



Opote & another v Registrar; Wawire & another (Interested Parties) (Judicial Review 7 of 2022) [2022] KEELC 3605 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
JUDICIAL REVIEW 7 OF 2022
E ASATI, J
JULY 21, 2022
FORMERLY KAKAMEGA JUDICIAL REVIEW NO 2 OF 2014**

BETWEEN

HESBORNE ALLAN OPOTE 1ST APPLICANT

FANICE KADAR MUDEGU 2ND APPLICANT

AND

THE LAND REGISTRAR RESPONDENT

AND

ISAAC WAWIRE INTERESTED PARTY

MARITA NAMBILO INTERESTED PARTY

RULING

Background

1. This ruling is in respect of the notice of motion application dated May 10, 2022 stated to be brought pursuant to the provisions of order 45 rule 1 of the [Civil Procedure Act](#). The application seeks for orders that: -
 - a. That this honourable court does review and set aside orders issued on 16/7/2019.
 - b. That the applicant be substituted in place of Hesborne Allan Opotewho passed on 15/10/2021
 - c. That the suit be set down for Judgment as submission had been filed.
 - d. That costs of this application be provided for.



2. The application is based on the grounds on the face of the application and the contents of the supporting affidavit sworn by the applicant Fanice Kadar Mudeguon May 10, 2022.
3. The application is unopposed.
4. A brief background to the application, as i can gather it from the record, is that this matter is a judicial review brought pursuant to the provisions of order 53 of the Civil Procedure Rules and filed on February 28, 2014 in the High Court at Kakamega as JR No. 2 of 2014. The record shows that on 11/3/2014 the court granted leave and ordered that the applicant files the substantive Judicial Review application within 21 days from 11/3/2014. The record further shows that the substantive application vide notice of motion dated March 25, 2014 was filed on March 26, 2014 which was within the time lines given by the court. The application was opposed vide the replying affidavits of Isaac Wawire and Marita Nambala the interested parties herein both sworn on September 19, 2014 and filed in court on September 23, 2014.
5. On 14/4/2014 the court gave directions that the judicial review application proceeds by way of written submission. The record shows that written submissions dated September 25, 2014 were filed on the same date by the firm of Aboge & Company Advocates on behalf of the applicant. Thereafter the matter came up for mention on 25/9/2014, 24/4/2015, 18/5/2015, 12/7/2016 and 8/8/2016 without any further progress. On 18/6/2019, the matter was fixed for mention for dismissal for want of prosecution on 16/7/2019. Notice of dismissal for want of prosecution under order 17 Rule 2(1) Civil Procedure Rules dated June 18, 2019 was sent out to the parties inviting them to attend court on 16/7/2019. On 16/7/2019 there was no attendance by all the parties and so the matter was dismissed for want of prosecution.
6. On 13/5/2022 the application the subject matter of this ruling was filed. When the file was placed before the trial court at Kakamega, the Judge made an order transferring the matter to this court as the subject matter is land situated within Vihiga County.
7. When the application came up for hearing before this court, the respondent and interested parties were absent. An affidavit of service sworn by Erick Swahili, a process server on July 4, 2022 showed that the interested parties' Advocates were served with hearing notice on 29th June 2022. A copy of the hearing notice dated July 28, 2022 attached to the affidavit of Service was duly received, stamped and signed by Wafula Wawire Advocate & Commissioner for oaths on July 29, 2022. Since this constituted sufficient service, the matter proceeded to hearing of the application in the absence of the respondents and the interested parties.

The Application

8. The substantive prayers sought in the application are substitution of the applicant who is since deceased and review and setting aside of the dismissal orders dated 16/7/2019.
9. The original applicant is said to have died on 15/10/2021. In paragraph 4 of the supporting affidavit, the current applicant deposes that Hesborne Alla Opotedied on 15/10/2021. She attached a copy of certificate death to the supporting affidavit and marked it PKM2. I have read the certificate of death and it indicates that the original applicant died aged 72 years on 15/10/2021 at Vihiga Hospital. She also deposed that she is the administrator of the estate of Hesborne Allan Opote. To the supporting affidavit she attached a copy of grant of letters of administration *Ad Litem* dated February 3, 2022 obtained in Vihiga SPM C AD LIT Succ Cause No 11 of 2022 To Re: Estate of Hesborn Allan Opote to demonstrate this.



10. The law on substitution of parties is found in order 24 [Civil Procedure Rules](#) 2010. Order 24 rule 3(1) provides.

“Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit”

11. It has been demonstrated that the original applicant herein died on 15/10/2021 and that the current applicant is his personal representative.

