



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

MISC. APP. 160 OF 2012.

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

**IN THE MATTER OF AN INTENDED APPLICATION BY THE NAMED EXPARTE
APPLICANTS FOR EXTENSION OF TIME TO SEEK LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE REGISTERED LAND ACT,CAP 300 LAWS OF KENYA.
THE LAW REFORM ACT, CAP 26 LAWS OF KENYA AND THE CIVIL
PROCEDURE RULES 2010.**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF MAGISTRATES COURT, BUSIA.....1ST RESPONDENT

THE BUSIA MUNICIPALITY

LAND DISPUTES TRIBUNAL.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

EXPARTE JOHN OCHOLA OWOKO

JOSEPH OGOLA OWOKO

AND

R U L I N G.

JOHN OCHOLAOWOKO and **JOSEPH OGOLA OWOKO** hereinafter referred to as 1st and 2nd Applicants, through Gacheche WaMiano Advocate filed this Notice of Motion dated 10th October, 2012 and brought under Order 50 Rule 6, Order 51 Rule 1, Order 53 Rule 2 of Civil Procedure Rules and sections 8 and 9 of Law Reform Act and section 3A of Civil Procedure Act for the following orders:

‘1. THAT this Honourable court be pleased to grant the Exparte Applicants herein extension of time to seek leave to apply for an Order of CERTIORARI to bring into this Municipality Land Disputes Tribunal the 2nd Respondent herein through Busia Municipality Land Tribunal Case No.11 of 2011, and subsequently adopted as judgment of the court in C.M Land Case No.74 of 2011 on the 3rd August 2011, purporting to deprive the Exparte Applicant the parcels of land known as L.R. NO.BUKHAYO/BUGENGI 3196 AND 3197 for the purpose of being quashed.

2. THAT this Honourable court be pleased to grant the Exparte Applicants herein extension of time to seek leave to apply for an order of PROHIBITION directed at the Respondents herein prohibiting them, whether by themselves, their servants, agents and or employees from alienating, transferring, consenting to, dealing with or otherwise adversely interfering with the Exparte Applicants inalienable, absolute and indefeasible property rights in respect of all those parcels of land known as L.R. NO.BUKHAYO/BUGENGI 3196 AND 3197 until further orders of this honourable court, and the interested parties herein to ensure compliance thereof.

3. THAT the Application for leave to apply for Judicial Review be deemed to have been duly filed within time.

4. THAT grant of such leave do operate as a stay of the judgment dated 3rd of August, 2011 or any intended transaction, transfer, alienation, consents, dealings or any adverse interference with the Exparte Applicants inalienable, absolute and indefeasible property rights in respect of all those parcels of land known as L.R. NO. BUKHAYO/BUGENGI/3196 AND 3197 pending the hearing and determination of the matter herein or until further orders of this honourable court.

5. THAT costs of this Application be provided for.’

That the Exparte Applicants instructed their counsel to apply for leave to apply for Judicial Review within time but the said counsel had the Application registered, assessed but never filed.

- That the decision of the Tribunal was arrived at without affording the Exparte Applicants herein an opportunity to be heard contrary to the sacred tenets of the rules of Natural Justice.
- That the Tribunal in entertaining the said case, acted ultra-vires the Registered land Act Cap 300, Laws of Kenya and thus the decision reached thereof is null and void and of no legal consequences whatsoever.
- That the Tribunal had no jurisdiction to entertain the said case as it did, on the basis of the relevant law and in view of the express provisions of the Land Disputes Tribunal Act No. 18 of 1990 (now repealed).
- That the said decision of the Respondents herein are highly suspect, flawed and fail the test of due diligence, natural justice, and the reasonable test as the law demands.

That the application is misconceived.

- That no application for leave was ever filed within the mandatory 6 months period and the period cannot be extended.
 - That the court has no jurisdiction to entertain the application.
1. That the application is an abuse of the court process intended to prejudice the intereste4d

party and delay the finalization of Busia CM Land Case No. 74 of 2011.

- That the matters raised in support of the application are in

Both Mr. Gacheche and Fwayaadvocates appeared before the court during the hearing of the application and made their submissions restating the contents of the papers filed in respect of their clients.

That Order 50 Rule 6 of the Civil Procedure Rules deals with the power of the court to enlarge time for doing any act or taking any proceedings under rules.

- Sections 8 of the Law Reform Act do not seem to have any relevance to this application while section 9 of the same Act makes provisions for rules of the court. Sub section 3 of the said section requires that applications for leave to apply an order of certiorari be filed not later than 6 months after the order complained of was made. The sub section is in the same wording as Order 53 Rule 2 of the Civil Procedure Rules.

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1. **MOTOKAA NTHAUTHO – APPLICANT**

JOSEPH NJERU & 3 OTHERS RESPONDENTS.

JAMES GITHINJI KIARA –VS- WILLIAM WACHIRA MWANIKI (2005) eKLR, where the court referred to Order L111 of CPR and held as follows:” This rule is almost identical with section 9 (3) of the Law Reform Act (Cap 26) which provides similar provision. It is apparent that the power of the court to extend time to apply for orders of certiorari after 6 months from the time the action complained of, has been taken away by this provisions which are mandatory provision;the court has therefore no powers to extend time if the application for leave is not made within the 6 months provided”.

3. **“ Often times deserving litigants are shut out because of the operations of Order L111 Rule 2**

Nyeri HCC. Misc. App. No. 112 of 2008

-vs-

The provisions of Order L111 Rule 2 of the then Civil Procedure Rules is in the same terms with Order 53 Rule 2 of the Civil Procedure Rules 2010 and agree with the position taken by the Honourable Judges in the cases cited above. The position of the law is as pronounced by the court of appeal in the case of Wilson Osolo referred to above and this court has no jurisdiction to extend the time set by the statute (Law Reform Act) of 6 months within which to file for leave. It matters not that the applicant may have very good grounds explaining the challenges that made him or her not to move the court within the said period.

6. That the requirement of seeking leave to file for substantive application under order 53 rule 2 of the Civil Procedure Rules is on applicable in respect of orders of certiorari. It does not include applications for orders of prohibition. The rule provides as follows:

That prayer 3 of the application is misplaced in that the court cannot be expected to take the application for leave to apply for judicial review, which is annexed to the application for extension of time to file for leave for the substantive application, to deemed as duly filed at this stage. This especially so when the court has found as it has done in this case that it has no jurisdiction to extend time to file for application for leave in view of the mandatory provisions of section 9 (3) of Law Reform Act.

- From the foregoing, the Exparte Applicant’s application dated 10th October, 2012 is without merit for reasons shown above and is hereby dismissed with costs.

JUDGE.

19TH JUNE, 2013.