



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 302 OF 2003**

**IN THE MATTER OF CHIEF MAGISTRATES COURT AT THIKA CRIMINAL CASE NO.  
3701 OF 2002.**

**REPUBLIC VS PAUL WAINAINA KAHIA**

**AND**

**IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF  
KENYA**

**BETWEEN**

**REPUBLIC**

**EXPARTE: DANIEL KIMANI NGUMI .....APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE**

**THIKA LAW COURTS.....1<sup>ST</sup> RESPONDENT**

**THE THIKA LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**VERSUS**

**ANN WANGARI KINYANJUI .....INTERESTED PARTY**

**RULING**

1. These proceedings were instituted in court for the first time on 23<sup>rd</sup> March 2003 wherein the exparte applicants were John Njuguna Ngumi and Daniel Kimani Ngumi (personal representative of the estate of Ngumi Njuguna (deceased)). The applicants sought from court and obtained leave to apply for Judicial Review orders of certiorari to bring to the High Court and quash the decision and orders of the Thika Principal Magistrate's Court (Honourable Mrs Rashid) in Thika Chief Magistrate's Case No. 3701 of 2002- Republic vs Paul Wainaina Kahia to the extent that the Land Registrar Thika to cancel entries over L.R. No. Kiganjo/Kiamwangi/962. On 26<sup>th</sup> March 2003, Honourable Justice G. Mbiti( as he then was) granted leave to apply as prayed and directed the substantive motion to be

filed within 21 days from the 26<sup>th</sup> March 2003.

2. Further, the learned judge ordered that the leave granted do operate as a stay relating to the matter and in particular any dealings with LR Kiganjo/Kiamwangi/962; with costs in the cause.

3. The impugned order was given on 14<sup>th</sup> March 2003 by Honourable B. Rashid, Principal Magistrate to the effect that: *That the District land Registrar Thika to cancel title Nos Kiganjo/Kiamwangi/1041; Kiganjo/Kiamwangi/961; and Kiganjo/Kiamwangi /962 obtained fraudulently and the name of Ngumi Njuguna to be deleted and revert the same to the original owners.*

4. On 23<sup>rd</sup> May 2003, the applicants by an application dated 22<sup>nd</sup> May 2003 filed a chamber summons praying that the orders of leave granted on 26<sup>th</sup> March 2003 by the duty judge be extended for a further 21 days and the orders be served upon the Land Registrar Thika Lands Registry for action.

5. It was averred that the substantive motion could not have been filed within 21 days due to confusion which had arisen when counsel for the applicants visited the lands office and discovered that the documents for the parcels of land in the suit were missing; that in a bid to conceal the material facts, the Land Registrar had recorded orders issued in a criminal court Thika Cr. 3701/2002 not in the parcels of land mentioned but in Kiganjo/Kiamwangi/1070 hence the need to have the orders of leave extended.

6. On 23<sup>rd</sup> May 2003 Honourable Justice Githinji ( as he then was) granted the orders in the application dated 22<sup>nd</sup> May 2003, extending the time for filing of notice of motion by a further 21 days.

7. Subsequent to the above enlarged time of 21 days from 23<sup>rd</sup> May 2003, on 10<sup>th</sup> June 2003, the exparte applicants filed notice of motion seeking for substantive orders, vide an application dated the same day 10<sup>th</sup> June 2003.

8. That application was served on 12<sup>th</sup> June 2003 upon the District Land Registrar, Thika and the Attorney General on 13<sup>th</sup> June 2003 and an affidavit of service filed to that effect on 25<sup>th</sup> June 2003 sworn by Tobias B. Oduya.

9. The substantive motion was heard on 7<sup>th</sup> July 2003 by Honourable Mbito J ( as he then was ) albeit the record is old and partly torn. The hearing took place in the presence of the applicant's counsel Mr Njoroge and Miss Okumu for the Attorney General who never objected to the application, and the Honourable judge(Mbito J) granted the prayers in the notice of motion dated 10<sup>th</sup> June 2003 as prayed with no orders as to costs. The said order was extracted and signed by the Deputy Registrar on 10<sup>th</sup> July 2003.

