REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)
MISC. CIVIL APPLICATION NO. 214 OF 2006

IN THE MATTER OF AN APPLICATION BY TEITA ESTATES LIMITED FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

-AND-

IN THE MATTER OF THE MWATATE LAND DISPUTES TRIBUNAL

-BETWEEN-

TEITA ESTATES LTD.....APPLICANT/1ST RESPONDENT

-AND-

MWATATE LAND DISPUTES TRIBUNAL.....2ND RESPONDENT

SINGILA MAJENGO GROUP.....INTERESTED PARTY/APPLICANT

RULING

The Interested Party came before the Court by Notice of Motion dated **16th March, 2010** and brought under Orders LIII (rule 3) and XVI (rule 4) of the Civil Procedure Rules, and s. 3 of the Civil Procedure

Act (Cap. 21, Laws of Kenya). The applicant had one substantive prayer: "that this honourable Court be pleased to dismiss this suit". The supporting grounds were stated as follows:

(i) leave had been granted to the respondent on **10th March, 2006,** to apply for the judicial review orders of certiorari and prohibition, the leave so granted to operate as stay of proceedings then pending before 2nd respondent;

(ii) as at the date of this application (**16th March, 2010**), the primary applicant had filed no motion as had been allowed by the Court, with the consequence that "the applicant herein has continued to suffer injustice in this matter";

(iii) the actions of the first respondent are "tantamount to an abuse of the process of the Court";

(iv) it is "only fair and just that the orders for leave so granted be set aside and the application for leave be dismissed with costs";

(v) "it would be in the interest of justice and [of the] expeditious determination of this matter that the same be put to rest".

Evidence to support the application is set out in the affidavit of **Mnjala Mwaluma**, the secretary of the applicant, sworn on **16th March, 2010**. The deponent avers that the plaintiff had filed suit in **February, 2007** [HCCC No. 103 of 2007] seeking temporary orders of injunction pending the hearing of the judicial review application *inter partes*; and after the main applicant's prayer for injunction were granted, that applicant took no further step in the prosecution of the matter. When the matter came up before **Mr. Justice Njagi** on **26th June, 2008** the temporary orders of injunction were extended for a period of two months, to provide an opportunity for the parties to reach a settlement. But the plaintiff/applicant then took no action to prosecute the application. It is noted that the applicant/1st respondent's judicial review matter was filed by Notice of Motion on **28th March, 2006.**

The deponent stated his belief in the truth of counsel's advice, that "the orders granted by the **Hon. Mr. Justice Maraga** for leave to apply for an order of certiorari has since lapsed".

On **10th May, 2010** M/s. Daly and Figgis, Advocates filed a notice of preliminary objection to the Notice of Motion herein; they challenged the Interested Party's application contending that it was fatally defective: so defective because while it comes under Order 53, rule 3 and Order 16, rule 4 of the applicable Civil Procedure Rules, the said Order 53, rule 3 and Order 16, rule 4 do not make provisions for the dismissal of judicial review proceedings for want of prosecution. It was contended that it is trite law, judicial review proceedings are proceedings *sui generis* and is not subject to orders such as those sought by the applicant herein. It was contended that only Order 53 of the Civil Procedure Rules, but not the remaining provisions of those rules, applied to judicial review proceedings. The respondent raised the objection that the application was "an abuse of the process of this Honourable Court as it undermines the sanctity and gravity of the judicial review proceedings…" The objector contended that the application "has been brought … *mala fide* as the …applicant is aware of the fact that there are pending negotiations to have this suit amicably settled", and "any orders to dismiss this suit for want of prosecution will have the effect of frustrating the critical negotiations between the parties herein, the Government and 91 other parties in **High Court Civil Case No. 103 of 2007** and **High Court Civil Suit No. 352 of 1998,** which suits involve the same subject-matter and have now been consolidated".

A replying affidavit was filed for the 1st respondent, sworn by one **Phillip Kyriazi**, that party's director,

on **9th July, 2010.** The depositions, in summary, ran as follows:

(i) the pending judicial review application was occasioned by the decision of Mwatate Land Disputes Tribunal (the respondent), and by the spectacle of a squatter invasion on the property;

(ii) the record shows the applicant to have been diligent in the prosecution of the application, save that the matter was stood over generally to allow the parties including the Government, and squatters living on the land, and the local leaders, to work towards an amicable settlement;

(iii) "high level negotiations" then began and have already reached an advanced stage, with the *ex parte* applicant being requested to sell the portion of its property occupied by the squatters to the Government – so the same may be allocated to the squatters;

(iv) bundles of documents including correspondence are on record showing the significant steps taken in the said negotiations;

(vi) as the applicant herein is well aware of the details of the negotiations in progress, the instant application is not lodged in good faith, and is apt to disrupt the process in hand;

(vii) dismissing the judicial review matter would affect the on-going negotiations negatively, and it is in the interest of justice that the application for dismissal, by the applicant herein, be dismissed.

