REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

JUDICIAL REVIEW NO. 5 OF 2019

IN THE MATTER OF AN APPLICATION BY MUGO KIMANJA GATIMU FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF RICE HOLDING NO.

3515 OF THE NATIONAL IRRIGATION BOARD

– MWEA IRRIGATION SETTLEMENT SCHEME

AND

IN THE MATTER OF ARBITRATION COMMITTEE

PROCEEDINGS AND VERDICT DATED 6TH JUNE, 2019

REPUBLIC.....APPLICANT

VERSUS

NATIONAL IRRIGATION BOARD.....RESPONDENT

AND

JANE WANJIRU.....1ST INTERESTED PARTY

JECINTA GICHUGU.....2ND INTERESTED PARTY

EX-PARTE: MUGO KIMANJA GATIMU

RULING

INTRODUCTION:

1. The Ex-parte Applicant herein Mugo Kimanja Gatimu, moved this Honourable Court by way of a Notice of Motion dated 19th November, 2019, whereby he was seeking leave to apply for prerogative Orders of Certiorari to remove into the High Court and quash proceedings and verdict of Arbitration Committee of the National Irrigation Board Mwea Irrigation Settlement Scheme dated 6th June, 2019 in respect of Rice Holding No. 3515 measuring 4 acres.

2. The Ex-parte Applicant also sought an order that the said leave if granted, to operate as a stay of the said impugned order prohibiting the Senior Scheme Manager- National Irrigation Board Mwea Irrigation Settlement scheme stopping him from allocating rice holding No. 3515 or any portions thereof to the interested parties or any other person and such allocations if any be declared null and void and the Senior Scheme Manager be compelled to adhere to the nomination of 16th November, 1970 which gave the rice holding to him.

3. Finally, he sought that the costs of his application be provided for. On 12th March 2020, the Ex-parte applicant was granted leave to file

the substantive motion within 21 days.

4. It seems that the Ex-parte applicant did not file the substantive motion within the stipulated time as on 18th May, 2020 he filed an application under certificate of urgency whereby he seeks the following orders:

(a) Spent

(b) That this Honourable Court do extend time for the ex-parte applicant to file his substantive notice of motion

(c) That costs be provided for.

5. The said application has been brought under Section ***3A of the Civil Procedure Act*** which provides that:

> *"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."*

6. The Ex-parte Applicant based his application on the grounds set out on the face of the notice motion and on grounds set out on his Supporting Affidavit sworn on 4th May, 2020.

7. In a nutshell, the Ex-parte applicant claimed he was unable to file the said substantive motion due to interruption of normal Court business due to the covid 19 pandemic.

8. The interested parties opposed the said application vide a Replying Affidavit sworn by the1st Interested Party on 22nd February, 2021.

9. The interested parties stated that the instant application was a delaying tactic aimed at further delaying this matter since he is enjoying open ended stay of execution and is consequently not in a hurry.

10. She further stated that she was greatly prejudiced and that court orders should not be issued in vain and or to benefit a litigant who deliberately misinterpret the law to perpetuate a mischief.

11. She contends that if this Honourable Court allowed the application, then it would be fair and just that conditions be imposed to ensure that the applicant doesn't get into slumber by being ordered to vacate the 2 acres for the interested parties pending hearing of this matter.

12. She also stated that time was not running from 15/3/2020 when the Chief Justice suspended court operations for a period of 14 days and consequently the instant application was not necessary as the Exparte applicant ought to file the instant application straight away. Further that electronic filing was never suspended.

13. On the part of the Respondent herein, it did not file a response to the application. Further from the records of this Honourable Court, there is no indication on whether the Respondent was served with the application as there is no affidavit of service to that effect.

14. Be that as it may, when the said application came up for hearing on 4th March, 2021, the Ex-parte Applicant and the interested parties through their advocates on record agreed to dispose of the application by way of written submissions.

EX-PARTE APPLICANT'S SUBMISSIONS

15. The Ex-parte applicant through his advocates on record filed his submissions on 9th April, 2021 whereby he urged this Honourable Court to exercise its discretion in favour of the applicant by granting the prayers sought in his application.

16. It was submitted that this Honourable Court has jurisdiction to enlarge time to file the substantive notice of motion outside the 21 days. To support this, he relied on the case of ***REPUBLIC VS SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY & ANOTHER EXPARTE EVANS KIDERO [2017] e KLR*** whereby the Honourable Judge after relying on the cases of: ***Republic Vs Public Procurement Administrative Review Board Exparte Syner –chemie Ltd***, ***Raval Vs The Mombasa Hardware Ltd [1968] EA 392*** and ***Equity Bank Limited Vs West Link MBO Ltd Civil Application (Appeal) no 78 of 2011*** held that:

> *"In my humble view, therefore, I find that Order 50 Rule 6 of the Civil Procedure Rules on enlargement of time under the rules is applicable to Judicial Review applications contemplated in Order 53 Rule 3 of the Civil Procedure Rules and even if it was not so, this court retains its inherent power to extend the time limited by Order 53 Rule (3), as a strict application of the rule would not be a legitimate restriction on the right of access to justice which is a constitutional right stipulated in Article 48 of the Constitution."*

17. The counsel for the ex-parte applicant further submitted that the delay in filing the application was not inordinate as there was a delay of 35 days. They urged that the delay was inadvertent and genuine, not intentional and was caused by the novel Covid-19 which led to closure of courts. On this issue they relied on the case of ***Ivita Vs Kyumba [1984] KLR 441 whereby the Honourable Court held that:***

> *" The test applied by the courts……is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse or the delay and that*

justice can still be served to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of discretion of the court."

