



REPUBLIC OF KENYA

High Court at Malindi

Miscellaneous Civil Application 27 of 2012

1. Material non-disclosure

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND CERTIRARI

AND

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT AND ORDER 53 OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF: TITLE NUMBER CHEMBE KIBABAMSHE/406

BETWEEN

LAND REGISTRAR KILIFI

(sued through the Attorney General).....DEFENDANTS/RESPONDENTS

EX PARTE.....VISCHI FERANANDO

AND

M/S DREAM GEAST LIMITED.....1ST INTERESTED PARTY

M/S MUMBU HOLDINGS LIMITED.....2ND INTERESTED PARTY

JUDGMENT

1. What is before me is the *ex-parte* Applicant's Notice of Motion dated 20th December 2007 and filed on 14th January 2008. The Application seeks for the following reliefs:

(a) That this Honourable Court be pleased to issue a Judicial Review Order to bring to the High Court to be quashed the Respondent's Decision of 30th May 2007 to cancel Title in respect of Chembe/Kibabamshe/406 previously issued to M/s Mumbu Holdings Limited on 17th May, 1995.

(b) That this Honourable Court be pleased to issue a Judicial Review Order of certiorari directed to the Respondent quashing the Respondent's Decision of 30th May, 2007 to approve and effect a Transfer of Title Chembe/Kibabamshe/406 from William Mulewa and 3 Others as owners thereof

to **M/s. Dream Geast Limited.**

(c) That this Honourable Court be pleased to issue a Judicial Review Order of Mandamus directed to the Respondent to reinstate Mumbu Holdings Limited Title and proprietorship over Title Chembe/Kibabamshe/406.

(d) That the costs of this Application be provided for.

2. The Application is supported by the Applicant's Statement dated 6th November 2007 and the Supporting Affidavit sworn by the Applicant on 6th November 2007.
3. The main grounds that the *ex-parte* Applicant relies on are that the Land Registrar, Kilifi (the Respondent herein) had no power or authority under the Registered Land Act, Cap. 300 to cancel a Title which had earlier on been issued to **M/s Mumbu Holdings Limited**, the 2nd Interested Party herein, in 1995, and that the cancellation of the Title by the Respondent in May 2007 was done in excess of the Respondent's authority under section 142 (1) of the Registered Land Act, Cap. 300.
4. The *ex-parte* Applicant has deponed that by an Agreement of Sale dated 23rd July 2007, he bought from **M/s Mumbu Holdings Limited**, the 2nd Interested Party, Title **Chembe/Kibabamshe/406** which was duly registered in the 2nd Interested Party's name.
5. However, it became apparent from the existing records that the Kilifi Land Registrar, the Respondent herein, had on 30th May, 2007 or thereabout caused cancellation of the Title in favour of **Ms Mumbu Holdings Limited** paving the way for him to approve and register a transfer of the said Title from **William Chengo Mulewa & 3 others** to **M/s. Dream Geast Limited**, the 1st Interested Party.
6. The *ex-parte* Applicant has further deponed that in cancelling **Ms Mumbu Holdings Limited's** Title, the Respondent acted *ultra vires* authority as envisaged under Section 142 (1) of the Registered Land Act; that the Respondent became *functus officio* having on 17th May 1995 issued a Title to **M/s Dream Geast Limited** (M/s Mumbu Holdings Ltd?) and that in the absence of a court order, the Respondent acted in excess of his authority.
7. The *ex-parte* Applicant urged the court to issue an order of Certiorari and Mandamus as particularised in the body of the Application.
8. The 1st Interested Party, **M/s Dream Geast Limited** and the 2nd Interested party, **M/s Mumbu Holdings Limited** filed their respective Replying Affidavits. The Respondent did not file any response.
9. The 2nd Interested Party's Replying Affidavit and the Supplementary Affidavit were sworn on 17th September 2012 and 26th November 2012 respectively. The 2nd Interested Party is in agreement with the depositions of the *ex-parte* Applicant which I have summarised in the preceding paragraphs.
10. The 2nd Interested Party's director has deponed that Mumbu Holdings Limited bought the suit property from the family of **Samuel Mulewa, Benjamin Mukare Mulewa** and **Paul Chai Mulewa**. The Title was subsequently issued in favour of Mumbu Holdings Limited on 17th May 1995 and registered as entry number 4 in the Green Card.
11. The 2nd Interested Party's director has further deponed that on 23rd July 2007, Mumbu Holdings Limited entered into a sale agreement with the *ex-parte* Applicant, Vischi Fernando, for the sale of the suit property. However, when they checked the record, they realized that the Kilifi Land Registrar, the Respondent, had caused cancellation of the Title in favour of the 2nd Interested Party.
12. It is the 2nd Interested Party's contention that the Respondent had on 26th May 2007, which was a

Saturday, removed restriction on entry number 6 and 7 of the Green Card and four days later transferred the land *vide* entry numbers 10 and 11 to different parties without jurisdiction or authority to do so.

