



**Mwenda v District Land Adjudication and Settlement Officer Tigania
East Sub-County; Ciciuna & another (Interested Parties) (Judicial
Review 20 of 2019) [2022] KEELC 3677 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW 20 OF 2019**

CK NZILI, J

MAY 4, 2022

BETWEEN

LILIAN GACERI MWENDA APPLICANT

AND

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER TIGANIA
EAST SUB-COUNTY RESPONDENT**

AND

KEN KIAMBI CICIUNA INTERESTED PARTY

MARTHA MWILA M'BIRITHI INTERESTED PARTY

RULING

A. The Application

1. By an application dated September 16, 2021 the applicant seeks leave to file the application for review out of time, the court to set aside the ruling delivered on May 20, 2021, time be extended to file the judicial review proceedings and the application dated October 30, 2019 to be reinstated for hearing and determination on merits.
2. The application is supported by an affidavit of Lilian Gaceri Mwenda sworn on September 16, 2021. The reasons given are that the applicant duly instructed her erstwhile advocates on record to pursue judicial review proceedings who filed the application which was dismissed but he failed to notify her of the outcome; - there was an oversight by counsel to seek leave to file the judicial review application out of time; the delay in filing the application is attributed to lack of advice or communication by the former advocates on record and Covid 19 pandemic lockdown.



B. Grounds of Opposition

3. The application is opposed by the respondent and interested party's grounds of opposition dated November 23, 2021 and a replying affidavit sworn by Ken Kiambi Ciciuna on December 13, 2021 respectively.
4. The respondent takes the view the application is an abuse of the court process as it conflates several issues which are distinct and deserving an independent determination namely reinstatement, review and setting aside. Secondly, it is stated that the order sought to be set aside or reviewed has not been sought for, extracted and attached for a fair and conclusive determination instead of engaging the court in a capricious and whimsical exercise.
5. The third ground is that the delay in filing the application was inexcusable given the applicant knew of the ruling but waited until July 2020 to file the application.
6. Fourth ground is that judicial review proceedings are governed by self-contained procedures as set out under order 53 *Civil Procedure Rules*, section 8 and 9 of the *Law Reform Act* and section 9 (1) of the *Fair Administrative Action Act* 2015, which have no provision for filing judicial review proceedings out of time hence rendering the application superfluous and a non-starter.
7. Lastly, it is averred the applicant has not demonstrated why the ruling made on May 20, 2020 should be set aside.
8. On the part of the 1st interested party, it is averred a defective application could not be reinstated especially where there was no prayer for leave made in the first instance and that the current application could not cure the defect; is brought in bad faith; it is a non-starter; misconceived; amounts to wastage of time; lacks merit and should be dismissed with costs.
9. In line with order 51 rule 16, *Civil Procedure Rules*, parties were directed to file written submissions by December 20, 2021.
10. The applicant submitted the omission to seek leave and the delay in filing the instant application were occasioned by her former lawyers on record and the errors should not be visited upon her since she has a strong and arguable case which the court should hear on merits otherwise, she shall be prejudiced and condemned unheard.
11. Reliance was placed on *Nicholas Kiptoo Arap Koriri Salat v IEBC & 7 others* [2014] eKLR on the principles for admitting an application out of time.
12. Regarding the merits of the application/case, it was submitted; equity suffers no wrong without a remedy and in line with the *Constitution*, a right to be heard is guaranteed. Reliance was placed on *Vishva Stone Suppliers Co Ltd v RSR Stone* [2020] eKLR, *Salim Mohammed v Robert Fondo Kirimo* [2021] eKLR.

C. History of the Matter

13. By an *ex parte* application dated October 30, 2019, the *ex parte* applicant sought for leave to commence judicial review proceedings to call for and quash the decision and award of the respondent in Objection Nos 1362 & 3438, delivered on November 22, 2016 regarding Parcel No 6221 Karama Adjudication Section.



14. In exercise of its discretion, the court on November 4, 2019 declined to grant the orders sought since the application had been filed over 3 years after the decision was delivered. It directed the application to be served for inter partes hearing on January 20, 2020.
15. By a ruling dated May 20, 2020, the court held the applicant had not applied for the extension of time to have her application admitted for hearing notwithstanding the expiry of six months as provided under order 53 Civil Procedure Rules & sections 8 & 9 of the Law Reform Act. Further, the court made a specific finding that nothing had been put forth to explain out the delay of 3 years.
16. The applicant never appealed against the ruling nor extracted any order or decree to that effect. Instead, she has waited for over one and half years to approach this court order for leave to mount a judicial review application now over four and half years since the objections were heard and determined. The reasons given are that the former advocates on record failed to seek leave in the first instance, failed to notify her of the outcome on time or at all; the delay was attributable to non-communication by erstwhile advocates and the Covid 19 travel restriction.

