



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT & LAND COURT

MISC. APPLICATION NO.52 OF 2014

ANDREW OKELLO OTIENO.....PLAINTIFF (EXPARTE APPLICANT)

THE HON. ATTORNEY GENERAL.....RESPONDENT

VERSUS

PETER HALLOWE ONG'ONGEL..... INTERESTED PARTY

RULING

1. Andrew Okello Otieno filed, the notice of motion dated 18th March 2014 through M/S Amondi & Co. Advocates describing himself as “**PLAINTIFF**” at the heading of the application. Though the application is said to be brought under " **Sections 1a, 1B, 3 & 3a of the Civil Procedure Act and Order 50 rules 6, Order 51 Rule 1 of the Civil Procedure Rules,** " the nature of prayer 2 which is for extension of time for leave to file for judicial proceedings shows that the application falls squarely under **Order 53 Rule 2 of the Civil Procedure Rules** and **Andrew Okello Otieno** is therefore the **Exparte Applicant** and not plaintiff and will be referred as such. The application is based on seven grounds on its face and the undated affidavit of **Andrew Okello Otieno** filed on 18th March 2014, to which is annexed a copy of

Memorandum of appeal to the Minister under **Section 89 of the Land Adjudication Act** and proceedings and ruling in **Nairobi Milimani H.C.J.R. MISC. App NO.370 of 2001** among others.

The application names the **Attorney General** and Peter **Hallowe Ongonge** as the respondent and Interested party respectively.

2. The application is opposed by the Respondent through the grounds of opposition dated 20th August 2014 as being misconceived, abuse of the court process, unmeritorious and time barred.

3. The Interested Party also opposed the application through the replying affidavit he swore on 25th June 2014 in which he among others deponed that the application is similar to others filed by the Exparte Applicant in **Nairobi Milimani JR Misc. App No.370 of 2001** and **Kisumu Misc.App No.400 of 2011**.

4. The application came up for hearing on 28th January 2016. M/S Kymasima and Aliongo for the Exparte Applicant and Respondent respectively and the Interested Party gave their rival submissions summarized as follows:

a) **EXPARTE APPLICANT'S COUNSEL'S SUBMISSIONS:**

The land parcel **Siaya/Koyeye/1674** belongs to the Exparte Applicant but was awarded to the Interested Party by the Adjudication officer. That the Exparte

Applicant failed an appeal with the Minister after which he travelled to Uganda and when he returned he to the county he was not given a hearing date. That in the year 2011, the Exparte Applicant learnt that his appeal had been dismissed by the Siaya District Commissioner without according him a hearing contrary to the provision of Article 47 of the constitution. That the Exparte Applicant should therefore have the time for applying for leave to file for judicial review orders of certiorari and enlarged.

b) **SUBMISSIONS BY RESPONDENT COUNSEL:**

That the Exparte Applicant's appeal was filed in 1991 and dismissed in 2000 and many years have passed before filing the application which should have been filed within six months in accordance with **Order 53 rule 2 of the civil Procedure Rules**. That the long delay shows that the Exparte Applicant has never been interested in pursuing what he believed was his rights and this application should be dismissed. The learned counsel referred the court to the documents annexed to the Interested Party's replying affidavit that show that a similar application had been dismissed in **Nairobi Milimani J.R. MISC. Appl. NO.370 of 2001**.

c) **SUBMISSIONS BY INTERESTED PARTY:**

That the Exparte Applicant had filed a similar application in Nairobi and this court which was decided against him. That the Exparte Applicant had failed to attend the hearing of his appeal and it was dismissed. He prayed that this application be dismissed with costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by the Exparte Applicant and the Interested Party, the grounds of opposition and rival submissions and come to the following determinations:

a) That from the available evidence and finding of the court in **Milimani Misc.App.No.370 of 2001** in its ruling of 28th January 2002, the Exparte Applicant's appeal to the Minister on the adjudication officer's decision filed in 1991 was made on **26th June 2000**. The provision of **Order 53 Rule 2 of the Civil Procedure Rules** required any party desirous of applying for certiorari orders against that decision had to seek leave of the court before the expiry of six months. This court has no jurisdiction to extend the time for filing the application for leave. [See the decision in the case of **Republic -V- Chairman Amagoro Land Disputes Tribunal & another, Exparte Applicant, Paul Mafwabi Wanyama Kisumu CACA No.41 of 2013**, and **James Githinji Kiara -V- William Wachira Mwaniki [2005] eKLR**].

b) That before the Exparte applicant filed the current application he had filed the proceedings of **Milimani JR Misc. App. No.370 of 2001**. The proceeding he annexed to the affidavit shows that he had filed an application for leave in the court. The court has perused those proceedings and they show that his advocate, Oluoch, prosecuted the application on 25th September 2001 and addressed the court as follows:

"Application dated 12th April 2001. We pray for leave to file an application for orders of certiorari and mandamus. We also pray for leave to operate as Order of stay We have annexed applicant's permits to show that he was indeed outside the country. Applicant has shown a Prima facie case for grant of leave."

The record also shows that the court ruling of 1st October 2001 was on leave to apply for orders of certiorari and mandamus.

The court's found the following in its ruling;

" Applicant applies for leave to apply for an order of certiorari to bring into this court and quash the decision of the Minister/District Commissioner given on 26th June 2000 dismissing the applicant's Land Appeal No.7 of 1991.

.....

By Order L111 Rule 2 C.P. Rules, court cannot grant leave to apply for an order of certiorari to quash a decision unless-the application for leave is made not later than six months after the date of the proceedings. The decision in this case was made on 26th June 2000. The six months limitation period expired on or about 25th December 2000.

.....

As the application for leave has been filed outside the limitation period it is incompetent and is hereby dismissed ." The foregoing shows that the court before which the application for leave had been filed made a finding that the application had been filed outside the six months period. The court went further to indicate that the court **is without jurisdiction to extend or enlarge the time once the six months had expired.** The Exparte Applicant was then, as is now, represented by counsel who the court believes guided him on the legal position. The filing of the current application about 12 years after the decision in **Milimani JR Misc. App.No.370 of 2001** is to say the least a misconceived and an abuse of the courts process.

c. That no appeal on the court's decisions in **Milimani JR Misc. App. No.370 of 2001** in respect of the rulings of 1st October 2001 and 28th January 2001 have been preferred. The Exparte Applicant should better know that Equity do not aid the indolent and litigation must come to an end.

6. That for reasons set out above courts do not have jurisdiction to enlarge time for filing the application for leave to apply for certiorari orders under **Order 53 rule 2 of the Civil Procedure Rules.** The application dated 18th March 2014 is dismissed with costs to both the Respondent and Interested Party to be paid by the Exparte Applicant (Plaintiff).

It is so ordered.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 9TH DAY OF MARCH 2016

In presence of;

EXPARTE APPLICANT Present

Respondent Absent

Interested Party Absent

Counsel Mr Omondi for Exparte Applicant

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016

9/3/2016

S.M. Kibunja J

Court Assistant Oyugi

Exparte Applicant present

Mr Omondi for the Applicant

Court: Ruling delivered in open court in presence of Exparte Applicant and his counsel Mr Omondi.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016