



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 198 of 2011

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY
JUDICIAL REVIEW ORDERS OF
PROHIBITION AND CERTIORARI**

AND

IN THE MATTER OF: MIREMA QUARRY ON L.R.NO.11478/NAIROBI

AND

**IN THE MATTER OF: THE NATIONAL ENVIRONMENTAL MANAGEMENT AND
CO-ORDINATION
ACT (EMCA) OF 1999**

AND

**IN THE MATTER OF: THE ENVIRONMENTAL (IMPACT
ASSESSMENT AND AUDIT)
REGULATIONS, 2003**

AND

**IN THE MATTER OF: THE INTERPRETATION AND GENERAL
PROVISIONS ACT CAP.2 OF THE LAWS
LAWS OF KENYA**

AND

IN THE MATTER OF: PURPORTED RESTORATION ORDER
CONTAINED IN THE LETTER DATED
4TH AUGUST 2011

BETWEEN

ELIZABETH NJERI HINGA
ANTHONY LAWRENCE HINGA (*Suing as the*

Administrators of the Estate of the Late

BERNARD NJENGA HINGA.....APPLICANTS

VERSUS

NATIONAL ENVIRONMENTAL MANAGEMENT
AUTHORITY.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

HINGA RESIDENTS WELFARE ASSOCIATION.....INTERESTED PARTY

EXPARTE

ELIZABETH NJERI HINGA
ANTHONY LAWRENCE HINGA

RULING

By way of a Notice of Motion dated 12th April 2012 and filed on 13th April 2012, the Exparte Applicants (*hereinafter referred to as the Applicants*) moved this court seeking extension of time within which to file a notice of motion to commence Judicial Review proceedings seeking the remedies of Prohibition and Certiorari.

The application is expressed to be brought under Order 50 Rule 6, Order 51 Rule I of the Civil Procedure Rules 2010 and the inherent powers of the court.

The application is supported by the affidavit sworn by the applicants' counsel Okindo D. Obed and a further affidavit sworn by Elizabeth Njeri Hinga one of the applicants herein. It is premised on the following grounds:

- (a) THAT the leave granted by Hon. Lady Justice Karanja, J (as she then was) on 22nd August expired due to counsel's oversight to file the Notice of Motion within 21 days from the date of grant of such leave.
- (b) THAT the mistake of counsel should not be visited upon an innocent litigant thus the need to hear the application filed herewith on a priority basis and appropriate orders be made.

(c) THAT it is to the interest of justice that the orders sought herein are granted to enable parties herein to substantively address the issues arising herein in the substantive motion to be filed.

(d) THAT it is counsel's humble prayer that this application be allowed by this Honourable Court to avoid punishment of the Applicants for his own mistake of which he is remorseful.

The application is opposed by the 1st Respondent and the Interested Party but is not opposed by the 2nd respondent. The 2nd respondent did not file either a replying affidavit or grounds of opposition. The 2nd respondent did not also attend the court for the hearing of the application on 20th July 2012 though hearing date had been fixed by consent of all the parties.

The 1st respondent opposed the application through grounds of opposition filed on 25th April 2012 and a replying affidavit sworn by Benjamin Langwen the 1st respondent's director in-charge of compliance and enforcement. The interested party opposed the motion through grounds of opposition filed on 23rd April 2012.

The application was argued before me on 20th July 2012 by learned counsel for the Applicant Mr. Okindo, Mr. Gitonga for the 1st respondent and Mr. Kago for the interested party.

The brief background against which the application was filed is that the exparte applicants were granted leave to commence judicial review proceedings by this court (J. Wanjiru Karanja) on 22nd August 2011 but no time limit was given within which the substantive motion commencing the contemplated judicial review proceedings was to be filed.

Subsequent to the grant of leave, apparently on the assumption that the applicants had filed the substantive motion, the 1st and 2nd respondents filed preliminary objections challenging the validity of the judicial review proceedings commenced by the applicants herein and also questioning the court's jurisdiction to entertain the same in view of the existence of an alternative remedy in the form of a statutory appeal mechanism provided under Section 129 of the Environmental Management and Coordination Act of 1999 (EMCA) which the applicants had not utilized prior to seeking and obtaining leave to commence judicial review proceedings.

While ruling on the two preliminary objections, the court discovered from the court record that the applicants had not in fact filed a substantive motion to commence judicial review proceedings and leave granted on 22nd August 2011 had already expired. As leave had already expired without being utilized by the exparte applicants, the court made a finding that there were no judicial review proceedings pending determination before it and ordered that the file be closed.

I have considered the application, the affidavits sworn in support thereof, the grounds of opposition and the replying affidavit filed by the 1st respondent in opposition thereto and the submissions made by the advocates on record for the respective parties.

Though I agree with the submissions made by Mr. Kago for the Interested Party that the judicial review jurisdiction is a jurisdiction *sui generis* which is neither civil nor criminal and that therefore the Civil Procedure Act or Rules made under it except Order 53 thereof are not applicable to judicial review proceedings, I have noted that besides grounding the application on Order 50 Rule 6 and Order 51 Rule I of the Civil procedure Rules, the applicants have also invoked the inherent powers of the court. Under its inherent powers, the High Court can hear and determine any matter before it in order to do justice to the parties before it. I therefore find that the court has jurisdiction to hear and determine the application filed by the applicants in this case.