10. Later on 2<sup>nd</sup> October 2003, a chamber summons dated 30<sup>th</sup> September 2003 was filed by one Anne Wangari Kinyanjui the administratrix of the estate of the late Mukono Ndurume & Ngatu Ndurume seeking to be joined as a party in the suit and that the order granted by Honourable Mbito J on 21<sup>st</sup> March 2003 be discharged on the grounds that the intended interested party had an interest in the matter hence the ruling by the learned judge affected her and that in any event, the orders of Mbito J granting leave and staying proceedings in the matter on condition that the application for Judicial Review is made within 21 days from the date of the order was never complied with as the application was made after 21 days hence the leave as granted lapsed.

11. That application was opposed by the exparte applicants vide a replying affidavit sworn by Daniel Kimani Ngumi on 27<sup>th</sup> November 2003.

12. The application dated 30<sup>th</sup> September 2003 came up for hearing on 3<sup>rd</sup> March 2004 before

Ransley J (as he then was) who ordered that the applicant file a further affidavit and the respondent was at liberty to reply. The learned judge stood over the matter to 16th March 2004 for hearing.

13. On 16<sup>th</sup> March 2004 the matter came up for hearing before Ransley J and the applicant's counsel reported that the applicant has not filed a further affidavit as the deponent was not available. The learned judge adjourned the matter to 24<sup>th</sup> March 2004 at 9.00a.m for hearing.

14. On 24<sup>th</sup> March 2004, the matter came up for hearing and the application dated 30<sup>th</sup> September 2003 was argued by Mr Arwa for the applicant and Mr Njoroge for the respondent opposed the application on the ground that the applicant had not seen the order of Mbito J which extended the earlier order in July by a further 21 days.

15. On the basis of the brief arguments above as recorded by Honourable Justice Ransley on 24<sup>th</sup> March 2004, the learned judge ordered as follows:

***“ The order of Mbito J of 23<sup>rd</sup> May 2003 extended the time for filing the notice of motion as per prayer No. 2 of the application of 23<sup>rd</sup> March 2003. Costs of today to respondent.***

***Signed***

***Ransley J”***

16. Surprisingly, the parties on 27<sup>th</sup> August 2004 fixed the same application dated 30<sup>th</sup> September 2003 for hearing on 13<sup>th</sup> October 2004.

17. On 13<sup>th</sup> October 2004, the matter came up for hearing before Honourable Justice Makhandia Ag J(as he then was) and in the presence of Mr Njoroge counsel for the applicant and no appearance for the respondent, the learned judge Makhandia (as he then was) on his own motion recorded as follows:

***“From the perusal of the record, this matter was finalized on the 7<sup>th</sup> July, 2003 when justice Mbito made an order quashing the decision of the Thika Principal Magistrate's Court in Cr. Case No. 3701/2002 Republic vs Paul Wainaina Kahia. That being the case, there is nothing left to which the applicant in the application dated 30th September 2003 can be enjoined to. In any event, the applicant is not present in court nor her counsel. Yet they are the ones who took the date and served the respondent with hearing notice. I would in the circumstances dismiss with costs the application dated 30th September 2003.***

***Signed***

***Makhandia Ag J.”***

18. This court has found it necessary to outline the history of this matter as per the manual handwritten record and pleadings filed therein, in order to appreciate what has had to transpire since 2003 and why, for the last past 12 years no action has taken place until 11<sup>th</sup> August 2016 when Professor Kiama Wangai filed notice of motion dated 11<sup>th</sup> August 2016.

