



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

JUDICIAL REVIEW NO. 30 OF 2013

NJERU MIRANI.....1ST APPLICANT

DAVID NJIRU MUTUA.....2ND APPLICANT

DANIEL NYAGA.....3RD APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

DISTRICT LAND ADJUDICATION OFFICER,

MERU SOUTH/MARAA DISTRICTS.....5TH RESPONDENT

AND

ANDREW NYAGA.....1ST INTERESTED PARTY

JAMES KANGORI.....2ND INTERESTED PARTY

KARUGU KUGERIA.....3RD INTERESTED PARTY

RULING

1. By Chamber Summons dated 13th December, 2012 the applicants sought the following orders:-

1. THAT the matter be certified as urgent and service of the same be dispensed with in the first instance.

2. THAT this Honourable Court do extend and or excuse the filing and service of the Notice to the Registrar.

3. THAT leave be granted to apply for an order of Prohibition to prohibit the 2nd, 3rd 4th and

5th respondents from effecting declaration reference number ADM/LA/4/118 of 4th October, 2012, by the 5th Respondent declaring, Kamaindi of Kamaindi Location in Igamba Ng'ombe Division pending the hearing and determination of the Judicial Review hereof.

4. THAT leave be granted to apply for an order of Mandamus be issued bringing into this Court and compelling the Respondents to cancel and remove Declaration Reference number ADM/LA/4/118 of 4TH October, 2012, by the 5th Respondent declaring KamaIndi of Kamaindi Location in Igamba Ng'ombe Division for want of representation.

5. THAT grant of leave do operate as a Stay of any intended decision, action, execution or enforcement of Declaration Reference number ADM/LA/4/118 of 4th October 2012, by the 5th Respondent declaring Kamaindi of Kamaindi Location in Igamba Ng'mbe Division.

6. THAT the costs of this application be provided for.

2. This application was supported by a Verifying Affidavit sworn by Njeru Mairani on behalf of the applicants.

3. On 30th September, 2013 Justice Olao, J, delivered a Ruling concerning the application. Among his findings were:-

1. There was a breach of Natural Justice when Declaration number ADM/LA/4/118 was issued on 4th October, 2012 which declared Kamaindi of Kamaindi Location in Igamba Ngo'mbe Division because the 5th respondent called a meeting on 29th September, 2012 where only members of Tharaka Nithi Community were represented and yet Kamaindi Location was occupied by both the Tharaka and Mbeere Communities.

2. The Applicants had satisfied him that there were sufficient grounds for the orders sought in the Chamber Summons dated 13th December, 2012.

4. Justice Olao, J, allowed the application and granted leave to the applicants to apply for Orders of Prohibition and Mandamus.

5. In accordance with Rule 3(1) of Order 53 of the Civil Procedure Rules, the Judge directed the applicants to file the apposite Notices of Motion within 21 days from 30th September, 2013. The applicants were also directed to serve the said Notice of Motion on the respondents within 14 days of its filing and thereafter to file an affidavit stating that it had been served.

6. Leave granted by the Honourable Justice Olao, J, was to operate as a stay of any intended decision, action, execution or enforcement of Declaration number ADM/LA/4 118 of 4th October, 2012 . Justice Olao, J, sitting at Kerugoya, also transferred this suit to Meru ELC Court.

7. The Deputy Registrar at Kerugoya, wrote a letter dated 04/10/2013 to the Deputy Registrar at Meru sending the file to Meru. This was only 4 days after Justice Olao, J, had delivered this ruling. On a cursory examination of this fact, there should have been no reason for the applicants not to have filed their Notice of Motion within the Stipulated 21 days.

8. On 13/03/2014, Mr. Kamunda for the applicants and Mr. Menge for the AG for the applicants appeared in my Court for the hearing of the applicants Notice of Motion dated 20/09/2013. Mr. Kamunda told the Court that he had served the Attorney General on 30/01/2014. This application was for contempt proceedings against the Respondents. This is the first time this matter came to this court.

9. The parties have filed several applications and rulings thereof have been delivered. But this ruling concerns a Notice of Preliminary Objection dated 20th June, 2015 filed by the Interested Parties.

The Objection seeks to have the motion dated 20/08/2013 struck out on the grounds:-

1. That there are no judicial Review proceedings pending before this Court.

2. That after leave to apply for Orders of Prohibition and Mandamus was granted on the 26/8/2013, the applicants did not file the necessary motion within 21 days or at all as ordered by the Court.

