



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Miscellaneous Civil Case 54 of 2009**

REPUBLIC.....APPLICANT

VERSUS

MWEA LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE
WANG'URU.....2ND RESPONDENT
SIMON NDAMBIRI WAWERU.....INTERESTED PARTY
EXPARTE.....JOHN MUCHIRI MAGONDU

R U L I N G

The Application at bar which is dated 24/2/2010 is brought under Section 95 of the Civil procedure Act and Order XLIX Rule 5 of the Civil Procedure Act.

The same seeks leave to file out of time a Notice of Motion under Order LIII Rule 3(1) of the Civil Procedure Rules.

It is premised on 6 grounds on its face and on the applicants supporting affidavit dated 24/2/2010. I will be very brief in this ruling. This court granted the ex-parte applicant leave to file a Notice of Motion seeking Orders of Certiorari and mandamus. The said leave was granted on 1/12/2009 and pursuant to Order LIII Rule 3(1), the Notice of motion should have been filed within 21 days. That Rule provides.

When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by notice of motion to the High Court.....” This provision is couched in mandatory terms. The question that arises is – “Does this court have jurisdiction to extend time under the provisions of the Civil Procedure Act in Judicial Review matters?”

My answer is a simple ‘NO’. It is trite law that Judicial Review matters are neither Civil nor Criminal matters. A court sitting on a Judicial Review matter does not exercise either in civil or criminal jurisdiction. It exercises a “*sui generis*” jurisdiction.

This therefore means that I cannot invoke the provisions of the Civil Procedure Act to grant the orders herein- This was clearly enunciated in the case of ***AKO –V- SPECIAL DISTRICT COMMISSIONER KISUMU AND ANOTHER (Civil Appeal No. 27 of 1989)***.

Although this case dealt with an application for extension of time to file an application for leave, my view is that the findings of the Court of Appeal therein also apply in respect of any other extension of time in Judicial Review matters. The Court of Appeal held that;

“ The prohibition is statutory and is not therefore challengeable under the procedural provisions of the Civil Procedure Rules.”

The celebrated case of ***COMMISSIONER OF LANDS –V- KUNSTE HOTEL LTD*** also held that the provisions of the Civil Procedure Act, those of Government Lands Act, could not apply in Judicial Review matters because

“ In exercising the power to issue or not the issue an order of certiorari the court is neither exercising Civil nor Criminal jurisdiction...”

Section 95 of the Civil Procedure Act and Order XLIX Civil Procedure Rules are not therefore applicable here. This application must therefore fail.

I would nonetheless like to comment on annexure ‘*JMMI*’ which the applicant was relying on to show why their application was not filed on time. I have gone through the original court record and noted that leave was granted on 1/12/2009 and the file returned to the registry. The record further shows that one Cecily from the Ex-parte applicants counsel’s office came to the court registry on 21/12/2009 and that is the day the application was given the hearing date of 15/2/2010. The question that cannot be answered is why they took a date for an application which had already been heard and orders granted. Infact, the entry of the hearing date which the said clerk signed is on the same page as the ruling granting leave.

Instead of taking a date for an application which had already been concluded, why did they not file the Notice of Motion on that date yet they were still within time? Counsel could have been misled by her clerk. That is unfortunate but the law is not on their side.

The application is therefore dismissed with no order as to costs.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 28th day of April 2010.

In presence of:-Mr. Okwaro for Ms Fatuma for applicant.