18. The Learned counsel also relied on the Supreme court of *Nicholas Arap Korir Salat Vs IEBC & 7 Others Sc Application No. 16 of 2014* and also*Belinda Murai& others Vs Amos Wainaina (1978) KLR 278* and *Phillip Chemwolo & Another Vs Augustine Kubende [1982-1988] KAR at 1040.*

19. The Learned Counsel also urged this Honourable Court that the respondents had not demonstrated any prejudice that had been suffered or likely to be occasioned to them if the enlargement of time was granted. Further that the delay was not aimed to cause the respondents hardships or injustice.

20. The Learned Counsel further urged this Honourable court that denying the ex-parte applicant the orders sought would amount to depriving him justice and that any inconvenience caused to the respondent could be adequately compensated by an award of costs.

INTERESTED PARTIES' SUBMISSIONS:

21. The interested parties through their advocates on record filed their submissions on 4th May, 2021.

22. The Learned counsel wholly relied on the Replying Affidavit sworn by Jane Wanjiru the 1st Interested Party herein sworn on 22/2/2021 and filed on 3/3/2021.

23. In their submissions the Learned Counsel for the Interested Parties emphasized that the applicant did not have any justifiable cause for failing to file the notice of motion within the stipulated period as the Court was never closed at any moment but only scaled down operations and put more emphasis on electronic filing of pleadings.

24. The Learned Counsel also submitted that the applicant has been enjoying unconditional stay since 12/3/2020 and was not in a hurry to have the proceedings brought to a close. He submitted that this was greatly prejudicial to the interested parties since they were unable to access and cultivate the suit land allocated to them by the National Irrigation Board and if this Honourable Court was inclined to allow the applicant's application, then the orders for stay of execution of the award of the board should be lifted.

ISSUES FOR DETERMINATION:

25. The following are issues for determination:

a. Whether this Honourable Court has jurisdiction to determine the Ex-parte Applicant's application dated 4th May, 2020.

b. Whether there are any repercussions for failure to serve the instant application upon the respondent herein.

c. Whether the Ex-parte applicant has made out a case to warrant the grant of the orders of enlargement of time.

d. Who should pay the costs?

WHETHER THIS HONOURABLE COURT HAS JURISDICTION TO DETERMINE THE EX-PARTE APPLICANT'S APPLICATION DATED 4TH MAY, 2020.

26. Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classicus case of ***The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1.*** Where **Nyarangi J.A**. held as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

27. In determining the issue of jurisdiction, the Supreme Court in the case of ***Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 others*** held as follows:

"…... A court can only exercise jurisdiction that has been donated to it by either the constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

28. This Honourable Court has jurisdiction to determine Judicial Review Applications after leave to file the same has been granted upon compliance with the timeline set out under ***Order 53 Rule 3(1) of the Civil Procedure Rules, 2010*** which provide as follows:

"When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing"

29. The above provision is mandatory in nature, hence the question whether this Honourable Court has jurisdiction to extend time once a litigant fails to comply with the said provision.

30. In this matter, the Ex-parte applicant was granted leave to file the substantive application on 12th March, 2020. The said motion was to be filed within 21 days and were to lapse on 1st April, 2020. The Ex-parte applicant failed to comply and has filed the instant application seeking extension of time within which to file the said substantive motion.

31. ***Order 50, rule 5 of the Civil Procedures, 2010*** provides that: -

> *"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.*

32. From the above provisions, it is clear that this Honourable Court has jurisdiction to extend time only where a limited time has been fixed for doing any act or taking any proceedings under the *Civil Procedure Rules* or by summary notice or by order of the Court.

33. The question this Honourable Court therefore ought to enquire is where the limited time sought to be extended emanates from. If the limited time emanates from the *Civil Procedure Rules* or by summary notice or by order of the court, then this Honourable Court has jurisdiction to enlarge the same. However, if the limited time does not emanate from the Civil Procedure Rulesor by summary notice or by order of the court, then the Honourable Court ought to down its tools for want of jurisdiction.

