



Republic v Deputy County Commissioner, Buuri East Sub-County & another; Tirindi (Exparte Applicant); M’Ringera (Interested Party) (Environment and Land Judicial Review Case E010 of 2022) [2023] KEELC 16201 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16201 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E010 OF 2022
CK NZILI, J
MARCH 8, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

DEPUTY COUNTY COMMISSIONER, BUURI EAST SUB-COUNTY 1ST RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER IMENTI NORTH DISTRICT 2ND RESPONDENT

AND

EVANGELINE TIRINDI EXPARTE APPLICANT

AND

LAWRENCE M’RINGERA INTERESTED PARTY

RULING

1. The court is asked to set aside, vary, review and or discharge orders issued on 24.1.2023 and thereafter grant the applicant leave to file a substantive notice of motion pursuant to the leave granted on 22.11.2022. The grounds in support of the application are contained in the supporting affidavit of Evangeline Tirindi sworn on 27.1.2023. It was averred that leave and conditional stay orders were issued on 9.12.2022, but unfortunately, the applicant was taken ill for the entire month of December 2022 and hence was unable to instruct counsel on the filing of the substantive motion, whose offices were also closed for the December holidays.
2. That the orders sought are to facilitate a fair hearing without locking her out of the seat of justice. That the application has been filed without inordinate delay. That the applicant furnished security for costs



thus no irreparable harm would be occasioned to the respondents or the interested parties, if leave to file the substantive motion was granted for the matter to be heard on merits and without regard to procedural technicalities. The applicant has attached medical reports which unfortunately bear dates of pre-2022. Further, the letter dated 26.1.2023 does not indicate and or cover the period of December 2022 when the applicant is alleged to have been admitted in hospital.

3. Be that as it may, the applicant filed a certificate of urgency dated 17.11.2022 which this court certified urgent on the same day and issued leave to commence judicial review proceedings, which leave was to act as a stay of the decision by the 1st respondent dated 9.9.2022.
4. The court directed that an undertaking as to damages to be filed by 20.11.2022 and for the substantive notice of motion to be filed and served upon the respondents within 21 days from the date thereof, in default leave and the stay orders to lapse. The court also directed that the matter be mentioned on 24.1.2023 for further orders.
5. The record indicates that the applicant extracted and collected the formal orders on 9.12.2022 through her agent, one Isaak. Concerning the undertaking as to damages, the applicant failed to comply by 20th November 2022 and instead filed a professional undertaking through her lawyers on record on 24.11.2022, which was different from what is envisaged under Order 53 of the [Civil Procedure Rules](#).
6. When the matter came for mention on 24.1.2023, there was neither a notice of motion before the court nor an appearance on the part of the exparte applicant to explain the position on both service and compliance with the previous directives.
7. Consequently, counsel on record and present for the respondent's Miss Mugambi, told the court that all that was served upon them was the chamber summons for leave and not a notice of motion as required under Order 53 of the [Civil Procedure Rules](#). She urged the court to find the proceedings incompetent. The court proceeded to find the leave as spent and closed the file as there were essentially no pending judicial review proceedings.
8. With this background in mind, the court is asked to extend the time to file the notice of motion. The applicant has relied on [R & another vs NEMA & another exparte Elizabeth Njeri Hinga](#) (2012) eKLR on the proposition that the court has discretion on the extension of time, which can be extended to a party who demonstrates good, credible, cogent and sufficient reasons for the failure to file the notice of motion within the time allowed by law. Further, the applicant relied on [Republic vs KRA exparte Stanley Mombo Amuti](#) (2018) eKLR.
9. Unfortunately, the facts in this matter are distinguishable and substantially different from the facts in the cited case law. Leave became spent after the failure to file the notice of motion within 21 days or at all as per Order 53 Rule 3 of the [Civil Procedure Rules](#).
10. The court upon being moved by the respondents in the absence of the exparte applicant, and whose absence has not been explained at all, marked the matter as closed since leave became spent with no application for leave to extend time sought and or obtained by 24.1.2023 to file the substantive motion. Similarly, after the exparte applicant failed to comply with the conditions set, the stay also lapsed on the 3rd day after the date of leave.
11. The court is now urged to extend time to file the notice of motion and not to re-issue leave. Time can only be extended if in the first instance leave to commence the judicial review proceedings is requested and or re-issued.
12. In [Nicholas Kiptoo Arap Salat vs IEBC & 6 others](#) (2013) eKLR the Court of Appeal held that courts must never provide comfort and cover to parties who extend scant respect for the rules and timelines



