



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 4 OF 2014

**IN THE MATTER OF AN APPLICATION BY ANDREW MUTISYA NZYIMI
FOR GRANT OF LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF
CERTIORARI & MANDAMUS**

AND

**IN THE MATTER OF THE DISTRICT COMMISSIONER OF MUKAA DISTRICT SECTION
CASE NUMBER 368 OF 2012**

BETWEEN

ANDREW MUTISYA NZYIMI.....APPLICANT

AND

MATHEKA W. MWIKYA.....1ST RESPONDENT

COURT OF THE DISTRICT COMMISSIONER OF MUKAA DISTRICT.....2ND RESPONDENT

RULING OF THE COURT

The Application

1. The Notice of Motion application before the court is dated **27th November, 2014**. It prays for the following orders;

- a. That this matter be certified urgent and be heard ex-parte.
- b. That this court be pleased to review its ruling made on 20th January, 2014 and make a finding that the application dated 6th January, 2014 and filed on 17th January, 2014 was filed within time.
- c. That this court do proceed to consider the application dated 6th January, 2014 and filed on 17th January, 2014 and grant the applicant the prayers sought therein.
- d. That the costs of this application be costs in the cause.

2. The application is founded on the grounds set out therein and is supported by affidavit of **Andrew Mutisya Nzyimi** sworn on 27th November, 2014.

3. The applicant's case is that on 17th January, 2014 through his then advocates, M/S Mwanzia & Co. Advocates he brought before court the application for judicial review dated 6th January, 2014. On 17th January, 2014 the court dismissed the application on grounds that time for seeking an order of certiorari had lapsed. The applicant knows that the time of filing judicial review application seeking the orders of certiorari is six (6) months. That the decision that the applicant was seeking to be quashed had been issued on 17th July, 2013, and the applicant's application for judicial review was dated 17th January, 2014. Taking into account the period of between twenty-first day of December and thirteenth day of January, 2014, six (6) months within which to file for certiorari would have ended on 9th February, 2014. For the foregoing reason, the applicant is applying for review of the ruling given on 20th January, 2014 and to be granted leave in terms of the application dated 6th January, 2014 and filed on 17th January, 2014. The decision the applicant is seeking to have reviewed and quashed affects a parcel of land belonging to him and he stands to be prejudiced if this application is not allowed.

The Response

4. The application is opposed vide the Replying Affidavit of **Matheka Wambua Mwikya** – the 1st Respondent herein – sworn on 27th November, 2015. The 1st Respondent's case is that contrary to what is alleged by the applicant that the Minister's ruling was delivered on **17th July, 2013**, the actual ruling of the Minister was delivered on **1st October, 2012** as shown by the annexed letter giving parties notice of the same and dated the 26th September, 2012 and marked MWM-1. The respondent states that he strongly believes that the Letter relied upon by the applicant is a corrupted version which might have been illegally obtained because it refers to a different case number being Minister's Appeal Number 202 of 2007 while the correct case is **Minister's Appeal Number 368 of 2011**. In view of the foregoing facts, the orders of Certiorari could not issue on in January 2014 as six (6) months lapsed in **April 2013** and therefore the court was right in its ruling. The respondent urged the court to decline the present application and dismiss the same with costs as there is no error apparent on the face of the record deserving a review.

5. The applicant filed a Supplementary Affidavit sworn on 11th December, 2015 where he stated that he was personally present on 1st October, 2012 when the Minister's ruling was to be delivered, and he was informed the same would be delivered on another date after the District Commissioner had confirmed some administrative issues which he did not disclose to the applicant. That it is after receiving the letter dated 4th July, 2013 that the applicant personally attended the reading of the decision at offices of the District Commissioner for Mukaa at Malili on 17th July, 2013. The applicant states that the 1st Respondent is being untruthful because on 17th July, 2013 when the decision was read, the respondent was present accompanied by his brother **Francis Kasanga Wambua**. The applicant's case is that the quoting of the wrong case number in the letter dated 4th July, 2013 does not invalidate the reading of the decision as all the parties knew the case number of the dispute. That it is not true that the letter dated 4th July, 2013 was corrupted since on the basis of the same letter the parties went for the reading of the decision.

Submissions and Determination

6. Parties filed submissions which I have considered. The first issue for this court to consider is who between the parties is telling the truth about the date when the decision on the appeal to the Minister was read. According to the applicant, the decision was read on 17th July, 2013, while according to the respondent the decision was read on 1st October, 2012. Both parties have filed what appear to be authentic documents to support the same. The court is not an expert on handwriting or signature. This court can only make a decision on the worthiness of a document on a balance of probability, and on that basis, I find that both documents are authentic and I believe the applicants' position that on 1st October, 2012 when the decision was to be read, the same did not take place, and that indeed the decision was read on 17th July, 2013 in the presence of the 1st Respondent and his brother.

7. The next issue is then whether the application can be allowed. An order of review is available to a

litigant under **Section 80** of the **Civil Procedure Rules, Cap 21 Laws of Kenya**, in orders and decrees where an appeal can be preferred and has not or where no right of appeal is provided. **Order 45 Rule 1 of the Civil Procedure Rules** provides that review is available where;

- a. There is discovery of a new and important matter or evidence which after exercise of due diligence was not within the knowledge or could not be produced by the applicant at the time when the decree was passed; or
- b. There is some mistake or error apparent on the face of the record; or
- c. There is any other sufficient reason.

8. It has been settled by the Court of appeal that a ground which would constitute a ground of appeal cannot be a ground for review. See the decision of the Court of Appeal in ***Pancras T. Swai v Kenya Breweries Limited [2014] eKLR.***

9. The question that arises is whether the applicant has made out a case for review. It is the applicant's submission that his application dated 6th January, 2014 which was seeking for leave to apply for an order of certiorari and mandamus was dismissed and or struck out for being out of time. **Section 9(3) of the Law Reform Act, Cap 27 Laws of Kenya** requires that an application seeking leave for an order of certiorari ought to be brought within six (6) months from the time the decision sought to be quashed was delivered.

10. The applicant has maintained that the decision he seeks to quash was made on 17th July, 2013. He has annexed a letter dated 4th July, 2013 summoning him and the 1st respondent to attend the reading of the decision by the 2nd Respondent on 17th July, 2013.

11. If the decision was made on 17th July, 2013 then six (6) months would have lapsed on 16th January, 2014. However, taking into account that under **Order 50 rule 4 of the Civil Procedure Rules, 2010** which provides that in "*the period between the 21st day of December in any year and the 13th day of January in the year next following, both days included*" time does not run, then the six (6) months for filing the applicant's application would have been 9th February, 2014.

12. Clearly there is what appears to be an error on the face of the record regarding the date when the decision on the appeal to the Minister was read. However, that is not the end of the matter. What did the applicant do upon establishing the error? It is clear that the court's decision which is sought out to be reviewed was delivered on 20th January, 2014. This application is dated 27th November, 2014. The applicant has not explained the delay of more than ten (10) months since the discovery of the alleged error.

13. Secondly, and this is crucial, in an application for review, the orders to be reviewed or the ruling must be attached to the application. In this case, the ruling is not attached. How does the applicant expect the court to review a ruling or orders which have not been brought to the court's notice? Indeed, this court cannot even independently confirm the date the said ruling to be reviewed was delivered. This was a material omission which deals a serious blow to the application.

14. In the upshot, the application is dismissed with costs to the respondent.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Nyaata – for 1st Respondent

Nthura – for Langalanga for Applicant