13. The 2nd Interested Party's director further deponed that the Respondent cancelled the entries in the Green Card using **black ink** instead of **red ink**; that the Respondent could not issue another Title having already issued a Title over the same property to the 2nd Interested Party and that the actions of the Respondent were *ultra vires* his authority.

14. In his Supplementary Affidavit, the 2nd Interested Party's director deponed that **Samuel John Mulewa, Benjamin Mukare Mulewa** and **Paul Chai Mulewa** appeared before an advocate and executed the transfer forms in favour of the 2nd Interested Party and obtained a consent to transfer the land from the Land Control Board where after a Title was issued in favour of the 2nd Interested Party.

15. It is therefore not conceivable, according to the 2nd Interested Party, that **William Chengo Mulewa and 3 Others** could again sale the same property to the 1st Interested Party without issuing a notice or giving the 2nd Interested Party a chance to be heard.

16. The 1st Interested Party, through its director filed a lengthy Replying Affidavit on 5th November 2012. According to **Philemon Mwavala**, the 1st Interested Party's director, the administrators of the estate of the late **Samuel John Mulewa** together with **Benjamin Mukare Mulewa** and **Paul Chai Mulewa** transferred the suit property to the 1st Interested Party on 3rd October 2005.

17. The 1st Interested Party's director has deponed that the transfer was authorized by Malindi Land Control Board and the sellers paid all the outstanding land rates; that the 1st Interested Party paid the requisite stamp duty and after the Title was registered in its favour, it proceeded to construct a hotel on the suit property.

18. It was deponed that in Mombasa **HC.C.C. No. 12 of 2006**, in which the *ex parte* Applicant is the Plaintiff, the *ex-parte* Applicant herein sought to have the suit property transferred to him and his colleague. He obtained temporary injunction orders against the Defendants in that suit.

19. The injunctive orders in favour of the *ex-parte* Applicant herein in Mombasa H.C.C.C. No. 12 of 2006 were issued on 27th January, 2006. Thereafter, the 1st and 2nd Interested Parties were enjoined in the said suit and the matter was transferred to this court for hearing and disposal. The *ex-parte's* application for injunction was heard and dismissed by the court. The *ex-parte* applicant filed an appeal and the said appeal is pending so is the main suit.

20. The 1st Interested Party's director has further deponed that the 2nd Interested Party filed **Malindi HCCC No. 78 of 2006** against David Mulewa and 8 others claiming proprietorship of the suit property. The 2nd Interested Party obtained temporary orders of injunction *ex-parte* without disclosing to the Court that it was a party to **H.C.C.C No. 12 of 2006**. Before the hearing of the Application for injunction *inter-partes*, the 2nd Interested Party withdrew the entire suit.

21. It is the 1st Interested Party's deposition that the 2nd Interested Party and the *ex-parte* Applicant have failed to disclose materials facts to the court with a view of misleading the court.

22. On the issues in the current Application, the 1st Interested Party deponed that the *ex-parte* Applicant is lying by alleging that he purchased the suit property from the 2nd Interested Party in view of his admissions in the previous proceedings that he entered into an agreement with his colleague to purchase the suit property from the Mulewa's who were the registered proprietors.

23. It is the 1st Interested Party's believe that the current Application is meant to have the Title issued

in the name of the 2nd Interested Party through the back door given that there are pending suits in this court by the *ex-parte* Applicant which he has not prosecuted; that the Mulewa's are categorical that they have never sold the property to the 2nd Interested Party and that the Title of the suit property in the name of the 2nd interested Party is a forgery.

24. The 1st Interested Party finally deponed that the Application is bad in law for non-joinder of the Mulewas through whom the 1st Interested Party obtained its title and from whom the 2nd Interested Party also claims proprietary interests.