- under the guise of Article 159, 2 (d) of *the Constitution*, where there are mandatory rules of procedures as held in *Africa Oil Turkana Ltd & 2 others vs Edward Kings Onyancha Maina and 2 others* (2016) eKLR.
13. In the case of *Republic vs Speaker of Nairobi City County Assembly & another exparte Evans Kidero* (2017) eKLR the court cited with approval *Wilson Osolo vs John Ojiambo Ochola & A.G C. A* No. 6 Nairobi of 1995 where it was held that Order 53 Rule 2 of the *Civil Procedure Rules* was derived verbatim from Section 9 (3) of the *Law Reform Act* hence the 21 days period was not extendable under Order 50 Rule 6 *Civil Procedure Rules*.
 14. The court in *Republic vs Speaker of County Assembly* (supra) invoked the inherent jurisdiction of the court under Articles 48 and 159 of *the Constitution* otherwise the strict interpretation of Order 53 Rule 3 *Civil Procedure Rules* would limit access to justice by the parties. In the case of *Equity Bank Ltd vs West Link MBO Ltd* Civil Appeal No. 28 of 2011, it was held a court of law exists to administer justice and should balance the compelling rights and interests of different parties both within the confines of two to ensure that ends of justice are met.
 15. Further in the case of *Republic vs Public Procurement Administrative Review Board exparte Syner Chemie Ltd* (2016) eKLR, the applicant instead of filing a notice of motion after leave was granted, filed a replica of the chamber summons for leave to apply which the court struck out. Leave had also automatically lapsed. The court held that there were two schools of thought, one stating that no enlargement of time could occur such as in *Republic vs Kabindi Nyafula and 3 others Exparte Kilifi South East Farmers' Cooperative Society* (2014) & *Paul Maswabi Wanyama vs Jacinta Pupa & Amagoro Land Disputes Tribunal* civil application No. 41 of 2013, where it was held that Sections 95, 1A, 1B and 63 (e) of the *Civil Procedure Act* and the *Rules* made thereunder were inapplicable in judicial review matters. The 2nd school of thought says that so long as leave is sought within 6 months, Order 50 Rule (6) of the *Civil Procedure Rules*, Section 59 of Cap 2, Section 95 *Civil Procedure Act* and Article 159 2 (d) of *the Constitution* are applicable. This is based on the holding in *Kenya Bureau of Standards and 3 others vs Maritime Authority Exparte car Importers association and Republic vs District Land Registrar Thika exparte Stephen Kiongo Kairu* (2014) eKLR and *REMCO Ltd vs Ministry Jadva Parbat & Co. Ltd & others* (2002) 1EA 227 ECLR. Additionally, the court cited with approval *Sony Holdings Ltd Vs Registrar of Trade Marks and another* (2015) eKLR & *David Njenga Ngugi vs AG* (2016) eKLR on the implications of the word “shall” which cannot oust the jurisdiction of the court and courts must construe it under the canons of statutory interpretation, in which case the word is not conclusive or decisive.
 16. In sum, the court held that for a court to consider whether to extend time or not, it has to satisfy itself that there is no demonstrable prejudice caused to the adverse party because of delay and whether the refusal to enlarge time will occasion hardship and or result in injustice to the applicant. Lastly, the court held that Order 53 of the *Civil Procedure Rules* even though there was no provision for an extension of time to file the notice of motion, the court has latitude to either invoke its inherent jurisdiction to prevent an injustice or hardship being occasioned to the parties or to apply Order 50 Rule 6 of the *Civil Procedure Rules*, Section 63 (e) and 95 of the *Civil Procedure Act*, Section 59 of Cap 2 and Article 159 2 (d) of *the Constitution*, since Order 53 of the *Civil Procedure Rules* does not specifically forbid the application of those provisions.
 17. In the case of *M. Mwenesi vs Shirley Luckhurst & another Civil Application* No. Nairobi 170 of 2000, the court held that a court of justice has no jurisdiction to do injustice and should therefore invoke its inherent jurisdiction to prevent it. Further, in *Caltex Oil (K) Ltd vs Rono Ltd* Civil Appeal/Application No. 97 of (2008), the court held that the fact that a default clause has been imposed does not necessarily deprive a court of its jurisdiction to extend time. Moreover, in the case of *Syombua Muli Mutava vs*



Charles A.K Mulela (2014) eKLR, the court held that it was not *functus officio* as regards the default clause and hence has powers to extend time notwithstanding clause, see also *Deynes Murithi & 4 others vs LSK & another* (2014) eKLR.

18. In the present case, the facts as indicated above are different from the fact in the case law cited. Deriving from the foregoing, courts have inherent powers to extend time to file a notice of motion out of the 21 days stipulated by Order 53 Rule 3 of the Civil Procedure Rules. What is unclear is whether the court can revive leave which as indicated above expired by 21.12.2022. The applicant has not sought for the revival or re-issuance of a fresh leave to commence judicial review proceedings. It is not for this court to grant that which has not been prayed for. A party in my view, cannot seek leave for the extension of time to file a notice of motion under Order 53 of the Civil Procedure Rules, before seeking for leave afresh, since once leave has expired, a notice of motion would have no substratum to be built on.
19. In the circumstances and being alive to the fact that the application for leave was filed within the statutory six months period, which is yet to expire, it cannot be said that there would be an injustice to the applicant if this application is not allowed. The applicant is to blame for failing to attend court and or offering no explanation why she failed to attend court on 24.1.2023, to salvage the situation. The notice of motion did not require a supporting affidavit, even if it were true that the applicant was admitted in hospital. Even if the applicant was allegedly sick, still counsel would have salvaged the situation by either filing the notice of motion or seeking for extension of time before the 21 days period was over.
20. The upshot is the court finds no merits in the application. The same is dismissed with no orders as to costs. The applicant is at liberty to seek for fresh leave by close of today.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8TH DAY OF MARCH, 2023

HON. C.K. NZILI

ELC JUDGE

In presence of:

C/A: Kananu

Mr. AYub Anampiu for 2nd & 3rd respondent

Mr. Mwititi for the exparte applicant