3. That after expiry of the 21 days granted by the Court, no further leave or extension was sought by the applicants.

4. That the Orders sought cannot be granted in the absence of a Judicial Review Motion.

5. That the proceedings are improperly instituted in the name of the applicants instead of the Republic as the law and practice demands.

10. The Interested Parties Submissions more or else echo what is contained in the Notice of Preliminary Objection. They submit that other than invoking the provisions of Order 53, a party cannot invoke the provisions of the Civil Procedure Act and rules made thereunder because Judicial Review is an application for prerogative orders and the Court exercises a special jurisdiction which is neither Civil nor Criminal. It is submitted that a party cannot invoke the provisions of Order 50 Rule 6 of the Civil Procedure Rules which allows enlargement of time. The Interested Parties stress that the Law Reform Act is the substantive law in the area of Judicial Review and overrides any subsidiary legislation such as the Civil Procedure Rules under which Order 50 Rule 6 is promulgated.

11. The Interested Parties submit that the issues they are raising do not constitute a mere technicality but constitute the basic issue of jurisdiction. They proffer HCCC 128 of 1994(O.S) RE YING *Versus* QUIREN (unreported). They also submit that the apposite motion is a nullity as it was instituted in improper names other than those of the Republic. They proffer several authorities in support of this proposition.

12. All in all, the Interested Parties have proffered the following authorities:-

1. *Farmers Bus Service and others versus The Transport Licensing Board Tribunal.*

2. *Misc. JR Application No. 104 of 2010- Cosmas Muriungi Thambo Versus the District Land Adjudication Officer and 2 others.*

3. *Republic versus Kahindi Nyafula and 3 others Exparte Kilifi South East Farmers Cooperative, 2014 e KLR.*

4. *Salesio Njagi Nthrimano Versus Rosaline Ruguru Waweru.*

5. *In the matter of an application by the Owners of Motor Vessel "Glob Your" (1998) e KLR.*

13. Misc. J.R Application No. 104 of 2010 was handled by me. I found that Judicial Review is a special jurisdiction governed by provisions of Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. I also found that where there are statutory provisions, failure to observe them is not a mere procedural technicality. I found that it was a substantial legal issue and that non-compliance with the apposite legal provisions will render an application incompetent.

14. The Applicants opposed the Preliminary Objection. Among other things they submit that as they had obtained leave to apply for Judicial Review Orders of Prohibition and Mandamus, there was in existence Judicial Review Proceedings. They further say that bureaucratic delays by the Court system delayed the transfer of the case file to Meru and that once the case was given a new number, they filed their Notice of Motion without delay. They further submit that they could not seek leave to extend time after the 21 days had expired because they could not do so as the file was in transit and hence they had no file in which to file any application. They further submit that Order 50 Rule 6 of the Civil Procedure Rules allowed the Court to extend time.

15. Regarding their affidavit dated 30th November, 2015 which has been challenged as constituting tendering of evidence whereas Preliminary Objections are supposed to address pure points of law, they say that this Court allowed them to give a chronology of the events that led to the delay in their filing of the apposite Notice of Motion.

16. Concerning the Submission that the institution of the suit in the wrong names rendered the suit incompetent, the applicants have submitted that substantive Justice should not be sacrificed due to technicalities.

17. I find the Replying Affidavit sworn by Daniel Kamunda on 30th November, 2015 on behalf of the applicants useful in setting out their position including the issues alluded to above. The affidavit says:-

“I DANIEL KAMUNDA of P.O Box 14827-00800 Nairobi in the Republic of Kenya do hereby make oath and state as follows:-

1. THAT I am an Advocate of the High Court of Kenya practicing as such in the name and style of Kamunda Njue & Co, Advocates.

2. THAT I have the conduct of this matter on behalf of the 1st , 2nd and 3rd Applicants hence competent to swear this affidavit.

3. THAT the Preliminary Objection raised by the Interested Parties arises from our application dated 20th September, 2013 after leave to apply for orders of prohibition and Mandamus was granted by the Honourable Court in Keruguya on 26th August 2013 before Justice Boaz Olao.

4. THAT it was ordered by the Honourable Court on 30th September, 2013 that the file be transferred to the Environment and Land Judge Hon. Njoroge in Meru High Court where it was to be mentioned on 4th November, 2013 for further orders.

5. THAT I went to Meru following the issuance of the orders to transfer the file from Keruguya to Meru to follow up on the availability of the file so that we could put in our Judicial Review Application by way of a Notice of Motion Application dated 20th September, 2013. (Attached herein is a copy of the said application marked DKN 1) .