25. The parties agreed to dispose of the Judicial Review Application by way of written submissions. The *ex-parte* Applicant, through his advocates Maranga Maosa & Associates filed his written submissions on 24th July 2008, the 1st Interested Party filed its written Submissions on 7th March 2013 while the 2nd Interested Party filed its written submissions on 4th December 2012.

26. The *ex-parte* Applicant's short written submissions are a reinstatement of the facts which were deponed in the Supporting Affidavit and the Statement and which I have already summarised above.

27. In addition to the facts in the 2nd Interested Party's Affidavit, which I have summarised above, Ms. Chepkwony counsel for the 2nd Interested Party has submitted that the general undisputed position in law is that under the Registered Lands Act, the Respondent has no power at all to cancel a title registered under the Act.

28. Ms. Chepkwony further submitted that the registrar's powers under the Act are aimed at effecting corrections or rectification of an entry in the register or instruments upon presentation for registration to remedy errors or omissions. Any other action by the Registrar, counsel urged, to affect any Title as happened in this case is *ultra vires* and amounts to a breach of the rules of natural justice. The 2nd Interested Party, counsel submitted, was never served with a notice and accorded an opportunity to be heard before the cancellation of his title.

29. It was further submitted on behalf of the 2nd Interested Party that Section 28 of the Registered Land Act offers an indefeasible right to a Title, and such a Title could only be cancelled by the Respondent if all the interested parties gave their consent in accordance with section 142 (b) of the Registered Lands Act. No such consent was obtained in this particular case to warrant the cancellation of the 2nd Interested Party's Title.

30. Ms. Chepkwony further submitted that the 2nd Interested Party's rights were openly infringed by the Respondent when the Respondent cancelled the 2nd Interested Party's Title; that Article 47 (1) of the Constitution gives persons legitimate rights of expectation and fair administrative action and that the failure by the Respondent to afford the 2nd Interested Party an opportunity to be heard before the cancellation of its title is in conflict with the express provisions of the law. Counsel relied on case law to buttress her arguments.

31. Mr. Kilonzo, counsel for the 1st Interested Party, submitted that the orders of *mandamus* and *certiorari* being sought by the *ex-parte* Applicant and by extension by the 2nd interested Party should not be granted by this court, **firstly**, because the *ex-parte* Applicant is guilty of material non-disclosure, **secondly** because the *ex-parte* Applicant has no *locus standi* to move the court, **thirdly** that leave to institute Judicial Review proceedings had dissipated as at the time of filing of the substantive motion, **fourthly** that the Judicial Review proceedings herein raises highly disputed facts of land ownership and the Applicant has another beneficial alternative remedy.

32. The 1st Interested Party's submissions are lengthy and I shall summarise them as follows:

33. On the issue of material non-disclosure, Mr. Maurice Kilonzo, counsel for the 1st Interested Party

has submitted that where a person invokes the court's jurisdiction to issue Judicial Review orders of certiorari and mandamus, the person must make a true, full and frank material disclosure as at the time the person is seeking for leave and while filing the substantive Motion. Failure to disclose a relevant fact to the court, counsel submitted, automatically disentitles an applicant of judicial review orders.

34. Mr. Kilonzo, counsel for the 1st Interested Party submitted that the *ex-parte* Applicant, the Respondent, the 1st and the 2nd Interested Parties were all parties in **Malindi H.C.C.C No. 69 of 2006** (formerly Mombasa HCCC No. 12 of 2006). According to counsel, the *ex-parte* Applicant herein, while a Plaintiff in the said suit, admitted that the subject matter belonged to the 1st to the 4th Defendants from whom they had executed a sale agreement and therefore pleaded for a specific performance of the agreement.

35. According to counsel, had the *ex-parte* Applicant disclosed to the court about the existence of **Mombasa H.C.C.C. No. 12 of 2006**, now Malindi H.C.C.C. No. 69 of 2006, leave to institute Judicial Review proceedings would not have been granted by the court. In fact, it was submitted, by the time these proceedings were being filed, Justice Ouko, as he then was, had already made a Ruling in which he had held that the suit property did not belong to the 2nd Interested party herein but to the 1st to the 4th Defendants in that suit.

36. Counsel further submitted that the *ex-parte* Applicant failed to disclose to the court that all the parties herein were also parties in Malindi HCCC. No. 78 of 2006 in which the 2nd Interested Party was the Plaintiff. This suit was withdrawn on 11th September 2007.