19. In the notice of motion dated 11<sup>th</sup> August 2016, subject of this ruling, the applicant Ann Wangari Kinyanjui, who was also the applicant in the application dated 30<sup>th</sup> September 2003 which Honourable Makhandia Ag J dismissed on 13<sup>th</sup> October 2004 seeks for the following orders:

***1. That the court be pleased to set aside the orders made by Honourable Justice Makhandia on 13<sup>th</sup> October 2004 and reinstate the interested party's application dated 30<sup>th</sup> September 2003.***

2. That costs be provided for.

20. The application is predicated on the grounds that:

1. the Chief Magistrate's court at Thika heard and determined Cr. Case No. 3701 of 2002 whereupon Honourable Rashid issued certain orders that relate to parcels of land on the 14<sup>th</sup> March, 2003;
2. the *exparte* applicant herein instituted Judicial Review 302 of 2003 in this court on 22<sup>nd</sup> May 2003 and was granted leave to commence the same and that the motion was to be filed within 21 days from the 26<sup>th</sup> May 2003;
3. the notice of motion was filed on 10<sup>th</sup> June 2003 after 21 days had lapsed without seeking extension of time;
4. the matter was mentioned on 1<sup>st</sup> July 2003 in the presence of an advocate holding brief for P.K. Njoroge for the *exparte* applicant and the same was scheduled for a hearing on the 7<sup>th</sup> July 2003.
5. on 7<sup>th</sup> July 2003 records indicate that the matter was canvassed on the 7<sup>th</sup> July 2003 whereupon an objection was raised as to the legality of the notice of motion by a Mrs Okumu nevertheless the Honourable Justice Mbiti granted orders to the *exparte* applicant.
6. on 9<sup>th</sup> July 2003 the advocates for the *exparte* applicants drafted the order which was checked and approved on the same date.
7. on 22<sup>nd</sup> July 2003 the Attorney General filed a notice of appointment of advocates the same having been drawn on 7<sup>th</sup> July 2003.
8. the interested party herein filed a chamber summons dated 30<sup>th</sup> September 2003 and filed in court on 2<sup>nd</sup> October 2003 and a further affidavit on 16<sup>th</sup> March 2004.
9. the *exparte* applicant filed a replying affidavit and grounds of opposition on 27<sup>th</sup> November 2003.
10. on 13<sup>th</sup> October 2004 the Honourable Justice Makhandia dismissed the application dated 30<sup>th</sup> September 2004 in the absence of the advocate for the interested party.
11. it is a travesty of justice to condemn any persons unheard.
12. it is in the interest of justice that the orders sought herein be granted and the application be heard on merit, further, the matter involves a very emotive issue relating to land.

21. The application was further supported by the affidavit of Ann Wangari Kinyanjui reiterating the grounds reproduced herein above while annexing proceedings in Thika Senior Principal Magistrate's Court Cr. Case No. 3701 of 2002 wherein Paul Wainaina Kahia was convicted on his own plea of guilty for the offence of fraudulently obtaining title to land and selling it. He was fined shs 30,000 on each of the 3 counts or to serve 12 months imprisonment each on each count in default. Prison sentences were to run concurrently. This was on 7<sup>th</sup> March 2003. The applicant also annexed copies of pleadings and orders issued in this court file as per the record which I have essentially reproduced in the historical background.

22. The application, despite being served upon the *exparte* applicant/ respondent, was not responded to

hence the court allowed the applicant to proceed *ex parte* on 6<sup>th</sup> December 2016 after satisfying itself that the respondent Attorney General and the *ex parte* applicant were served with hearing notice for that day.

23. In his oral submissions, Professor Wangai counsel for the applicant reiterated the prayers and grounds as supported by the applicant's affidavit and the annexures, while urging the court to set aside the order of Makhandia J made on 13<sup>th</sup> October 2003 since the substantive motion was filed out of time and that hence the learned Justice Makhandia should have heard the application for joinder and for setting aside the order of certiorari *inter partes*, since the effect of quashing the order of 14<sup>th</sup> March 2003 allowed the *ex parte* applicant to have land acquired fraudulently vested in him and yet the estate of the deceased had never been administered. That there was miscommunication between the applicant and her counsel, causing the delay.