34. In this case leave to file the Judicial Review application was sought timeously as contemplated under ***Section 9(3) of the Law Reform Act, Cap 26*** and the same was granted. The default on the part of the Ex-parte Applicant was the failure to file the substantive motion as ordered by this Honourable Court, that is, within the required 21 days provided ***under Order 53 Rule 3(1) of the Civil Procedure Rules, 2010.***

35. In determining a similar case, Honourable Justice R.E. Aburili held in ***Republic Vs Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] e KLR*** that:

> *"47. By placing Order 53 within the Civil Procedure Rules, it was intended that the order would operate alongside other enabling rules under the statute. And if that were not the case, then the Court of Appeal would not have stated the following in the case of* **Wilson Osolo Vs John Ojiambo Ochola & the Attorney General CA No. 6 Nairobi of 1995** *while considering whether the court has power or jurisdiction to enlarge time stipulated under Order 53 of the Civil Procedure Rules:*
>
> *"A can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, the procedure cannot be availed of the extension of time limited by statute, in this case, the Law Reform Act."*
>
> *48. In the same judgment, the Court of Appeal stated:*
>
> *" It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15th February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules."*

36. Following the above authority and the Court of Appeal Case cited therein, I am of the considered view that the mandatory timeline above mentioned emanated from an order of this Honourable Court as provided under ***Order 53 Rule 3(1) the Civil Procedure Rules, 2010*** and can therefore be enlarged under ***Order 50, rule 5*** of the same rules if there are sufficient grounds to do so.

37. It therefore goes without saying that this Honourable Court therefore has the jurisdiction to enlarge the same. This is so especially because the mandatory and inflexible timeline provided under ***Order 53 Rule 2 of the Civil Procedure Rules*** which stems from ***Section 9 (3) of the Law Reform Act*** had already been complied with.

38. The timeline set out to file the substantive motion is purely procedural and is curable under ***Order 50, rule 5 of the Civil Procedure Rules, 2010.*** The same is discretionary and can only be granted to a deserving party upon laying a basis to the satisfaction of the Court.

WHETHER THE EX-PARTE APPLICANT HAS MADE OUT A CASE TO WARRANT THE GRANT OF THE ORDERS OF ENLARGEMENT OF TIME

39. The guiding principles for determining whether or not a court should grant orders of extension of time are laid out by the Supreme Court of Kenya in the case of ***Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 others [2014] e KLR*** whereby the Court held that:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

40. From the above authority it is clear that the orders sought are discretionary and are available to a deserving party upon laying a basis to the satisfaction of the Court.

41. In this case, the applicant explained that his advocate on record prepared that Notice of Motion and was ready for filing, however when his advocates went to file the same, she was advised that it was not possible as the Court registry was dealing with matters under certificate of urgency. He stated that this was occasioned by the interruption of normal court business due to the novel Covid-19 Pandemic.

42. The rule of the thumb is that whoever alleges must prove.

43. The facts deponed by the ex-parte applicant are contradictory. This is because from his submissions his advocates on record submitted that it was the advocate's clerk who went to file and found the court gates closed. However, from his affidavit he deponed that it was actually his advocate who went to file the Substantive Motion but found the gate locked.

44. Be that as it may, the applicant did not state the date when the said clerk or even his advocate went to file the motion. He also did not annex an affidavit by his advocates or even the clerk on record to prove this. It therefore falls that his averment is purely hearsay and the same is untenable in this Honourable Court.

45. The applicant did not also annex the said substantive motion to prove to the court that indeed it was ready as alleged. Given that the subject matter of this suit is land which is highly contentious and the applicant is enjoying orders of stay, he ought to have annexed the alleged motion to satisfy to this honorable Court on its readiness. Failure to do this shows lack of seriousness on the part of the applicant thus making him an undeserving of the discretion of this Honourable Court.

46. The interested parties stated that the instant application was a delaying tactic aimed at further delaying this matter since he is enjoying open ended stay of execution and is consequently not in a hurry. Further that electronic filing of pleadings was never suspended. The applicant did not file any affidavit to rebut any of the facts deponed by the interested party.

47. In as much as Court operations were scaled down, parties could file their pleadings electronically. The applicant did not explain why he did not employ the electronic mode of filing. I therefore find and hold that the applicant went to slumber upon acquiring the orders for stay. This court being a court of equity, it is bound by the maxim that equity aids the vigilant and not the indolent. The applicant therefore ought not to blame Covid-19.

48. The applicant has urged this Honourable Court that if denied the orders sought would deprive him justice. However, justice cuts on both sides. It is therefore my view that it is actually the interested parties who will continue to suffer injustice if the orders sought are granted whereas the applicant continues to enjoy the stay orders.

49. As stated above the time within which the applicant was required to file the substantive application lapsed on 1st April, 2020. The instant application was filed on 4th May, 2020. The applicant did not explain why it took him that long to file the instant application. The said delay being unexplained, it is my opinion that the application has been brought with undue delay.

CONCLUSION

In the circumstances, it is my finding that the application dated 4th May, 2020 has no merit and the same is hereby dismissed and the orders of stay issued on 12th March 2020 be and are hereby vacated. Costs to be borne by the Ex-parte Applicant. It is so ordered.

RULING DATED, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT THIS 17TH DAY OF SEPTEMBER, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Munene holding brief for Ann Thungu for Applicant

2. Jane Wanjiru – present

3. Mugo Kimanja – present

4. Kabuta, Court clerk – present.