

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Miscellaneous Application 70 of 2002
EMILY WANYAMA WASIKE APPLICANT

VRS
HON. ATTORNEY GENERAL..... RESPONDENT

AND
FRANCIS M. MARKO INTERESTED THIRD PARTY
RULING

This is a ruling on the application dated 20/9/2002 brought by the Interested Party Francis M. Marko. It was heard by Justice Mitey on 10/07/03. The Judge thereafter retired before delivering the ruling. I have now taken over this file for purposes of writing and delivering the ruling.

The application is brought under Order VI A Rule 3, Order XLIV rules 1 and 2 and Order 53 Rule 6 of the Civil Procedure Rules. It seeks for review of the court's orders given on 28/8/2002. It also seeks for striking out of the motion filed pursuant to that order. The grounds supporting the application are contained in the Applicant's affidavit and on the face of the application. Briefly, the Applicant herein alleges that the Respondent secretly and mischievously obtained the orders in issue and without notifying the other party, filed another application. It is claimed that the orders obtained therein are erroneous given the fact that the Respondent's earlier proceedings had been struck out.

The application was opposed by the Respondent relying on his grounds of opposition dated 4/10/2002 and filed the same day. The Respondent contends that this application is a delaying tactic and that the court has an unfettered discretion to grant the orders sought. The Applicant should not be allowed to continue enjoying benefits accruing from an illegality.

The brief background of this matter is that the Respondent was granted leave to file a judicial review application within 21 days. The orders were granted and the 21 days period was to expire on 2/5/2002. The Respondent filed the application a week later which the court dismissed. The Applicant later filed another motion dated 19th July 2002 seeking for extension of time to file a fresh judicial review application. The application was heard *ex parte* and orders granted on the 28th August 2002. The Applicant is now aggrieved by the said orders.

The said orders were granted by Justice Mbitio J. after hearing the Respondent's advocate. Order XLIX Rule 5 under which that application was brought gives the court the discretion to enlarge time where a limited time had been fixed and has expired. The court extended the time given earlier with ten (10) days. The orders given were in exercise of the discretion of the court. The Judge was satisfied that the respondent had good grounds to justify exercise of the discretion.

This application is brought under Order XLIV rules 1 and 2. rule 1 requires that the Applicant who is aggrieved by the order for which he seeks review must have discovered new and important facts or an error or mistake on the face of the record. The Applicant has not satisfied any of those requirements. Rule 2 provides

that an application for review, be done by the Judge who gave the orders sought to be reviewed. Justice Mbiti had left the station on transfer when Justice Mitey heard this application in 2003. I am now writing the ruling seven (7) years after the application was heard. This is not a mistake of any of the parties and it presents some difficulty in attempting to review the orders of the Judge unless there are very sound grounds to do so. The substantive application for judicial review was allowed by the Judge which I believe is in the interests of justice so that both parties can be heard in the matter.

I am convinced that the application has no merit and I dismiss it accordingly. Due to the fact that the applicant herein was not served with the application which gave rise to the orders of 28/08/2002, I hereby order that the Respondent meets the costs of this application.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma this 29th day of April, 2010.

In the presence of Mr. Makokha for the Exparte Applicant.