is not therefore challengeable under the Procedural Provisions of the Civil Procedure Rules more specifically Order 49 Rule 5 which permits for enlargement of time"***

Similarly, ***Order 53 (2) of the Civil Procedure Rules*** stipulates that leave shall not be granted to apply for an order of certiorari unless the application for leave is made not later than six months after the date of the order or judgment sought to be quashed.

In the case before me, leave has already been granted. That leave has not been challenged. For my part, I have looked at the record. The decision sought to be quashed was made by the Kirinyaga Central Division Land Disputes Tribunal on 12th May, 2010 and adopted by the Court on 8th June, 2010. The application for leave was filed on 15th June, 2010 well within the six months period stipulated in law.

What the applicant seeks here is the extension of the 21 days within which to file the substantive Notice of Motion application.

The reasons why the same was not filed within 21 days have been explained above. Does this Court have the jurisdiction to extend that period? The 21 days period is provided for under ***Order 53 Rule 3 (i) of the Civil Procedure Rules***. This is un-like the six months period which is provided for under substantive law that is the Law Reform Act. Under ***Order 50 Rule 6 of the Civil Procedure Rules***, it is provided that the Court may extend time within which a party may do any act. It reads as follows:-

> ***"Where a limited time has been fixed for doing an act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.***
>
> ***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the Court orders otherwise"***

In my view, the **AKO** case (supra) was dealing with the issue of whether the time provided under the ***Law Reform Act*** can be enlarged. That was the same situation in the three cases cited by Mr. Ombongi counsel for the 3rd respondent. Those cases are distinguishable. The application herein seeks to enlarge time within which to file the substantive Notice of Motion. That time is limited to 21 days by the provisions of ***Order 53 Rule 3 (i) of the Civil Procedure Rules***.

I am aware that some Courts have taken the view that Judicial Review is a special procedure to which the regular ***Civil Procedure Rules*** do not apply and on that basis, those Courts have refused to enlarge the 21 days within which to file the substantive Judicial Review application. See for instance the following cases:-

1. ***REPUBLIC VS NYANDARUA DISTRIC – OC JOROK DIVISION LAND DISPUTES TRIBUNAL AND MOSES NJUGUNA***

   EX-PARTE CYRUS KAMAU NGANGA & ANOR.

H.C . MISC. APPLICATION NO. 505 OF 2006 (NAKURU)

2. ***REPUBLIC VS KAHINDI NYAFULA AND THREE OTHERS EX-PARTE KILIFI SOUTH EAST FARMERS CO-OPERATIVE J***

UDICIAL REVIEW APPLICATION NO. 3 OF 2013 (MALINDI)

The above cases are of only persuasive value to this Court. It is clear to me that whereas the six (6) months period stipulated in the ***Law Reform Act*** within which to apply for leave to file Judicial Review proceedings cannot be enlarged as it is barred by statute, the 21 day period within which to file the substantive Judicial Review motion is only provided for under the Rules and specifically ***Order 53 Rule 3 (i)*** and in view of the provisions of ***Order 50 Rule 6 of the Civil Procedure Rules*** which empowers the Court to enlarge time, it is my considered opinion that this Court has power to enlarge the time provided under ***Order 53 Rule 3 (i) of the Civil Procedure Rules.***

I have also looked at the Court of Appeal's decision in ***WILSON OSOLO VS JOHN OJIAMBO OCHOLA & THE ATTORNEY GENERAL C.A CIVIL APPEAL NO. 6 of 1995 (NBI)*** and it is clear from it that indeed the Court has a discretion and power to enlarge time within which to file a substantive Notice of Motion for Judicial Review once leave is given though there is no such power to extend the time stipulated under ***Section 9 (3) of the Law Reform Act*** within which to apply for leave. While considering ***Order 53 of the Civil Procedure Rules***, the Court rendered itself as follows:-

> "***It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9 (3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act"***

Further on in the same judgment, the Court added the following:-

> "***It was a mandatory requirement of Order 53 Rule 3 (i) of the Civil Procedure Rules then (and it is now again so) that the Notice of Motion must be filed within 21 days of grant 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 mine.

This judgment was delivered on 6th August, 1996 and ***Order 49 of the Civil Procedure Rules*** (as it stood then) is the current ***Order 50.*** It is clear from that case which is binding on me, that the time stipulated under ***Order 53 of the Civil Procedure Rules*** can be extended if an application to do so is made. I am therefore persuaded that whereas the six (6) months period within which to commence Judicial Review proceedings is governed by substantive law being the ***Law Reform Act,*** the twenty one (21) day period within which to file the Notice of Motion can be extended by the Court since that period is governed by the Rules which, under ***Order 50***, empower the Court to extend time.

Further, under ***Article 159 (i) (d) of the Constitution***, it is provided that:-

> "***Justice shall be administered without undue regard to procedural technicalities"***

Section 3A of the Civil Procedure Act on the other hand grants the Court powers to make such orders as may be necessary to meet the ends of justice. Looking at the circumstances of this case which I have already summarized above, it is clear that although W. Karanja J (as she then was) granted leave to the applicant on 21st June, 2010 to file the Notice of Motion within 21 days, that decision or order was not read to the applicant. The applicant and her advocate were not therefore aware that leave had been

granted and only became aware of the said order on 17th October, 2011. This application was then filed on 8th November 2011. The order of 21st June, 2011 not having been read to the applicant or his advocate in Court or Chambers as is the normal practice, it would be un-just to punish the applicant by not extending time within which to comply with the order of 21st June, 2011 as neither she nor her advocate were to blame for the failure to comply with the directions given therein. In my view, bearing in mind the circumstances of this case, it would only be fair and just that this application is allowed having also taken into account that the applicant moved the Court expeditiously upon learning about the order of 21st June, 2011.

I accordingly grant the applicant an extension of time for the filing of the Notice of Motion to the effect that the said Notice of Motion be filed and served within 21 days of the delivery of this ruling.

With regard to costs, ***Order 50 Rule 6 of the Civil Procedure Rules*** provides that they shall be borne by the party making such application unless the Court orders otherwise. As indicated above, the applicant was not to blame as the order of 21st June, 2011 was not read to her or her advocate and they were not in Court when those orders were made. It would therefore be unfair to penalize the applicant with an order for costs.

In the circumstances of this case, the interests of justice will best be served if I make no order as to costs.

It is so ordered.

- **B.N. OLAO**
- **JUDGE**
- **8TH DECEMBER, 2014**

8/12/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Magee for Applicant – present

Mr. Ombongi for Respondent – absent

COURT: Ruling delivered in open Court this 8th day of December, 2014

Mr. Magee for Applicant present

Mr. Ombongi for Respondent absent.

- **B.N. OLAO**
- **JUDGE**
- **8TH DECEMBER, 2014**