



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. MISC. JUDICIAL REVIEW APPLICATION NO. 18 OF 2020**

**IN THE MATTER OF ARTICLES 10, 40 & 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTIONS 3, 4, 5 & 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION  
ORDERS 53 RULES 3(1) OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTIONS 12, 13 & 30 OF THE LAND ADJUDICATION ACT CAP 284**

**AND**

**IN THE MATTER OF DECISION OF THE DEPUTY COUNTY COMMISSIONER MASINGA, APPEAL FROM THE  
MINISTER IN CASE NO. 182 /2006 IN LAND PARCEL NUMBER MASINGA/KANGONDE/682**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DEPUTY COUNTY COMMISSIONER**

**MASINGA SUB COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF LANDS.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**PAUL MWAU MWONGA.....1<sup>ST</sup> INTERESTED PARTY**

**THE LANDS REGISTRAR MACHAKOS COUNTY.....2<sup>ND</sup> INTERESTED PARTY**

**SAMUEL MWANGANGI MULWA.....EX PARTE APPLICANT**

**RULING**

What is before court for determination is the 1<sup>st</sup> Interested Party/Applicant's Notice of Motion application dated the 18<sup>th</sup> February, 2021 where he seeks the following orders:

1. Spent
2. Spent
3. The Court do expunge the affidavits of SIMON MUNYWOKI KIMINZA, NICHOLAS KISWILI MAWIA, KATIVA MUSYOKA and STEPHEN VOI MAKAU purportedly listed as further affidavits for having been filed without leave of court and introducing new facts which were not raised in the 1<sup>st</sup> Interested Party's replying affidavit.
4. The costs of this application be paid for by the Ex parte Applicant

The application is premised on the grounds on the face of it and the supporting affidavit of PAUL MWAU MWONGA he deposes that on the 14<sup>th</sup> October, 2020, the Ex parte Applicant was granted leave of 45 days to file a further affidavit in respect to the 1<sup>st</sup> Interested Party's replying affidavit. Further, on 28<sup>th</sup> January, 2021 the Ex parte Applicant failed to file the said affidavit and he was directed to do so before close of business of the same day but he only filed it on 2<sup>nd</sup> February, 2021. He claims the Ex parte Applicant introduced new deponents and the fresh affidavits were filed without leave of court. He has reason to believe some of the affidavits were a forgery. He reiterates that the said affidavits were not filed on time as the Ex parte Applicant intended to steal a match against him and gain undue advantage by introducing fresh evidence too late.

The Ex parte Applicant opposed the application and insisted it is an abuse of the Court process. He relied on Order 53 Rule 4(2) of the Civil Procedure Rules in respect to filing of further affidavits.

The application was canvassed by way of written submissions.

#### **Analysis and Determination**

Upon consideration of the instant Notice of Motion application including the respective affidavits and rivaling submissions, the only issue for determination is whether the further affidavits of SIMON MUNYWOKI KIMINZA, NICHOLAS KISWILI MAWIA, KATIVA MUSYOKA and STEPHEN VOI MAKAU should be expunged from record.

The 1<sup>st</sup> Interested Party in his submissions avers that the aforementioned affidavits do not amount to a further affidavit. Further, the deponents did not have leave to file them. He further submits that the purported further affidavits do not comply with the law as they introduce new issues. To support his averments, he has relied on the following decision: **Astute Africa Investment & Holding V Spire Bank Kenya Limited & Another (2015) eKLR; Nyumu & 3 Others V Muema & 21 Others (2004) eKLR and Kiiru Tea Factory Company Ltd V Stephen Maina Githiga & 13 Others (2019) eKLR.**

The Ex parte Applicant in his submissions, insist the further affidavits as filed are properly on record. He proceeded to explain the proceedings in the court file and distinguished the decisions cited by the 1<sup>st</sup> Interested Party. He contends that judicial review are special proceedings in nature and a party except for invoking Order 53 cannot invoke other provisions of the Civil Procedure Rules. To buttress his averments, he relied on Order 53 Rule 4(1) of the Civil Procedure Rules as well as the following decisions: **Commissioner Lands & Kunste Ltd (1977) eKLR; M.M Ole Keiuwa & Another V Yash Pal Ghai (2002) eKLR; and Republic V Kahindi Nyafula & Others ex parte Kilifi South East Farmers' Cooperative (2014) eKLR.**

From a perusal of the Court Record, it is evident that the Ex parte Applicant sought leave to file the further affidavit and filed the same albeit late, which forms the fulcrum of this application.

Order 53 Rule 4(2) of the Civil Procedure Rules provides that: **'2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.'**

In the case of **Equity Bank Limited v West Link MBO Ltd Civil Application (Appeal) no 78 of 2011**, it was held that: **"Courts of law exist to administer justice and in doing so, they must of necessity balance between the competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute."**

While in the case of **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC** stated: **"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."**

See also the case of **Republic v Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] eKLR.**

In this instance, I note the Ex parte Applicant filed his further affidavits late after the period of leave had lapsed. The 1<sup>st</sup> Interested Party

insists these affidavits should be expunged from record but has not indicated what prejudice he stands to suffer except for the fact that it introduces new issues. I have perused the further affidavits which the 1<sup>st</sup> Interested Party seeks to expunge and I note that the matters raised therein concern the dispute at hand. I opine that in order to enhance access to justice, this court has inherent powers to receive all the evidence in respect to a dispute before making a determination of the same. In the case of **Republic v Attorney General [Sued for and on behalf of the Ministry of Lands] & 2 others ex parte South and Central [Thika] Investments Limited [2015] eKLR**, the Court held that: **‘It is therefore my view and I hold that the affidavit sworn by Anthony Muriithi Kireria is worthless. Mercifully there is a further affidavit on record. The law is now clear that the Court ought not to ignore documents on record even if irregularly filed unless the filing thereof has prejudiced the other party in material respect. See Trust Bank Limited vs. Amalo Company Limited Civil Appeal No. 215 of 2000 [2002] 2 KLR 627; [2003] 1 EA 350 and Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998.’**

Based on the facts as presented while associating myself with the decisions cited above, I find that the further affidavits which were filed albeit late are already on record and I do not see the reason why I should ignore them as they raise pertinent issues therein which will aid the court in determining the dispute herein. It is my considered view that the same are pertinent and should hence form part of the court record. I opine that there is no prejudice the 1<sup>st</sup> Interested Party will suffer as he can seek leave to file a supplementary affidavit in response to the issues raised in the further affidavit. Further, in the current constitutional dispensation and pursuant to article 159(2) (d) of the Constitution which stipulates that **‘in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities,’** I find that the 1<sup>st</sup> Interested Party’s action of applying to expunge the further affidavits for having been filed without leave is seeking to rely on procedural technicalities.

In the circumstances while associating myself with the decisions cited above, I will exercise my discretion, adopt the aforementioned further affidavits as part of the record. I will further grant the 1<sup>st</sup> Interested Party leave of 21 days to file a supplementary affidavit in response to the issues raised in the further affidavits.

Based on the foregoing, I find the Notice of Motion application dated the 18<sup>th</sup> February, 2021 unmerited and will disallow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**