D. Issues for Determination

17. Having gone through the application, dispositions and submissions, four issues commend themselves for my determination; -
 - (i) If the court has powers to extend statutory timelines set out by order 53 rules (2) Civil Procedure Rules and sections 8 & 9 of the Law Reform Act.
 - (ii) If so in (1) above, what are the principles of law applicable?
 - (iii) If the court heard and determined the application dated October 30, 2019 on merits.
 - (iv) If the applicant has made a case for leave to lodge an application for leave out of time and for the subsequent filing of the notice of motion to quash the proceedings and decision, setting aside the ruling dated May 20, 2020, reinstatement of the chamber summons and hearing of the same on merits.
18. Order 53 rule (2) Civil Procedure Rules provides, no leave shall be granted to apply for certiorari to remove a proceeding for purposes of being quashed unless the application for leave is made not later than six months from the date of the proceedings or such shorter period as may be prescribed by any Act and where the proceeding is subsequent to appeal, the court has wide powers to adjourn the application until the appeal is determined and the time for appeal has expired.
19. Looking at the chamber summons and the notice of motion herein, the inordinate delay of over 3 years has not been explained at all. The applicant has said there would be no prejudice if the court were to extend time to mount judicial review proceedings, set aside and or reinstate the application for hearing on merits.
20. One of the annexures to the application dated October 30, 2019 was annexure Lam “3” which is an amended certificate of confirmation of grant in favour of the estate of Francis Kalunge Mwenda issued to the *ex parte* applicant and Moses Gitonga M’Thuranira Mwenda on April 8, 2014, among which parcels granted to the *ex parte* applicant was parcel No 6221 Karama Adjudication Section. The grant had initially been issued on February 4, 2009. The applicant had also sought and obtained a consent to sue dated September 3, 2019. In the letters dated November 29, 2016, the *ex parte* applicant was bringing to the attention of the 1st respondent the confirmed grant and requesting for the rulings and proceedings in relation to parcel No 6221, which was at A/R stage. The letter indicates the directive was given on December 8, 2016 for the applicant to pay Kshs 3,900/= charges in order to collect the



- copies. Payment for the same was made on December 20, 2016 by the ex parte applicant vide receipt No 0789635. There is no indication that there was any delay on the part of the respondent in supplying the proceedings and the decision.
21. Between the payment for the proceedings on December 20, 2016 and the filing of the application for leave dated October 30, 2019, there was a gap of over 3 years which the applicant did not attempt to explain then and to the present.
 22. As to whether the court has mandate to extend the statutory timelines under order 53 rule 2 *Civil Procedure Rules* and sections 8 & 9 the *Law Reform Act* in *Republic v Speaker of Nairobi city County assembly and another ex parte Evans Kidero* [2017] eKLR, it was held judicial review proceedings are special jurisdiction and the statutory timelines set out are not intended to be extended and should be strictly adhered to. The same position was taken by the Court of Appeal in *Commissioner of Land v Hotel Kunste* Court of Appeal 234/1995 and *MM Ole Keiuwa & JN Odera Juma v Yash Pal Ghai* [2003] eKLR where it held order 50 rule 6 of the Civil Procedure Rules and article 159 (2) of the *Constitution* was not available to the applicant.
 23. In *Nicholas Kiptoo Salat v IEBC & 6 others* [2013] eKLR, the Court of Appeal held that courts must never provide comfort and cover to parties who exhibit scant respect for rules and timelines.
 24. In *Wilson Osolo v John Ojiambo Ochola & the AG* CA No 6 of Nairobi of 1995, the court held order 53 rule 2 Civil Procedure Rules was lifted word by word from section 9 (3) of the *Law Reform Act* and therefore unlike time limited under the Civil Procedure Rules which would be extended under order 50 rule 6 *Civil Procedure Rules*, time limited by statute could not be extended under the Civil Procedure Rules.
 25. In *Republic v Public Procurement Administrative Review Board & 3 others Ex Parte Syner-Chemie Limited* [2018] eKLR, the court held it had to satisfy itself if there was any demonstrable prejudice to be caused to the adverse party because of the delay and whether the refusal to enlarge time would occasion hardship and result in an injustice, while exercising the courts inherent jurisdiction to prevent a miscarriage of justice under article 159 (2) of the *Constitution*. See *Rawal v The Mombasa Hardware Ltd* (1968) EA 392, *Bremer Vulcan Schiff-bar and Maschinen Fabrick v South Indian Shipping Corporation Ltd* [1981] AC 909, *Equity Bank v West Link MBO Limited* (Civil application No 78 of 2011), quoted with approval in *Evans Kidero supra*.
 26. As indicated above and as held in *Ivita v Kyumbu* [1984] KLR 441, even if the court had to invoke its inherent jurisdiction, the delay herein has been prolonged, unexplained and inexcusable.
 27. A lot has since happened to the suit land given the dispute was at AR stage. The respondents have pleaded prejudice and so has the 1st interested party.
 28. That notwithstanding, neither the respondents nor the interested parties have told this court whether the status of suit land has changed and if perhaps title deeds have been issued or whether witnesses to the dispute are still available.
 29. In *Aviation & Allied Workers Union v KQ Ltd & 3 others* [2015] eKLR, the court held the onus and the burden was on the party seeking extension to lay basis to the satisfaction of the court why she deserved such discretion exercised in her favour and to give good reasons of the delay, the explanation for the delay and if it was in the public interest to extend time.
 30. Applying the above principles, I am not convinced that even if the court were to set aside, reinstate and or readmit the application, which in my view was heard on merits, any useful purpose would be served by rehearing it given nothing has changed, no new material or facts or sufficient reasons have



been offered by the applicant why upon collecting the proceedings on December 20, 2016 or so soon thereafter, she had to wait for another 3 years to lodge the application for leave yet the consent to sue dated September 3, 2019 by the Land Adjudication Officer was specific that she had to file the claim on account of judicial review within 60 days.

31. While being issued with a consent to sue, the Land Adjudication Officer was clear that in order to complete the adjudication record for Karama Adjudication Section he needed a copy of the final orders of the case so as to hasten the adjudication process in order to cater for public interest.
32. In view of the foregoing, I find no merits in the application dated September 16, 2020. The same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 4TH DAY OF MAY, 2022

In presence of:

Kevin for applicant

Kieti for respondents

HON CK NZILI

ELC JUDGE