### **Determination**

24. I have carefully considered the applicant's application dated 11<sup>th</sup> August 2016, the grounds, the supporting affidavit, annexures and oral submissions by counsel Professor Kiama Wangai.

25. In my humble view, the only issue for determination is whether there is merit in the prayer that this court do set aside orders of 13<sup>th</sup> October 2004 made by Honourable Makhandia J and reinstate the interested party's application dated 30<sup>th</sup> September 2003.

26. Albeit the application was brought under Section 1A, 1B and 3A of the Civil Procedure Act and the inherent powers of the court, seriously speaking, even assuming that the application had merits, the delay of 12 years between 13<sup>th</sup> October 2004 and 11<sup>th</sup> August 2016 which I find to be extremely excessive has not been explained by way of affidavit evidence. That delay alone is inordinate and therefore inexcusable such that it would have been pointless to venture into the merits of the application. In **Utalii Transport Company Limited & 3 Others Vs NIC Bank Limited & Another [2014] e KLR** it was held as follows:

*“Whereas there is no precise measure of what amounts to inordinate delay: and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth;*

*Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that is it inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word “inordinate” in its dictionary meaning, but in the sense of excessive and compared to normality.”*

27. The application dated 30<sup>th</sup> September 2003 was dismissed on 13<sup>th</sup> October 2004 a year later, which was about 12 years to the filing of this application. Therefore, is that the kind of delay justified in the circumstances of the case? The applicant has not by way of affidavit attempted to explain why there was this kind of inordinate delay in bringing this application for reinstatement of an application dismissed nearly 12 years ago.

28. The only attempt was by the advocate Professor Wangai in his concluding submission that there was delay because of a miscommunication between the applicant and her then advocates.

29. In an application for reinstatement of the dismissed application or proceeding, time is of essence. A party who instructs an advocate to represent them in a case and then go to slumber for nearly 12 years cannot be excused as it is a party's case and not an advocate's case hence it is the duty of a party to follow through his or her case with his or her counsel hence, diligence in the prosecution of one's case is expected.

30. In the instant case, I find that there is no explanation acceptable to the court to justify such inordinate delay in bringing this application for reinstatement of an application dismissed on 13<sup>th</sup> October 2004.

31. No case is expected to remain archived in the court registry forever. This file according to me, ought to have been archived away long ago. Article 159(2) (b) of the Constitution abhors delay and stipulates that justice shall not be delayed. There is no justice in such prolonged delay which has not been explained to the satisfaction of the court. Not even the overriding objective of the law under Sections 1 and 1A of the Civil Procedure Act comes to the aid of the applicant for the overriding objective of the law is that disputes should be resolved expeditiously. Delayed justice is denied justice. The Supreme Law of the land abhors delay in the dispensation of justice and therefore it would not be in the interest of justice to revive this matter which slept on 13<sup>th</sup> October 2004. As the old adage says, let sleeping dogs lie.

32. On the merits of the application, besides the inordinate unexplained delay, the power to reinstate proceedings or to set aside an order of the court is a discretionary power which must be exercised judiciously and on sound principles of law not capriciously. The applicant must establish that they indeed deserve the orders sought or that the order sought is available to them and that therefore notwithstanding the inordinate and unexplained delay like in the instant case, they have a strong case put forward for consideration.

33. In the instant case, it is claimed that the matter relates to title to land which was obtained fraudulently by the exparte applicant hence to decline to grant the orders would be sanctioning a fraudulent acquisition of land and that in addition, the order quashing the decision of the magistrate as issued was made in an application filed out of the 21 days stipulated in the order for leave granted on 26<sup>th</sup> March 2003.