Mr. Kago for the interested party also submitted that this court does not have jurisdiction to extend time within which to file the substantive Notice of Motion if the notice of motion is not filed within the

21 days prescribed under Order 53 Rule 3(1) of the Civil Procedure Rules from the date leave is granted because Order 53 Rule 3(1) is in mandatory terms.

To counter Mr Kago's submissions, Mr. Okindo submitted that the requirement to file the substantive motion within 21 days after grant of leave is a procedural technicality which can be disregarded under Article 159(2)(d) of the Constitution.

Order 53 Rule 3(1) of the Civil Procedure Rules states as follows;

“(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.”

I have considered the two rival submissions on the interpretation of Order 53 Rule 3(1) of the Civil Procedure Rules (CPR). I find that though Order 53 Rule 3(1) of the CPR is couched in mandatory terms, it is part of subsidiary legislation under the Civil Procedure Act though made under powers donated by Section 9 of the Law Reform Act. It is in essence procedural law which regulates the procedure and the time within which judicial review proceedings should be commenced. The substantive law governing judicial review proceedings is found in the Law Reform Act.

It is therefore my finding that since Order 53 Rule 3 (1) is not part of the substantive law governing the conduct of judicial review proceedings, this court can exercise its discretion to extend time within which to file a substantive motion for judicial review even after expiry of the 21 days prescribed under Order 53 Rule 3 (1) under its inherent powers if it is satisfied that it is fair and just to do so. The court must however exercise that discretion judiciously on the basis of sound legal principles and on the evidence before it. I hasten to add that the court's discretion in such applications must be exercised cautiously and only when it is necessary to meet the ends of justice. In my opinion, the court's discretion should only be exercised in favour of a party who demonstrates that he has good, credible, cogent and sufficient reasons to account for his/her failure to file the motion within the time allowed by the law.

In this case, the reason given by Mr. Okindo for failure to file the Notice of Motion within the prescribed time is that it was an oversight on his part after he allegedly devoted all his energies towards defending the preliminary objections raised by the respondents in this case. I must say that I find the reason offered by Mr. Okindo rather weak and unsatisfactory. In my view, the simple task of filing a notice of motion can be performed by any other person including clerks in the Law firm representing the applicants in this case and did not need to be performed by Mr. Okindo personally. Secondly, It is important to note that the 2nd respondent filed its preliminary objection on 4th of October 15, 2011 after period within which the notice of motion should have been filed had expired.

Thirdly, the applicants have not given any reason to explain their delay of about one year in moving the court to seek extension of time within which to file the substantive motion. This is despite the fact that the preliminary objections revolved around a challenge on the validity of judicial review proceedings the respondents assumed the applicants had already commenced and in ordinary circumstances, such a challenge would have reminded counsel to check and confirm whether or not the substantive motion had been filed and if not take appropriate action.

Taking all factors into account, I am satisfied that the reason given by the applicants in this case to explain failure to file the substantive motion within the time prescribed by the law is not credible or satisfactory. It cannot form the basis of the exercise of the court's discretion in favour of the applicants especially when it is apparent that the applicants or their counsel have not been diligent in the way they have conducted this matter.

Secondly, it is noted that after the court ordered that the applicant's case be closed as there were no proceedings pending the court's determination, the applicants did not thereafter file any application seeking to reopen the applicant's case or seeking a review and/or the setting aside of those orders. I have

looked at the application before me and the granting of such orders is not included in the prayers sought in the application.

Since no orders have previously been issued by the court reopening the applicants' case and no such orders have been sought in the instant application and considering that the court cannot grant orders not prayed for in the application, the applicant's case technically remains closed and it would not be prudent or appropriate for the court to grant the orders sought in the application in a case that is for all practical purposes closed.

Finally, it is my view that even if the orders sought are not granted, the applicants will not suffer any prejudice since they will not be left without a remedy.

The applicants still have the alternative remedy of the statutory appeal mechanism provided under Section 129 of the Environmental Management and Coordination Act which in my opinion offers a more convenient and effective avenue for the resolution of the dispute between the parties in this case. The Constitution of Kenya at Article 159(2)(c) enjoins the court to encourage and promote alternative forms of dispute resolution and considering the nature of the issues in dispute between the parties as can be discerned from the pleadings and documentation in the court record, this is one of the cases in which the court should promote alternative dispute resolution by encouraging the parties to utilize the statutory appeal process provided under the Environmental Management and Coordination Act.

For all the foregoing reasons, I am persuaded to find that the applicant's Notice of Motion is not merited and it is hereby dismissed with no orders as to costs. Each party to bear its own costs.

DATED, SIGNED and DELIVERED at Nairobi this **12th** day of **October 2012**.

C. W. GITHUA
JUDGE

In the presence of:

Court Clerk - Florence

Mr. Matwere holding brief for Mr. Okindo for Exparte Applicants

N/A for 1st Respondent

N/A for 2nd Respondent

Mr. Kago for the Interested party