12. As concerns the application for review and setting aside of orders issued on 16/7/2019, the record shows that since 25/9/2014 the matter came up for mention on 5 different occasions to confirm filing of submission on the substitutive application. A part from that, no substantive action had taken place from 25/9/2014 till 18/6/2019 when the court fixed the matter for mention for dismissal for want of prosecution on 16th July 2019. The record shows further that a notice dated 18/6/2019 for dismissal for want of prosecution under order 17 rule 2(1) of the [Civil Procedure Rules](#) 2010 was sent to the parties. There was no appearance on 16/7/2019 and the trial court proceeded to dismiss the case for want of prosecution. The court order made on that day reads as follows; -

“No appearance for the parties. Matter is hereby dismissed for want of prosecution”

This is the order that the current applicant seeks to review.

13. The provisions relating to seeking review of court orders are contained in order 45 of the [Civil Procedure Rules](#) 2010 under which the current Application is brought. Order 45 rule 1 provides

“Any person considering himself aggrieved,

- a. By a decree or order from which an application is allowed, but from which no appeal has been preferred.
- b. By a decree or order from which no appeal is hereby allowed and who from the discovery of a new and important matter or evidence which after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons desire to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”

From the above quoted provision of the law, the ground for applying for review of judgements, decrees or orders of the court are:

- i. Discovery of new and important matter of evidence,
- ii. Some mistake or error apparent on the face of the record,
- iii. The application must be made without reasonable delay,
- iv. Any other sufficient cause.



14. The current application is premised on the grounds inter alia that: -
- i. The access road has not been opened by the Land Registrar Vihiga up to date and his insisted that he needs a court order to conduct the exercise.
 - ii. That on 3/7/2014 the matter was ordered to proceed by way of written submissions and the applicant filed submissions that are on record.
 - iii. That it is in the interest of justice that the order sought be granted.

15. None of the grounds in order 45 is cited or proved in bringing the current application. There is no allegation of discovery of new or important matter, or error apparent on the face of the record. The law in order 45 rule 1(b) requires that the application be brought without unreasonable delay. Case Law also abound on what amounts to unreasonable delay. In *Ruth Kwachimoi & another vs Charles Nalika Cheloti & another* [2021] eKLR the court held that what is unreasonable delay will be determined by the circumstances of each case. In *Jaber Mohsen Ali & another vs Priscillah Boit & another* [2014]eKLR- the court held that

“the question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter...”

In *John Agina vs Abdulsamad Sharif Alwi* C.A Civil Appeal 83 of 1992 the court held that an unexplained delay of 2 years in making an application for review under o. 44 rule 1(the equivalent of the present order 45 rule 1) is not the type of sufficient reason that will earn sympathy from the court.

16. In the present case there was a delay of 3 years from the date of the order sought to be reviewed to the date of making the Application for review. No explanation was tendered for this. The applicant has always been represented in the case. The substantive matter was a judicial review which in its nature calls for expeditious disposal. Under section 9 of the *Fair Administrative Action Act*, the action should be filed without unreasonable delay and prosecuted expeditious. Section 8 of the *Fair Administrative Action Act* gives a time line of 90 days for determination of such action. In *Republic vs Mwangi Nguyai & 3 others ex-parte Haru Nguyai* High Court at Nairobi Constitutional and Judicial Review Division, Misc. Application No. 89 of 2008, the court held:

“Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognized that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve millions and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. People should not be left to fear that there investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty... Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes.”

17. Secondly, before the orders sought to be reviewed were made there had been a period of inaction of about 3 years. The matter could be listed for mention and nothing happens until the court dismissed



- the matter for want of prosecution. The matter has been characterized with unexplained delay all through. By the time of dismissal, the time lines for finalizing a judicial review matter had long lapsed,
18. This court is duty bound under the overriding objective of the court as contained in section 1B of the *Civil Procedure Act* to handle all matters presented before it for the purpose of attaining among other objectives, the timely disposal of the proceedings, and all other proceedings in the court at a cost affordable by the parties. And the parties are enjoined by the provisions of section 1A (3) to assist the court achieve this.
 19. Thirdly, Judicial Review being in its nature a public interest litigation, the circumstances on the ground may have changed since 2014 when the matter was filed in court.
 20. In view of the fact that none of the grounds for review in order 45 (1) has been cited or proved and the fact that the application was file after an unreasonable delay, I find that the application for review is not merited. Substituting the applicant will not serve any useful purpose. I dismiss the application with no order as to costs.

Orders accordingly.

RULING READ, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 21ST DAY OF JULY, 2022.

E. ASATI

JUDGE

In the presence of:

Neville Court Assistant.

No appearance for the Defendant/Applicant

No appearance for the Plaintiff/Respondent

E. ASATI

JUDGE.