6. THAT I was informed by the Registry in charge of the ELC matters in Meru that the file had not been received having perused their file movement register.

7. THAT I went back to Keruguya High Court where the transfer orders had been issued to enquire on whether the file had been forwarded to Meru High Court Registry.

8. THAT I was informed by the then Deputy Registrar in charge, High Court at Kerugoya, Hon. Teresia Ngugi that the Court file had been forwarded to Meru High Court Registry on 4th October, 2013 as per the copy of the letter dated 27th November, 2013. (Attached herein is a copy of the said letter marked DKN 2).

9. THAT I went back to Meru High Court Registry to follow up on whether the file had been delivered and received in Meru High Court Registry. The same was not yet available.

10. THAT I was still frustrated on what step to take on the matter having in mind that I was running out of time to file the Judicial Review Application.

11. THAT during this time, our hands were tied and hence we could not file and serve the Notice of Motion within 21 days as ordered due to the unavailability of the file at Meru High Court Registry.

12. THAT vide a letter dated 27th November, 2013 it is clearly indicated that the file was received

and dealt with on 2nd December, 2013 and 3rd December, 2013 way later than the stipulated 21 days and also after the ordered mention date of 4th November, 2013

13. THAT vide a letter dated 4th October, 2013, the file was forwarded to Meru from Keruguya with instructions. (Attached herein is a copy of the said letter marked DKN 3)

14. THAT I also went to Meru on 4th November, 2013, for the file to be mentioned before Hon. Justice Njoroge . I was informed that the file was still not available,

15. THAT there was further delay that was occasioned by the issuance of a new case number at the Registry at Meru after the file was received.

16. THAT once the file was given a new case number, we immediately without hesitation and or further delay filed the Notice of Motion dated 20th, September, 2013 and not 20th August, 2013 as indicated in the preliminary objection raised.

17. THAT I was later served with a copy of the Notice of Preliminary Objection dated 20th January, 2015 which raised various issues among them being that there are no Judicial Review proceedings pending before the Court.

18. THAT there are indeed Judicial Review Proceedings pending before Court vide the Notice of Motion dated 20th September, 2103.

19. THAT the Interested parties contradict themselves and mislead the Honourable Court when they further state in the Notice of Preliminary Objection on ground No. 5 that the Judicial Review proceedings are improperly instituted before this Court whereas on ground No. 1 they refute the existence of any Judicial Review Proceedings pending before the same Court.

20. THAT such information can only be conceived to mislead and create confusion before this Honourable Court.

21. THAT further , in response to ground No.2 and No. 3 of the Notice of preliminary Objection dated 20th January, 2015; failure to proceed as ordered was occasioned by inevitable and unavoidable circumstances touching on the transfer of the Court file as explained earlier in this Replying Affidavit in paragraphs 4 to 14 above.

22. THAT in response to ground No. 5 of the Notice of Preliminary Objection dated 20th January, 2015, the failure to adhere to Order 53 (1) sub-rule (2) was not deliberate or inordinate and the same can be remedied by way of an amendment with leave of this Honourable Court.

23. THAT with the foregoing, it is trite law that substantive justice should not be sacrificed due to procedural technicalities and such should not be used to obstruct and/or deny justice to the applicants herein who have high chances of success in this matter.

24. THAT I swear this Affidavit in reply to the Notice of Preliminary Objection dated 20th January, 2015.

25. THAT what is deponed to hereinabove is true to the best of my knowledge, information and belief.

18. The applicants have proffered Misc. Civil Application JR. NO 12 of 2014, The Republic Versus The General Manager, Moi International Airport and Another Exparte Jared Adimo Odhiambo and another for their proposition that Order 50 Rule 6 of the Civil procedure Rules allowed for extension of time beyond the required 21 days in Judicial Review Proceedings.

19. The applicants have proffered Civil Appeal Nos. 120, 105 and 168 “A” of 2013 (consolidated)

Between Pattni and Director of Public Prosecutions and 3 others in H.C JR 305 of 2012 for their proposition that Justice should be administered without undue regard to procedural technicalities. In this case the Court of Appeal allowed extension of time where the delay was only for one day.

20. I have considered the pleadings, the Submissions and the authorities proffered by the parties. I do find that the authorities the parties have proffered are good authorities in their circumstances. The authorities proffered by the Interested parties are relevant to this Ruling. I do opine that Order 50 Rule 6 of the Civil Procedure Rules being a provision promulgated under subsidiary legislation can not an override act of parliament, in this case the Law Reform Act.