When the application came up for hearing on **12th July, 2010** learned counsel **Mr. were** represented the Interested Party/applicant, while learned counsel **Mr. Kibet** represented the *ex parte* applicant/respondent.

Mr. Were urged that the pending judicial review proceedings be dismissed, as the *ex parte* applicant had taken no steps to prosecute; the matter had last been in Court, before **Mr. Justice Njagi**, on **26th June, 2008** when temporary orders then in force had been extended for two months, but thereafter no step to prosecute had been taken. This, counsel urged, was untenable, for "the law is quite clear, litigation must come to an end". Counsel urged that the *ex parte* applicant, when once he secured a stay order, "went to sleep, enjoying that order". Counsel discounted the *ex parte* applicant's contention that some important negotiations had been in progress justifying the non-prosecution of the judicial review matter.

Counsel invited the Court to apply its inherent powers to dismiss the judicial review application, so that "parties can enjoy the fruit of the Tribunal's decision".

Mr. Kibet submitted that it was improper to seek the dismissal of the judicial review proceedings on grounds of non-prosecution, while relying on the ordinary provisions of the Civil Procedure Rules – since such proceedings were special and were founded on Order 53 of those Rules, and otherwise, on the Law Reform Act (Cap. 26), ss.8 and 9. Counsel also urged that it was improper for the Interested Party/applicant to seek reliance on the Court's inherent powers – for such powers would be interpreted restrictively, and the applicant had to show a specific legal provision enabling him to seek the **dismissal of judicial review proceedings**.

Relying on the depositions on record, **Mr. Kibet** submitted that the *ex parte* applicant had not shown unwillingness to prosecute, the Court record showing that the proceedings had been stood over generally to enable out-of-Court negotiations to take place. It was urged that the path of prosecution of the judicial

review matter had been rendered complicated by a squatter factor which was clearly manifested in two separate civil suits, **HCCC No. 103 of 2007** and **HCCC No. 352 of 1998** which had to be consolidated; the *ex parte* applicant was willing to indulge the squatters, following the conduct of negotiations which have taken some time. It was counsel's prayer that the judicial review proceedings be still kept stood-over-generally, to enable the on-going negotiations to proceed, in the interest of all the parties. Counsel urged that if the Interested Party/applicant would not agree to such a position, then "the [instant] application … be dismissed, and the *ex parte* applicant … allowed to set down the application for hearing at the earliest [opportunity]."

Mr. Kibet called in aid several authorities, to support his submission that the Interested Party had failed to show a proper legal basis for the dismissal of a judicial review matter.

In **Holbert D. Njoroge v. Joseph W. Kamau & 3 Others,** Nairobi H.C. Misc. Application No. 1356 of 2003 [2006]eKLR (**Wendo, J.**), the following pertinent passage appears:

"[A] … ground of opposition is that the Notice of Motion that is pending before this Court is filed pursuant to provisions of Order 53 [of the] Civil Procedure Rules and that Order 53 which is an exclusive set of Rules does not provide for [the] dismissal of a suit as prayed.

"I have considered the application before me, [and] the affidavits filed and submissions [made] by both counsel. I do agree with counsel for the respondent, that the application that is sought to be dismissed is brought pursuant to Order 53 [of the] Civil Procedure Rules. Order 53 … is said to be a special jurisdiction whose powers are donated by Sections 8 and 9 of the Law Reform Act. In the case of *Republic v. Hotel Kunste Limited* [1995] E.A. 234 the Court of Appeal held that it is a special jurisdiction and when the Court is exercising its jurisdiction under that order, it is neither exercising [a] civil nor criminal jurisdiction ….

"In another case, *Republic v. Communications Commission of Kenya & Others,* Civil Application No. 175 of 2000, the Court of Appeal again held that when exercising jurisdiction under Order 53 [of the] Civil Procedure Rules, one cannot invoke provisions of the Civil Procedure Rules. In that case an application had been brought to strike out the proceedings under Order VI [of the] Civil Procedure Rules. The Court held that the application should have been brought under the inherent jurisdiction of the Court.

"I find that this being an application for judicial review, the applicant cannot invoke provisions of Order 16 [of the] Civil Procedure Rules. He should have filed *an application for setting aside of the leave and order of stay,* under the Court's inherent jurisdiction under Order 53 [of the] Civil Procedure Rules. This Court has not been properly moved for the grant of the orders sought and, on that ground alone, the Court orders the application … [to be] struck [out] with costs".
The foregoing passage comprehensively expresses the principle more cursorily set out in yet other cases cited: **Peter Gitahi Kamaitha v. Secretary, Public Service Commission and Two Others**, Nyeri H.C. Misc. Civil Application No. 22 of 2009 [2010]eKLR (**Makhandia, J.**); **Republic v. The Land Disputes Tribunal, Maragua District and Another**, Nairobi H.C. Misc. Application No. 1145 of 2002 [2010]eKLR (**Onyancha, J.**).