Finally, counsel submitted that the *ex-parte* Applicant failed to disclose to the court that as at the time of executing the agreement of sale dated 23rd July 2007 between himself and the 2nd Interested Party, the suit property was already registered in the name of the 1st Interested Party herein. Counsel relied on case law to buttress this argument.

37. On the issue of whether the *ex-parte* Applicant has the *locus standi* to move the court for the orders of *certiorari* and *Mandamus*, Mr. Kilonzo submitted that legal rights and obligations attach solely to parties directly affected by the said legal rights and obligations. From the pleadings, counsel submitted that the party with the proper *locus standi* is the 2nd Interested Party and not the *ex-parte* applicant.

38. The *Ex-parte* Applicant, it was urged cannot move the Court for leave to institute judicial review proceedings on behalf of the 2nd Interested Party.

39. On this limb, counsel submitted that a person can only have the legal standing to institute proceedings over land which has been registered under the RLA upon such land being transferred and registered in his name. The *ex-parte* Applicant, it was argued, has moved this court for orders of mandamus and certiorari when he had no right or interest in the subject land. He therefore lacks the *locus standi*.

40. Mr. Kilonzo further submitted that when a court is exercising its judicial review jurisdiction, it is neither exercising civil nor criminal Jurisdiction. In this regard, it was urged, Order 53 of the Civil Procedure Rules is independent of the other provisions of Civil Procedure Act and Rules and is only governed by the provisions of sections 8 and 9 of the Law Reform Act. It is Mr. Kilonzo's submissions that the current application was filed after the expiry of 21 days, contrary to the provisions of Order 53 Rule 2(1). Consequently, the Motion is a nullity.

41. I have considered the 1st Interested Party's submissions on the issue of whether a notice was supposed to be given to the registrar before the judicial review Application could be instituted and whether there is a judgement, order, decree or proceedings which are capable of being quashed, whether the Respondent failed to perform any statutory duty for orders of mandamus to issue and whether the issues herein are highly disputed and therefore not amenable to judicial review.

42. In a nutshell, I have considered the lengthy submissions by the 1st Interested Party and the case law.
43. Before I consider the merits of the *ex-parte's* Applicant Application, I need to address the issue of whether there was material non-disclosure on the part of the *ex-parte* Applicant when he moved the court *ex-parte* and whether the current Motion was filed within the requisite period.
44. I do so on the basis of the well-established legal principles that where a party is guilty of material non-disclosure, such a party will be disentitled to the judicial review orders. It is also an established principle of law that a party cannot be heard to say that he was not aware of the importance of the facts so misstated or concealed or that he had forgotten them.
45. Ordinarily, the court does not deal with the same severity and strictness in the case of orders obtained on notice, as with an *ex parte* injunction or leave which is to allow a party to commence judicial review proceedings and to operate as a stay obtained *ex-parte*. A party will not be allowed to maintain such leave on the merits of the facts then disclosed. So what were the prevailing facts as at the time the *ex-parte* applicant filed his chamber summons dated 15th November 2007 and filed on the same day for leave to commence the current proceedings?
46. The 1st Interested Party has annexed on its Replying Affidavit a copy of the Plaintiff in Malindi **H.C.C.C. No. 69 of 2006** (formerly Mombasa H.C.C.C. No. 12 of 2006).
47. The Plaintiffs in that suit are **Fernando Vischi** (the *ex-parte* Applicant) and **Renzo Quaciari** and the five Defendants are **Albert Mukare Mulewa, Francis Karema Mulewa, Benjamin Mukare Mulewa, Paul Chai Mulewa and the Land Registrar Kilifi**.
48. At paragraph 5 of the said Plaintiff, the *ex-parte* Applicant herein has averred that Benjamin Mukare Mulewa, Paul Chai Mulewa and Samuel John Mulewa are the registered owners of Chembe/Kibabamshe 406 (the suit property).
49. At paragraph 8 of the Plaintiff, the *ex-parte* Applicant has averred that by an agreement of sale dated 25th July 2005 made between himself and the 3rd and 4th Defendants (the Mulewas), the 3rd and 4th Defendants agreed to sell to him the suit property for Kshs. **2,568,000** where after he paid the sellers a deposit of Kshs. **822,320.00**.
50. At paragraph 15 of the Plaintiff, the *ex-parte* applicant herein avers that the 5th Defendant, who is the Respondent herein, (Kilifi Land Registrar) failed to register the restriction against the suit property until the issue of ownership was sorted out between the Mulewa's and Mumbo Holdings Ltd. (the 2nd Interested Party herein). According to the said Plaintiff, the Kilifi Land Registrar had given the reason for his refusal to register a restriction on the suit property because the entry of 17th May 1995 was not signed.
51. Consequently, the *ex-parte* Applicant herein prayed in his Plaintiff for specific performance of the sale agreement between himself and the Mulewas.
52. From the annexed pleadings, the 1st and 2nd Interested Parties herein were joined as Interested Parties in Malindi H.C.C.C. No.69 of 2006, and more specifically to the application for injunction. While dismissing the Plaintiff's application for injunction on 21st November 2006, Justice Ouko, as he then was, declined to injunct the Land Registrar Kilifi "*from making any entries in the register of Chembe/Kibabamshe/406.*" The main suit is pending in this court for hearing and determination.
53. On 15th September 2006, the 2nd Interested Party herein filed in this court **H.C.C.C. No. 78 of 2006** in which he sued the Mulewa's (who were also Defendants in **H.C.C.C. No. 69 of 2006**), the 1st Interested Party herein, **Fernando Vischi** (the *ex-parte* Applicant), **Renzo Quaciari** and **the Kilifi Land Registrar** (the Respondent herein). In the said suit, the 2nd Interested Party herein sought for declaratory

