



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

JUDICIAL REVIEW NO. 13 OF 2012 “B”

M’ARACHI M’MUTUNGI.....APPLICANT

VERSUS

THE PROVINCIAL LANDS APPEAL TRIBUNAL.....1ST RESPONDENT

THE CHIEF MAGISTRATE LAW COURTS AT MERU.....2ND RESPONDENT

M’THURANIRA RUKUNGA.....INTERESTED PARTY

JUDGMENT

BACKGROUND

These Judicial Review proceedings were initially instituted by the ex-parte through an exparte chamber summons under Order 53 Rule 1(2) (3) (4) 3(1) CPR and Section 8 &9 of the Law Reform Act Cap 26 Laws of Kenya seeking leave of this court to apply for an order of prohibition prohibiting the chief Magistrate’s court Meru from confirming the award of the 2nd respondent dated 12/01/2010. The exparte applicant is also seeking leave to apply for prohibition prohibiting the interested party from implementing the same.

That application is supported by statutory statement of facts and a verifying affidavit sworn on 30th April 2012. Also attached to the verifying affidavit is a green card for Nyaki/Kithoka/1880 and proceedings of the land Disputes Tribunal No. 21 of 2007 and the Eastern Provincial Land Appeal Tribunal at Embu. Further attached to that application is a Notice of motion by the interested party herein dated 10th April 2012. When the ex-parte chamber summons filed under certificate of urgency was placed before the duty court on 10/5/2012, the same was certified urgent and the ex-parte applicant granted leave to apply for the orders sought. The court also ordered the leave so granted do operate as a stay of confirmation of the award made by the Provincial Lands Appeal Tribunal pending the filing hearing and determination of the substantive motion which was directed to be filed within 21 days from the date thereof.

On 30/05/2012, the ex-parte applicant filed his substantive Notice of motion under order 53 Rule 3 and 4 CPR and section 8 & 9 of the Law Reform Act. On 12/9/2012 the interested party through the firm of Mithega & Kariuki Advocates filed a Notice of Motion dated 14th August 2012 under Order 53 Rule 3 CPR and section 8 & 9 of the Law Reform Act Cap 26 Laws of Kenya seeking the following orders-;

- (a) That this Honourable court be pleased to strike out the notice of motion dated 30/05/2012 and filed in court the same date.**
- (b) That this Honourable court be pleased to set aside the stay of implementation orders granted to the ex-parte application on 10th May 2012.**
- (c) That costs of this application be provided for.**

That application is supported by grounds shown on the face thereof and an affidavit sworn by the interested party on 11th September, 2012.

When the matter came up for directions on 3/3/2014, the parties agreed to dispose of the said application by way of written submissions within 21 days. At the close of the stipulated period only the interested party filed submissions.

INTERESTED PARTY’S SUBMISSIONS

The interested party through the firm of Mithega & Kariuki advocates submitted that after the ex-parte applicant obtained leave from this court on 10/05/2012 which leave was to operate as a stay against the proceedings in the Chief Magistrate’s court or the implementation of the award made by the Provincial Appeals Committee, he filed the substantive Motion within the stipulated period of 21 days but failed to serve

the same for close to two (2) months. The interested party submitted that the delay in serving the Notice of Motion for close to two months was an inordinate period as no explanation for such delay was given. The interested party further submitted that the only inference to be made is that the ex-parte applicant deliberately withheld service of the said Motion to derail Justice which a court of law should not countenance.

The learned counsel relied on the following cases-;

1. Republic – Versus – National Environment Management Authority and 20 others ex-parte green hills investments Limited & 2 other (2006) eKLR.

2. Grainbult Handlers Ltd – Versus – J.B Maina Co. Ltd & 2 others (2006) eKLR.

As stated herein above, neither the ex-parte applicant nor the Respondents filed any response to that application.

I have considered the application dated 14th August 2012 and the materials in support thereto.

I have also considered the submissions by counsel for the interested party. Under Order 53 Rule 3, CPR, the Law Provides thus-;

53(B)

(1) 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.

53 (3)

(2) The notice shall be served on all persons directly affected and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and all parties to the proceedings.”

It is not in dispute that the substantive motion was filed by the ex-parte applicant within the 21 days directed by the court, but failed to serve the parties within the same period. The provisions for Judicial Review Proceedings under Order 53 CPR and section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya are special proceedings which do not provide a remedy where an ex-parte applicant partly performs an order given by the court. The ex-parte applicant in this case filed the substantive motion within 21 days but failed to serve within the stipulated period. Since the Law does not provide a consequence for such a failure, it is my view that the remedy becomes a discretionary power of the court to be exercised in the interest of justice. Though the ex-parte applicant has not filed any response or submissions to this application it behoves the court to look at the overriding objective of the law and the Rules made thereunder. Section 1B of the Civil Procedure Act Cap 21 Laws of Kenya provides as follows-;

“ 1B(1) for the purposes of furthering the overriding objective specified in section 1A the court shall handle all matters presented before it for the purpose of attaining the following aims-;

- (a) The just determination of the proceedings.
- (b) The efficient disposal of the business of the court,
- (c) The efficient use of available Judicial and administrative resources.
- (d) The timely disposal of the proceedings and all other proceedings in the court, at a cost affordable by the respective parties.

The ex-parte applicant’s failure to effect service of the notice of motion is a procedural lapse which in my view is curable under Article 159 of the constitution of Kenya 2010 which provides thus-:

“159 (2) (d) Justice shall be administered without undue regard to procedural technicalities. The interested party/applicant has not shown what prejudice he suffered with the delay in effecting service upon him for two months after the filing of the Notice of Motion by the ex-parte application.”

For all the reasons I have given herein above, I find no merit in the notice of motion dated 14th August 2012 and the same is hereby dismissed with costs to be in the cause.

It is so ordered.

Read, delivered and signed in the open court this 4th day of July 2018.

MR. E. CHERONO

ELC JUDGE

In the presence of:

- (1) Interested party M'Thuranira Rukunga
- (2) C/C Galgalo/Janet
- (3) Ex-parte applicant/advocate – absent
- (4) Respond/Advocate - absent