



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC JUDICIAL REVIEW APPLICATION NO. 6 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDER OF CERTIORARI

AND

IN THE MATTER OF: -

PETER MAWEU NTHIWA.....1ST EX-PARTE/APPLICANT

CHARLES MATHEKA LOVE.....2ND EX-PARTE/APPLICANT

PHILII NYAMAI KAMUYA.....3RD EX-PARTE/APPLICANT

SAMMY MAUNDU MWANIA..... 4TH EX-PARTE/APPLICANT

-VERSUS-

THE COUNTY DIRECTOR OF LAND

ADJUDICATION AND SETTLEMENT (MAKUENI COUNTY).....1ST RESPONDENT

THE MINISTER HOUSING AND LANDS THROUGH THE

DEPUTY COMMISSIONER MUKAA SUB-COUNTY..... 2ND RESPONDENT

AND

GIDEON MWONGELA KIMANGO.....INTERESTED PARTY

R U L I N G

1. What is before this court for ruling is the Interested Party's Notice of Preliminary Objection dated 23rd September, 2019 and filed in court on 24th September, 2019 wherein he seeks to have the Notice of Motion application dated 22nd August, 2019 struck off for being incompetent and being improperly on record in that: -

(a) The said Notice of Motion dated 22nd August 2019 offends the mandatory provisions of Order 53 Rule 3(1) of the Civil Procedure Rules, 2010.

(b) The said Notice of Motion is in breach of the express order of the Honourable Court made on 30th July, 2019.

(c) That the Notice of Motion as filed is defective and incompetent in that the leave granted by the Honourable court on 30th July, 2019 was for an order of certiorari and not leave to seek an order of Prohibition or Mandamus and thus offends the Provision of Order 53 Rule 1 of the Civil Procedure Rules, 2010.

2. The Interested Party and the Ex-parte Applicants filed their written submissions on 15th October, 2019 and 21st November, 2019 respectively pursuant to the Court's direction that the Preliminary Objection be disposed off by way of written submissions.

3. With regard to ground one, the Counsel for the Interested Party submitted that leave to apply for an order of certiorari was granted to the

Ex-Parte Applicants on 30th July, 2019 thus the substantive Notice of Motion ought to have been filed on or before 20th August, 2019. The Counsel pointed out it is evident that the Notice of Motion dated 22nd August, 2019 was filed on 04th September, 2019 outside the mandatory period of 21 days as per **Order 53 Rule 3(1) of the Civil Procedure Rules**.

The above rule provides 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 other wise directed, be at least eight clear days between the service of the Notice of Motion and the day named therein for hearing.”

4. And on ground two, the Counsel submitted that on 30th July, 2019 the Court made an express order being **Order No.4** that;

“That substantive application for Judicial Review orders of certiorari to be served within 21 days.”

The Counsel was of the view that failure to comply with the express order of the court made on 30th July, 2019 means that the Ex-parte Applicants have disobeyed the said order and that cannot be entertained by the Court.

5. On the third ground, it was submitted that the substantive Notice of Motion filed by the Ex-Parte Applicants is fatally defective and an abuse of the court process, incompetent and offends the mandatory provisions of **Order 53 Rule 1(1) of the Civil Procedure Rules, 2010**.

The above mentioned rule provides as follows: -

“No application for an order of mandamus, prohibition or certiorari SHALL be made unless leave therefore has been granted in accordance with this rule.”

6. The Counsel added that the application for leave ought to have been by way of chamber summons and Notice of Motion as filed by the Ex-parte Applicants on 30th July, 2019. He pointed out that the Ex-parte Applicants sought for leave to apply for an order of certiorari, stay of judgement of the Deputy County Commissioner and costs and this is what leave was so granted.

7. It was further submitted that the Ex-parte Applicants were not granted leave to seek for orders of Prohibition and Mandamus thus making their Notice of Motion an abuse of the court process, incompetent and improperly on record for having been filed out time and it ought to be struck out.

8. The Counsel urged the Court to allow the Interested Party's Notice of Preliminary Objection. The Counsel relied on the case of **Republic vs. Pparb & Another, Mer Security Communication System Ltd/Megason Electronic & Control 1978 (iv) & another (Interested Parties Ex parte Magal Security Systems Ltd/Firefox Kenya Ltd (JR) [2019] eKLR**.

9. The Counsel for the Ex-parte Applicants submitted that on 30th July, 2019, the Ex-parte Applicants were granted 21 days to file a substantive application for judicial review orders.

10. The Counsel went on to submit that the Preliminary Objection was by implication based on the doctrine of res judicata, which the Counsel pointed out that it has no place in judicial review proceedings. In support of his submissions, the Counsel relied on the case of **Republic vs. Judicial Service Commission Ex-parte Pareno [2004] eKLR**.

11. The Counsel concluded by submitting that the point of Preliminary Objection is not merited and that the issue of whether the application is in breach of express order of the court can only be ascertained after hearing the Notice of Motion. The Counsel was of the view that in any case, the court has jurisdiction to stretch its hand to remedy the irregularity or any other nullities by quashing them.

12. Having read the Notice of Preliminary Objection together with the submissions filed by the Counsel for the parties on record, I wish to point out that **Order 53 Rule 1(2) of the Civil Procedure Rules** provides as follows: -

“An application for such leave as aforesaid shall be made ex parte to a judge in chamber, and shall be accompanied by a statement setting out the name and description of the Applicant and the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

13. Although the rule is couched in mandatory terms in the manner in which an application for leave for judicial review orders ought to be made, in my view, the rule is procedural and want of form cannot be a ground for dismissing the application. Thus it would fall on technicality which Article 159(2)(d) of the Constitution discourages. I would agree with the Counsel for the Interested Party that the Notice of Motion application was filed outside the 21 days as per Order 53 Rule 3(1) of the Civil Procedure Rules and it was incumbent upon the Ex-parte Applicant to seek leave to extend the time so as to enable them file the motion.

14. Having successfully sought for leave to apply for an order of certiorari on 30th July 2019 and having been granted leave to do so, the Notice of Motion application dated 22nd August, 2019 should have strictly been limited to the application for the orders in question.

15. I would therefore agree with the Counsel for the Interested Party that the Notice of Motion dated 22nd August, 2019 is an abuse of the court process, incompetent and offends the mandatory provisions of **Order 53 Rule 1(1) of the Civil Procedure Rules**.

16. The upshot of the foregoing is that the Interested Party's Notice of Preliminary Objection has merits and I will uphold it. Consequently, the Notice of motion dated 22nd August, 2019 is hereby struck out with costs to the Interested Party.

Signed, Dated and Delivered at Makueni via email this 22nd day of May, 2020.

MBOGO C. G.,

JUDGE.

Mr. G. Kwemboi – Court Assistant