



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 378 OF 2010

IN THE MATTER OF THE PHYSICAL PLANNING ACT NO. 6 OF 1996

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TRANSALLIED LTD

AND

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

TRANSALLIED LTD APPLICANT

AND

CITY COUNCIL OF NAIROBIRESPONDENT

AND

NORTH LAKE LTD INTERESTED PARTY

RULING

On 24th December, 2010 this court granted leave to the applicant to apply for an order of prohibition, prohibiting the respondents, servants, agents or anyone claiming under them from interfering, harassing, demolishing or in any way tampering with the applicant's business on L.R. No. 330/351 and 330/377, Thomson Estate on James Gichuru Road. The leave granted was to operate as a stay of any further action by the respondent relating to demolition or interference in any way whatsoever with the applicant's aforesaid business, pending hearing of the substantive motion. The court further directed that the substantive motion be filed and served within 21 days from 24th December, 2010. The matter was to be mentioned on 24th January, 2011 for further orders and/or directions.

Come the 24th day of January, 2011 the applicant's advocate did not attend court, only the advocates for the respondent and interested party were present. The said advocates told the court that they had been served with the extracted orders issued on 24th December, 2010 but the substantive motion had not been filed as directed by the court. They urged the court to vacate the orders that were issued on 24th December, 2010. The court observed that the leave that had been granted had lapsed and vacated the ex parte orders which had been issued in favour of the applicant.

On 25th January, 2011 the applicant filed an application seeking to vacate the orders made on 24th January, 2011 and reinstatement of the earlier orders made on 24th December, 2010. The application was supported by an affidavit sworn by Mr. Simon Gitonga advocate. He stated that the brief had been given to him by the firm of Kounah and Company advocates and upon grant of the orders on 24th December, 2010 he did a brief and forwarded the file to the said firm but did not diarise the mention date. He further stated that he advised the firm of Kounah and Company that pursuant to **Order 50 Rule 4** of the **Civil Procedure Rules** time was not running from 21st December to 13th January. He advised them that the deadline for filing substantive motion was 21 days after 13th January, 2011. Regarding court attendance on 24th January, 2011, counsel stated that he inadvertently forgot about the same.

The respondent and the interested party opposed the said application and stated that the provisions of **Order 50 rule 4** do not apply to judicial review proceedings which are exclusively governed by **Order 53** of the **Civil Procedure Rules**. This meant that the applicant was under an obligation to file his motion by 14th January, 2011.

Counsel for the parties made brief submissions in support of their respective clients' affidavits and I have duly considered the submissions.

The orders made on 24th December, 2010 were very clear that–

“The substantive motion should be filed and served within 21 days from the date hereof.”

That being the case, the applicant was under an obligation to file and serve his Notice of Motion by 14th January, 2011. I do not agree with Mr. Gitonga's submission that he thought and/or believed that the 21

days were to run from 13th January, 2011. If that were the case there would have been no point of mentioning the matter on 24th January, 2011. It was the responsibility of counsel to make proper notes and attend court as required.

The applicant, having failed to file and serve the substantive motion within the stipulated period of time, and having failed to attend court on 24th January, 2011 the orders granted on 24th December, 2010 had to be vacated. I am not persuaded that there is any valid reason to necessitate lifting of this court's orders issued on 24th January, 2011. Consequently, the applicant's application is dismissed with costs to the respondent and interested party.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Mr. Gitonga for the ex parte applicant

Mr. Okuta holding brief for Mr. Mburugu for the respondent

Mr. Otieno holding brief for Mrs. Shaw for the Interested party