orders that he is the rightful and absolute proprietor of the suit property. The 2nd Interested Party has not informed this court the position of that suit.

54. It would appear that after Justice Ouko declined to injunct the Kilifi Land Registrar from making any entries in the register in H.C.C.C. No.69 of 2006, the Respondent herein proceeded to rectify the register in respect to the suit property by cancelling entry number 4 which, according to the *ex-parte's* present application, paved way for the Respondent to approve and register a transfer of the title from **William Chengo Mulewa and 3 Others** to the 1st Interested Party.

55. It is that act of cancellation of entry number 4 by the Respondent that the *ex-parte* applicant is challenging *vide* the current Judicial Review Application.

56. When the *ex-parte* Applicant moved the court under a certificate of urgency on 15th November 2007 for leave to commence judicial review proceedings and for leave to operate as a stay, the *ex-parte* Applicant did not mention the existence of **Malindi H.C.C.C. No. 69 of 2006** which was pending hearing and determination notwithstanding the fact that H.C.C.C. No. 69 of 2006 and the judicial review application were in respect to the suit property.

57. The *ex-parte* applicant did not inform the court that the parties in the judicial review application were the same parties in **Malindi H.C.C.C. No. 69 of 2006** and that the subject property was the same.

58. I have gone through the 2nd Interested Party's Supplementary Affidavit which is in Support of the current Application and I have not seen any response as to the reasons as to why the current Application was filed notwithstanding the fact that there exists a suit in this court that addresses similar issues.

59. It was the duty of the *ex-parte* Applicant to disclose to the judicial review court of the existence of the current suit. As was stated in the case of **THE OWNERS OF THE MOTOR VESSEL "LILIANS - VS- CALTEX OIL (KENYA) LIMITED C.A. NO. 50 of 1989**, in which the court cited with approval the case of **REPUBLIC -VERSUS- KENSINGTON EDMOND DE POLIGNA C (1917) 1 K.B. 486** which held as follows:

"It is well settled that a person who makes an *ex-parte* Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all materials facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it."

60. In **JUDICIAL REVIEW**, 3rd Ed, at page 352, Professor Michael Fordhan states as follows:

"A claimant for permission is under an important duty to make full and frank disclosure to the court of all material facts and matters. It is especially important to draw attention to the claim and in particular:

- a) **Any statutory restriction on the availability of Judicial Review;**
- b) **Any alternative remedy;**
- c) **Any delay or lack of promptness and so the need for extension of time."**

61. The Court in **Nipun Naginda Patel -Vs- AG: H.C. Misc Application No. 463/2005** adopted the above principles and discharged an *ex-parte* order that had been issued without the Applicant making a full and frank disclosure of the material facts.

