



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**MISC. APPLICATION CASE NO. 322 OF 2005**

**IN THE MATTER OF AN APPLICATION BY ABSOLOM KISUTIA MASIBO**

**TO APPLY FOR AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990**

**BETWEEN**

**REPUBLIC..... APPLICANT**

**AND**

**THE CHAIRMAN KANDUYI LAND DISPUTES TRIBUNAL ..... RESPONDENT**

**EXPARTE**

**ABCOLOM KISUTIA MASIBO..... APPLICANT**

**VERSUS**

**WYCLIFFE WANYAMA SIMIYU ..... INTERESTED PARTY**

**RULING**

The applicant has moved this court under Order 42 Rule 35 (2) of the Civil Procedure Rules and Section 3 & 3A of the Civil Procedure Act seeking the court to vacate its orders granting leave to the exparte applicant to commence judicial review proceedings. The applicant argues there has been non-compliance with the court's ruling. He also prayed for this matter to be deemed closed. The application is supported by the grounds on the face of it and on the affidavit of Wycliffe Wanyama Simiyu Masibo.

The present applicant is the Interested Party in the motion while the Respondent was the exparte applicant. For ease of reference, I will refer to them as Applicant and Respondent only. The Applicant argues the Respondent has not filed the substantive motion within 21 days and is therefore enjoying the stay of execution unlawfully. In one of the grounds on the face of application, he states the Respondent has not moved the court expeditiously. The supporting affidavit also contains similar sentiments expressed on the grounds on the face of the application.

The Respondent has opposed the application by filling a replying affidavit. The gist of their opposition is

that his advocates on record was never informed of the outcome of the ruling. This matter was previously handled by Muchelule J. before transfer. He urged that mistake of his advocate should not be visited on him. The Respondent further stated he has a good case and the court has discretion to extend time.

I have perused the record which reveals the following; on 8th November 2011, parties appeared before Muchelule J and agreed to file and exchange written submissions. On 10th October 2012, the matter was transferred to the Environment and Land court in the presence of Mr. Areba for interested party and Ms. Masibai for exparte applicant. It is therefore not true as put by the Respondent that his counsel was not aware of the transfer to the Environment & Land Court.

Subsequently this matter was fixed for mention before me by the applicant for 10th December 2012. Mr. Onyando held brief for Areba for the interested party while there was no appearance for the exparte applicant. An order was made for the interested party (applicant) to serve the exparte applicant (Respondent) with ruling date fixed for 18.12.12. When the matter came up for ruling, none of the parties appeared and I delivered it in their absence and referred the file back to the registry.

In the present application, the applicant has not mentioned that he served the Respondent with the date of 10.12.12 when the matter came up or the date of 18.12.12 fixed for ruling. However this is not to exempt the Respondent from exercising due diligence in following up on his application. The Respondent said he learnt of the ruling when this application was served on his advocate.

This application was filed on 17th March 2013 and was adjourned twice at the instance of the Respondent. Yet in all these times, they have not moved the court in any way in attempting to execute the ruling of 18th December 2012. There is a valid reason for the applicant in feeling prejudicial with the grant of leave operating as stay. The law permits an interested party to challenge the stay granted exparte. In my view this would have been one such challenge that is merited for this court's consideration. However the applicant did not seek the order for vacating stay but prayed for vacating orders granting leave.

In my view, Leave is only valid for 21 days for purposes of filing substantive motion. Once the leave is granted, the court is functus officio. The applicant can only challenge the validity or otherwise of the leave granted after the Respondent takes any further steps. If no steps are taken within the stipulated period, in my opinion, there ceases to exist such an order. In any event order 42 r 35(2) does not apply to judicial review applications.

The case law of **R. Vs. ICPSK Nbi. Misc. case No. 322 of 2008** cited by the applicant is not relevant in this instance, as it refers to computation of time when applying for leave for judicial review. In the present case, the court already found the leave application was made within the stipulated time. In conclusion, I do not grant prayer 1 of the application. I will also not grant prayer (2) as deeming a matter closed is not a mandate of this court but by operation of law. You cannot extinguish rights of parties in filing any necessary applications within a suit that is concluded. Costs shall be in the cause.

**RULING DATED, SIGNED, READ AND DELIVERED** in open court this 29th day of August 2013.

**A. OMOLLO**

**JUDGE.**