34. This court has meticulously combed through this file and I have endeavoured to reproduce in this ruling with precision such that nearly every action that took place has been captured. I have in the process established beyond doubt that albeit the order of 26<sup>th</sup> March 2003 was to the effect that the substantive motion be filed within 21 days from that date (26/3/2003); and albeit the substantive motion was not, indeed, filed within 21 days from 26<sup>th</sup> March 2003; Nonetheless, the exparte applicant vide a chamber summons dated 22<sup>nd</sup> May 2003 filed under certificate of urgency sought for enlargement (extension) of time within which the substantive motion should have been filed as per leave granted on 26<sup>th</sup> March 2003. He gave the reasons for the delay and on the same day 23<sup>rd</sup> May 2003, the matter was placed before Honourable Githinji J who considered the application for enlargement of time and granted it, enlarging the time for filing of the substantive motion by a further 21 days which 21 days started running from 23<sup>rd</sup> May 2003, ending on 16<sup>th</sup> June 2003. The substantive motion was eventually filed on 10<sup>th</sup> June 2003 which was within 18 days from 23<sup>rd</sup> May 2003.

35. It is that notice of motion which was filed before the end period as enlarged by Githinji J on 23<sup>rd</sup> May 2003 that was heard and the learned judge Mbitio J granted the substantive Judicial Review order of certiorari quashing the decision and orders of the Thika Principal Magistrate's court ( Honourable Rashid) made in Thika CM Cr. Case No. 3701/2002 **Republic vs Paul Wainaina Kahia**, to the extent that the Land Registrar Thika do cancel entries over LR No. Kiganjo/Kiamwangi/962.

36. It therefore follows that although the applicant by her application dated 30<sup>th</sup> September 2003 was seeking to be enjoined to these proceedings as an interested party and or seeking to discharge the orders of Mbitio J made on 21<sup>st</sup> March 2003, although there are no such orders on record made by Honourable Mbitio J on 21<sup>st</sup> March 2003 as the first order on record was made on 26<sup>th</sup> March 2003 granting leave to apply for Judicial Review orders of certiorari; and such leave to operate as stay, there are valid orders of 23<sup>rd</sup> May 2003 made by Githinji J extending the time for filing of the

substantive motion by a further 21 days.

37. Accordingly, not only is the applicant guilty of laches but that the application for setting aside of the orders of 13<sup>th</sup> October 2004 issued by Makhandia J (as he then was) and for reinstatement of the application dated 30<sup>th</sup> September 2003 is grossly misguided, misplaced and frivolous, vexatious and absolutely and exceedingly unmerited.

38. There is no challenge to the orders of Githinji J made on 23<sup>rd</sup> May 2003 enlarging the time for filing of the substantive motion hence those orders as valid as they are, they stand undisturbed.

39. Further, the substantive notice of motion was filed within the 21 days enlarged period by the order of 23<sup>rd</sup> May 2003 hence the Judicial Review orders were not obtained in an application which was filed out of time as the applicant would wish this court to believe.

40. There is also no appeal filed challenging the Judicial Review orders of certiorari issued by Honourable Mbiti J (as he then was) on the 7<sup>th</sup> July 2003 wherein the learned judge quashed the decision and further orders of the Thika Principal Magistrate's Court (Honourable Rashid) in Thika **CM's Cr. Case No. 3701/2002 Republic vs Paul Wainaina Kahia** to the extent that the Land Registrar Thika do cancel entries over LR No. Kiganjo/Kiamwangi/962; which order was extracted and issued 10<sup>th</sup> July 2003.

41. In the end, I find the applicant's application dated 11<sup>th</sup> August 2016 not merited and I proceed to dismiss it without costs as the respondent and ex parte applicant did not file any responses to the application.

42. This file to be marked closed and taken to the archives.

**Dated, signed and delivered at Nairobi this 18th day of January 2017.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Isaac Kinyanjui Njoroge (Family member of the disputants. Aged about 80 years old)

N/A for applicant/interested party

N/A for respondent

N/A for ex parte applicant

CA: George