62. In **Uhuru Highway Development Ltd. -Vs- C.B.K; H.C.C.C. No. 29 of 1995**, the Court considered

the issue of non-disclosure of material facts. The court adopted the decision of Viscount Reading C.J. In **King -Vs- G.C for customs purposes of Income Tax (1917) 1 KB** where at Page 495 he stated as follows:

“Before I proceed to deal with the facts I desire to say this, where an ex-parte application has been made to this court for a rule nisi or other process, if the court comes to the conclusion that the affidavit in support of the Application was not candid and did not fairly state the facts but stated them in such a way as to mislead the court as to the true facts, the court ought for its own protection and to prevent an abuse of its process, refuse to proceed further with the examination of the merits.”

63. In **THOMAS A. EDISON LTD. -VS- BULLOCK 15 ELR 679**

The court said as follows:

“Uberrimae fides is required, and the party inducing the court’s attraction in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the court acts in forming its Judgement is unfulfilled and the Order so obtained must almost invariably fail.”

64. The issues which the *ex-parte* applicant and the 2nd Interested Party have raised in this Application are both legal and factual and are likely to determine most of the issues in *HCCC. No. 69 of 2006* in which the “Mulewas” are also defendants without calling *viva voce* evidence.

65. Indeed, if this court were to grant the prayers being sought in the current Application, the import of such a decision would be to dispose of the 1st Interested Party the suit property before ascertaining by way of *viva voce* evidence whether firstly, the *ex-parte* applicant had any recognizable interests in the suit property, secondly, whether entry number 4 of the Green Card in favour of the 2nd Interested Party was an entry known in law and lastly whether the Mulewas transferred the suit property to the *ex-parte* Applicant or the 1st Interested Party or the 2nd Interested Party. A Title document is an end product and all circumstances must be investigated to determine its validity. That can only be determined upon the hearing of **HCCC NO. 69 of 2006** which is pending in this court.

66. I am therefore in agreement with the 1st Interested Party’s submissions that the *ex parte* Applicant is guilty of material non-disclosure for his failure to disclose to the judicial review court in Nairobi that **Malindi H.C.C.C. No. 69 of 2006**, in which he was the Plaintiff, was pending for hearing; that he had filed an application in H.C.C.C. No. 69 of 2006 to stop the Respondent from registering any further transactions or entries against the Title which application was dismissed; that **Malindi H.C.C.C. No. 78 of 2006**, in which the 2nd Interested Party was the Plaintiff and the *ex parte* Applicant, the 1st Interested Party, and the Respondents were Defendants.

67. I am certain that if all the above facts were brought to the attention of the judicial review court at the *ex-parte* stage, the Judge would not have granted leave to commence these proceedings. The *ex parte* Applicant has another appropriate remedy as against the Kilifi Land Registrar who is already a party in *Malindi H.C.C.C. No. 60 of 2006*.

68. The 2nd Interested Party has also raised the issue of whether the current Motion was filed within 21 days as prescribed under Order 53 of the Civil Procedure Rules.

69. The *ex parte* Applicant moved Justice Ang’awa for leave to file the judicial review proceedings. On 11th December, 2007, the judge granted the *ex parte* Applicant leave to commence the judicial review proceedings and for the leave to operate as a stay. The judge further directed that the substantive Motion to be filed within 21 days.

70. The *ex parte* Applicant filed the Motion on 14th January, 2008, way after 21 days had lapsed from the date the Ruling was delivered by Justice Ang'awa.

The *ex parte* Applicant and 2nd Interested Party did not address this issue at all.

71. I agree with the 1st Interested Party's counsel's submissions that when a court is exercising its judicial review jurisdiction, it is neither exercising civil nor criminal Jurisdiction. Order 53 of the Civil Procedure Rules is independent of the other provisions of the Civil Procedure Act and Rules and it is only governed by the provisions of sections 8 and 9 of the Law Reform Act.

72. Consequently, the *ex parte* Applicant cannot rely on the provisions of Order 50 Rule 5, though he has not attempted to do so, which provides for when time is deemed to stop running. I therefore find and hold that the current Application was filed after the expiry of 21 days, contrary to the express provisions of Order 53 Rule 3(1) of the Civil Procedure Rules and the same is a nullity.

73. The upshot of my findings is that the *ex parte* Applicant is guilty for material non-disclosure and the Motion dated 20th December, 2007 is a nullity having been filed out of time.

74. I dismiss the *ex parte* Applicant's Application dated 20th December, 2007 with costs to the 1st Interested Party.

Dated and Delivered at Malindi this 26th day of **April**, 2013.

O. A. Angote
JUDGE