



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

MISC. CIVIL APPLICATION NO. E015 OF 2021

REPUBLIC.....APPLICANT

VERSUS

COUNTY SURVEYOR VIHIGA COUNTY.....RESPONDENT

MATIA LUDENYO LUHUNZA.....INTERESTED PARTY

EX PARTE APPLICANT: TOM MAHAGWA EGOSANGWA

RULING

1. On 12th July 2021, my sister N. A. Matheka J granted the ex parte applicant leave to commence judicial review proceedings. In terms of **Order 53 Rule 3 (1)** of the **Civil Procedure Rules**, it was expected that the ex parte applicant would file the substantive Notice of Motion within 21 days of obtaining leave. When the matter came up before me on 20th September 2021, it transpired that the ex parte applicant was yet to file the Notice of Motion. Counsel for the ex parte applicant orally sought enlargement of time on the ground that he was not aware that leave had been granted. He undertook to file the application within 14 days.

2. Counsel for the respondent opposed the application for enlargement of time on the ground that leave was granted way back on 12th July 2021. On his part, counsel for the interested party argued that it is not possible that counsel for the ex parte applicant was not aware that leave had been granted yet he moved the court under certificate of urgency. He further argued that time within which to apply for certiorari has since lapsed.

3. I have considered the application and the respective submissions. The requirement that the substantive Notice of Motion be filed within 21 days is found at **Order 53 Rule 3 (1)** of the **Civil Procedure Rules**. The rule provides:

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.

4. Pursuant to **Order 50 rule 6** of the **Civil Procedure Rules**, this court has power to enlarge time. The rule provides as follows:

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.

5. While there is no doubt that the court has discretionary and unfettered power to enlarge time, such must be exercised judiciously. Among other considerations, the court will enquire into the length of delay and the reasons for the delay.

6. Having obtained leave on 12th July 2021, the ex parte applicant ought to have filed the Notice of Motion by 2nd August 2021. As at 20th September 2021 when the issue of enlargement of time was raised before me, there had been a delay of one month and 18 days. I do not consider that to be inordinate delay.

7. The explanation tendered by counsel for the ex parte applicant to explain the delay is that he was not aware that leave had been granted. I agree with both counsels for the respondent and the interested party that that is simply not a good explanation. Having moved the court under certificate of urgency, the ex parte applicant could not just sit back. It was incumbent upon him to check the court record to see what orders had been made on the certificate of urgency.

8. That said, I am alive to the court's overall mission to do substantive justice pursuant to **Article 159 (2) (b) and (d)** of the **Constitution** and **Section 3** of the **Environment and Land Court Act**. I am further guided by what the Court of Appeal stated in **Coast Development Authority v Adam Kazungu Mzamba & 49 others** [2016] eKLR:

... Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In Salat v. IEBC & 7 Others, Petition No. 23 of 2014, the Supreme Court reiterated that the above constitutional provision accords precedence to substance, over form and in Lamanken Aramat v. Harun Maitamei Lempaka, Petition No 5 of 2014 the same Court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under Article 159, is indeed cured. The Court concluded thus:

“The Court’s authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice.”

As regards the overriding objective, the ELC Act provides that its principle objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes and enjoins the court to discharge its functions so as to give effect to the overriding objective. ...

9. In view of the foregoing, I am inclined to give the ex parte applicant a chance but on terms. I therefore make the following orders:

a) Time within which to file the substantive Notice of Motion in respect of the leave granted on 12th July 2021 is hereby extended by a period of 14 (fourteen) days from the date of this ruling.

b) The substantive Notice of Motion be filed and served within 14 (fourteen) days from the date of this ruling. In default, Chamber Summons dated 30th June 2021 shall stand dismissed with costs and this case shall be marked closed.

c) Costs of the application for enlargement of time shall be borne by the ex parte applicant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF OCTOBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance by counsel for the Ex Parte Applicant

The Ex Parte Applicant present

Mr Juma for the Respondent

Mr Chitwa for the Interested Party

Court Assistant: E. Juma