



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU  
MISCELLANEOUS APPLICATION 505 OF 2006**

REPUBLIC.....APPLICANT  
VERSUS  
NYANDARUA DISTRICT - OLJORO OROK  
DIVISION LAND DISPUTES TRIBUNAL.....1<sup>ST</sup> RESPONDENT  
MOSES NDIRANGU NJUGUNA.....2<sup>ND</sup> RESPONDENT  
AND  
EXPARTE..... (1) CYRUS KAMAU NGANGA  
(2) SUSAN NJOKI DIRANGU  
(3)GODFREY KINYORI WAMWEGA

**JUDICIAL REVIEW**

1. *An application for leave is spent once leave is granted.*
2. *Leave once granted can only be set aside by a substantive motion under the court's inherent jurisdiction.*
3. *A motion for any of the Judicial review orders must be filed within the prescribed period of 21 days.*
4. *There is no provision for enlargement of time in judicial review proceedings.*

**RULING**

This Ruling relates to a Notice of Motion dated and filed on 2<sup>nd</sup> November 2006 by the ex parte Applicants and seeks an order of certiorari to remove to this court and quash an award by the Nyandarua District Ol Joro Orok Division Land Disputes Tribunal Case No. 012 of 2005 and issued on an unknown date as the page bearing the signature of the Chairman and two members had no date but is stated to have been delivered on 15<sup>th</sup> March 2006 according to the grounds in the Motion aforesaid.

One of the arguments advanced by Mr. Rugut the Interested Party's Counsel, was that the leave to bring Judicial Review proceedings in the matter of the Tribunal's decision was made outside the six months statutory period prescribed by **Section 9(3) of the Law Reform Act (Cap. 26, Laws of Kenya)**. Mr. Ndegwa who urged the motion on behalf of the ex parte applicants submitted otherwise.

It is necessary to observe at this early stage of this Ruling that whenever and however leave was granted, once its granted the matter becomes *functus* unless there is a substantive application to set it aside under the court's inherent powers. There was no application to set aside the leave, and such leave cannot be set aside through argument on the substantive motion.

However having stated this, it is also necessary for the purposes of the eventual decision in this Ruling, to explore and establish when indeed that leave was granted for the reason that it has a direct bearing on the competence of the motion which is based or arises out of such leave.

I noted, that the leave to institute judicial review proceedings in this matter was made through Miscellaneous Application No. 442 of 2006 and once leave was granted that file was discarded, and a new file Misc. Application No. 505 of 2006 was opened. This court is therefore unable to access notes of the Judge who granted leave, and ascertain the date of the ex-parte application for leave and the exact date when leave was granted, and if it was granted, as there seems to be some doubt about that too.

The practice of discarding the file upon which an application for leave is made and granted seems to be based upon the decision of my learned and senior brother, Sergon J. in the case of **Republic vs. Funyula Division Land Disputes Tribunal & 3 others** [2004] 1 KLR 585 in which the said Judge held inter alia that once leave is granted, the motion be filed as a new cause in a separate file. With respect to my learned brother, there seems to be no legal basis for that decision.

**Order LIII rule 4(1)** provides that copies of the statement accompanying the application for leave shall be served with the Notice of Motion and copies of any affidavits accompanying the application for leave shall be supplied on demand, and no grounds (*except as may be allowed under rule 4(2)*) shall be relied upon or any new relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

To me therefore, the rules contemplate that one and the same file shall be used both for the application for leave, and the filing of the substantive motion. An analogy may be made with ordinary civil procedure, if an application to appeal out of time is made and allowed, to file the appeal out of time in a new file would be hide information that the appeal was filed outside of the allowed.

In this matter therefore the substantive motion ought to have been filed in Miscellaneous Application No. 442 of 2006, and no new file No. 505 of 2006 ought to have been opened. Having clarified that matter of procedure I now turn to the matter herein.

Mr. Ndegwa for the ex-parte applicant contended that the motion was filed within time Without going into the issues when receipts, for filing the same were issued, and therefore when the Motion was deemed to have been properly filed, the matter may be determined by briefly looking at the date when leave was granted and the motion was filed.

According to the order extracted from Misc. Application No. 442 of 2006 (*the leave file*) and attached to the Affidavit (*Affidavit verifying the facts*) of Cyrus Kamau Ngang'a, as exhibit CKN"5", the application (*chamber summons*) for leave was dated 13<sup>th</sup> September 2006, and went under a Certificate of Urgency dated 12<sup>th</sup> September 2006 (*not 12<sup>th</sup> October 2006 as indicated in the order*), and was granted on 13<sup>th</sup> September 2006. It was not issued until the 23<sup>rd</sup> October, 2006. Paragraph 3 thereof expressly stated that the substantive motion was to be filed within 21 days from the date thereof. The order thus took effect from the date it was made (*13<sup>th</sup> September 2006, and not the date it was issued (23<sup>rd</sup> October, 2006)*).

Leave having been granted on 23<sup>rd</sup> September, 2006, the substantive motion ought to have been filed within 21 days, or latest on the 21<sup>st</sup> day after the leave was granted. The motion herein was filed on 2<sup>nd</sup> November, 2006, that is to say, some 48 days after the grant of leave. This was certainly contrary to the provisions of **Order LIII rule 3(1)** of the **Civil Procedure Rules** which require the motion be filed within 21 days of the date of the grant of leave to file Judicial Review proceedings. Any motion filed after that the prescribed time is for that reason incompetent, and stands struck out *ab initio*.

Considerable effort and time (*with written skeletal arguments and authorities*) was spent by both the ex-parte Applicants' and the Interested Party's Counsel (*referred to wrongly as 2<sup>nd</sup> Respondent - he is not, as he made no decision to be quashed*) that motion herein was

filed within time because it was done through one composite deposit cheque, with the Registrar, and that it was the clerk's responsibility to write the receipts. If that be so, then the extracted order of 13<sup>th</sup> September 2006 dispels any doubt as to when the leave was granted even though counsel for the Interested Party doubted if ever leave was granted. The latest time the Motion ought to have been filed ought to have been 4<sup>th</sup> October 2006, and not 2<sup>nd</sup> November 2006 as the order of leave takes effect from the date it is given, and not from the date of issue or extracted, unless of course those dates coincide which is not the case here.

As there is no provision for extension of time in Judicial Review, the ex-parte applicants' proper remedy in the circumstances is to proceed by way of ordinary suit.

In the premises therefore, the ex parte applicants' motion dated and filed on 2<sup>nd</sup> November, 2006 is struck out with costs to the Interested Party.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 23<sup>rd</sup> day of July 2010**

**M. J. ANYARA EMUKULE**  
**JUDGE**