21. I am concerned that should the provisions guiding Judicial Review proceedings be trumped, then Judicial Review will be extended to cover unintended situations. At the end of the day the line between Judicial Review Proceedings and other proceedings may be blurred. This will lead Courts to uncharted territory. The process will then become an unruly horse which will lead us to unknown directions. I opine that Judicial Review should remain a process and jurisdiction *sui generis* and parties ought to follow the laid down rules. Otherwise Judicial Review, as we know it, will cease to have the intended efficacy. Perhaps It will be pushed into a comatose position and be just as dead as the Dodo.

22. No no one shoe-size fits all cases. Every case has its particularities For example in HC Judicial Review Application 305 of 2012 (op.cit), the delay was only for one day This is not the case anywhere near the case in this suit. In J.R NO. 12 OF 2014 at Mombasa (op.cit) the delay was for about 7 days. This is not the case in the circumstances of this matter.

23. It is my opinion that the institution of a suit in the wrong names, if it is the only infraction being challenged, can be cured by the invocation of Article 159 (d) of the Constitution of Kenya and the Parties can thereafter in the proceedings make the correct citations. In this case, I am inclined not to dismiss this suit on this ground only.

24. The Interested Parties have demonstrated an arguable case. However, from the proceedings it is not clear whether leave to file JR Proceedings was granted on 26/8/2103 or on 30/09/2013, when the presiding Judge signed his ruling. It is clear that the suit file was sent to Meru from Kerugoya vide a letter signed by the Deputy Registrar, Kerugoya, on 4th October, 2013. I am unable to ascertain when the file reached Meru.

25. The exparte Applicant's claim that they could not access the file for several months. From the pleadings made by the parties I am unable to authenticate the integrity of this claim. But I ask myself:- What if this is true? What if the file, as often happens, had been misplaced. Do we condemn the applicants when they may be innocent?.

26. If the applicants could not access the file, then they would not be in a position to file their Notice of Motion. Refusing to allow the applicants to file JR proceedings when they did not have custody of apposite files will fly in the face of delivery of substantive justice. It may even promote dishonesty in that some litigants could arrange for files to be lost. In such a situation, procedural technicalities will be trumping substantial justice.

27. The Court notes that at the leave stage, the Judge at Kerugoya found that the applicants had been denied Natural Justice. This is a Court of Concordant, Concurrent, accumbent and horizontal jurisdiction with the Court at Kerugoya. The finding by Hon. Justice Olao , J, at the leave stage needs to be canvassed as a Judge cannot casually or will nilly grant orders that can be seen to set aside orders issued by another Judge of the same rank.

28. I note that the applicants did not file an application to extend time. Indeed, the first time they came to Court, their purpose was to prosecute contempt proceedings against the respondents. I find that they may have contributed to the delay in the filing of the apposite Notice of Motion.

29. In the Interest of Justice although I find the applicant not completely blameless, I deem the Notice of

Motion which is the subject of the Notice of preliminary Objection as properly filed. In future, the parties should cite their pleadings and averments properly. The prayers in the preliminary Objection are declined.

30. As nevertheless the applicants were guilty of not complying with provisions that guide Judicial Review Proceedings, and in view of the fact that they never applied to Court for enlargement of time, making the Preliminary Objection herein necessary, they will pay the Interested Parties costs pertaining to the Notice of Preliminary Objection.

31. I applaud Advocate Murango Mwenda for having incisively, pellucidly and in an apposite manner put forth the valid arguments contained in his Submissions. It is only because this suit evinces *sui generis* issues, that this Preliminary Objection will not be allowed. In other Circumstances, the Preliminary Objection would have been found veritably meritorious.

32. The apposite Notice of Motion comprising these Judicial Review Proceedings will proceed to hearing. I direct the applicants to file their Submissions within 30 days of today. The respondents and the Interested Parties are directed to file their Submissions within 30 days after they are served with the Applicants' Submissions.

33. Costs of this Preliminary Objection are awarded to the Interested Party.

34. It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 14TH DAY OF SEPTEMBER , 2016 IN THE PRESENCE OF:

CC: Lilian/Daniel

Murango Mwenda present for Interested Party

Miss Njenga h/b Kamunda for the Applicant

Kimathi for Respondent

P.M. NJOROGE

JUDGE