Learned counsel, **Mr. Were** did not contest the consistent principle emerging from the case law; but implicitly, he was asking this Court to focus on the more practical question, and find in favour of his client; he signally responded: *"I will only ask one question: If there is no provision for dismissing [a] judicial review [matter], then what will happen if [it is] not prosecuted at all?"*

Consistency and *regularity* in judicial decision-making must be seen as a fulfilment of goals of justice, insofar as it enables parties to found their cases upon known, duly-considered criteria; and, relying on the principle set out by my learned sister, **Justice Wendo** in **Holbert D. Njoroge v. Joseph W. Kamau & 3 Others**, I think the answer to **Mr. Were's** question, in the context of the current law, is that he has recourse in reverting to the original **leave** which had authorized the *ex parte* applicant to move the Court for judicial review orders (and this was done on **28th March, 2006**); if the leave is set aside even at a rather belated stage, this would undercut the substantive motion for judicial review, which would, consequently, become null. In making such an application, the complainant would be invoking the inherent powers of the Court, within the framework of Order 53 which governs judicial review applications.

On that basis it appears that there will, in this case, be no basis for entertaining the Interested Party's Notice of Motion of **16th March, 2010.**

But I have taken care to examine the proceedings as recorded on file, as well as the several papers on record. Leave to file judicial review proceedings was granted by **Mr. Justice Maraga** on **10th March, 2006**, and the leave so granted was to operate as stay on the hands of Mwatate Land Disputes Tribunal. Subsequently the matter (the **main** motion)came up, on **22nd November, 2006** before **Mr. Justice Sergon**, and, by **consent**, he stood it over generally. It was again stood over generally when it came up before **Maraga, J** on **19th July, 2007**. On **3rd April, 2008** the matter came up before **Mr. Justice Njagi**, and the record of that day provides an impression of the underlying circumstances; the parties were represented by counsel, and **Mr. Oddiaga** for the Interested Party stated thus:

"We took the liberty to fix the date because this is a very sensitive matter".

The learned Judge on that occasion, in standing-over the matter generally, stated:

It is evident that this matter cannot proceed today. It is accordingly stood over generally. Today's costs will be in the cause".

Thereafter, this matter came within my docket; and the first major item of agenda was the Interested Party's instant application.

Does the *ex parte* applicant stand to blame for the non-prosecution, to-date, of the judicial review motion of **27th March, 2006?** Such does not emerge from the records kept by the Judges who have handled the case. I have also seen the bundle of correspondence attached to the *ex parte* applicant's replying affidavit: letter from the District Land Adjudication & Settlement Officer, Taita District to the *ex parte* applicant, dated **25th November, 2009**; from the *ex parte* applicant to surveyors, dated **28th September, 2009**; from the Director of Land Adjudication and Settlement to the *ex parte* applicant's advocates, dated **24th September, 2009**; from the Director of Land Adjudication and Settlement to the Land Adjudication and Settlement Officer at Wundanyi, dated **4th November, 2009** and copied to the *ex parte* applicant's advocates.
This trail of correspondence gives me the sense that the year 2009, in particular, was marked by much activity on the ground, aimed at settling the primary land-holding issue at the *locus in quo* which led to the commencement of judicial review proceedings; and learned counsel **Mr. Kibet** has represented in Court that there are active negotiations and arrangements to solve the basis of the gravamen in the judicial review matter.

Taking judicial notice of the complexity of the squatter phenomenon, and recognizing what it entails at the *locus in quo*, this Court regards it as eminently reasonable that the *ex parte* applicant should engage in protracted negotiations and arrangements, to solve the problem. There is, therefore, justification in the delay in prosecuting the judicial review application, and, in these circumstances, the Interested Party's application for the dismissal of that application is not reasonable.

I will make *orders* as follows:

(1) The Interested Party's application by Notice of Motion dated 16th March, 2010 is disallowed.

(2) The *ex parte* applicant's judicial review motion of 27th March, 2006 shall continue to be stood over generally.

(3) The Interested Party shall bear the costs of the instant application.

DATED and **DELIVERED** at **MOMBASA** this **28th day of January, 2011.**

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***
Court Clerk: ***Ibrahim***
For the Interested Party/Applicant: ***Mr. Were***
For the Ex parte Applicant/Respondent: ***Mr. Kibet***