



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC CIVIL APPLICATION NO 61 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010,**

**THE LAW REFORMS ACT CAP 26 OF THE LAWS OF KENYA,**

**FAIR ADMINISTRATIVE ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF THE REMOVAL OF THE CAVEAT ON L.R. NO. 9042/2223 NAIROBI**

**AND**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY**

**FOR ORDERS OF MANDAMUS AND PROHIBITION**

**AND**

**REPUBLIC.....APPLICANT**

**- VERSUS -**

**REGISTRAR OF TITLES.....RESPONDENT**

**AND**

**KENYA AIRPORTS AUTHORITY.....INTERESTED PARTY**

**EX PARTE APPLICANTS**

**1. KANTI PINDORIA**

**2. MANJU KANTI PINDORIA**

**RULING**

1. The Ex-Parte Applicants filed a chamber summons dated 4<sup>th</sup> April 2018 in which they named the Registrar of Titles as the Respondent and Kenya Airports Authority as an interested party. By this application, the Ex-Parte Applicants were seeking leave to bring judicial review proceedings seeking orders of mandamus and prohibition. Leave was granted on 13<sup>th</sup> June 2018. The Ex-Parte Applicants filed a substantive Notice of Motion dated 2<sup>nd</sup> July 2018 in which they sought an order of Mandamus directing the Respondent to remove a caveat which had been registered on the Ex-Parte Applicant's title LR No.9042/223 IR 51767 and prohibiting the Respondent from interfering with their title.

2. Before the Notice of Motion could be heard, the Ex-Parte Applicants learnt that the National Land commission had recommended revocation of their title following review of grants. It therefore became necessary to file an application seeking to amend the substantive Notice of Motion to include a prayer for certiorari and bringing in the National Land Commission.

3. Through Notice of Motion dated 4<sup>th</sup> September 2019, the Ex-Parte Applicants seek to amend their Notice of Motion dated 2<sup>nd</sup> July 2018. The interested party has opposed the Ex-Parte Applicant's application based on grounds of opposition dated 4<sup>th</sup> November 2019. The interested party contends that the Ex-Parte Applicant's application offends the provision of order 53 of the Civil Procedure Rules which provides that applications for Judicial Review should be brought by Chamber Summons ; that the application is not accompanied by a statement describing the parties, reliefs sought ; grounds thereof, and verifying affidavits ; that the National Land Commission is neither a party to the Judicial Review proceedings nor was leave to institute these proceedings against it sought and that the order for certiorari is time barred.

4. The parties were directed to file written submissions. The Applicants filed their submissions on 13<sup>th</sup> March 2020. The interested party appear not to have filed submissions and if any were filed, they were not uploaded to the E-Filing System of the court. The interested party only uploaded a list of authorities together with two out of the four authorities cited. The court assistant called the 1<sup>st</sup> interested advocates lawyer Mr. Wilson who informed the court assistant that they had filed their documents online on 9<sup>th</sup> February 2021. The court portal shows that the interested party uploaded a list of authorities in respect of Misc. Application No. E433 of 2020 (**Dr. Philip Kipkurui Vs Medical Practitioners and Dentists Council & Another**). This perhaps explains why their submissions are not in the system.

5. I have considered the Ex-Parte applicants' application as well as the grounds of opposition by the interested party. I have also considered the submissions by the Ex-parte Applicant. The 1<sup>st</sup> issue to be determined is whether the proposed amended Notice of Motion is time barred by dint of the provisions of Order 53 Rule (2). The determination by the National Land Commission which is sought to be quashed was made on 15<sup>th</sup> February 2019 and the application for amendment was filed on 10<sup>th</sup> September 2019. There is no doubt that the application was made outside the six-month period provided under Order 53 Rule (2). This was the position Pre-2010 Constitution.

6. After the promulgation of the 2010 Constitution, Article 47 of the Constitution provides for fair hearing. It is pursuant to Article 47 of the Constitution that the Fair Administrative Action Act was enacted. Under the said Act, an application for Judicial Review should be made within a reasonable time. There has been decisions which have been made by the superior court which even state that there is no need for seeking leave to commence Judicial Review Proceedings. The Application for amendment was made a few days after the expiry of the six-month period. This is soon after the Ex-Parte Applicant learnt of the decision by the National Land Commission. The Ex-Parte Applicants are not guilty of any unreasonable delay. The decision in **Republic Vs County Council of Kwale & Another Ex-Parte Kondo & 57 Others (1998) 1e-KLR** (E&L) was given when courts were strictly adhering to strict provisions of the law. This decision cannot hold in the present times under the 2010 Constitution.

7. The other issue to be determined is whether this application is incompetent for having been brought by way of Notice of Motion rather than Chamber Summons. On this one, I state from the outset that this is an issue of procedure which does not affect the substance of the application. Article 159 of the Constitution obligates courts to do substantial justice without undue regard to technicalities. There is therefore nothing which can prevent this court from considering the application on its merits.

8. The Ex-Parte Applicants had already filed their notice of motion for Judicial Review before the National Land Commission published its determination in the Gazette Notice. There is no way the Ex-Parte Applicants can proceed without amending the notice of motion. I have said hereinabove that it is not mandatory to seek leave before one can file Judicial Review proceedings. The amendment sought will not prejudice the interested party. I find that the Ex-Parte Applicants' application is well founded. I allow the Notice of Motion dated 4<sup>th</sup> September 2019 in terms of prayers (2) and (5). The amended motion to be filed within 14 days from the date hereof.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30<sup>TH</sup> DAY OF NOVEMBER 2021**

**E. O. OBAGA**

**JUDGE**

In the Virtual absence of parties who were aware of the date of the Ruling.

Court Assistant: Mercy

**E. O. OBAGA**

**JUDGE**