



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND JUDICIAL REVIEW APPLICATION NO. 35 OF 2012

IN THE MATTER OF AN APPLICATION BY FANUEL OKOTH ONYANGO FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF NYANZA LAND DISPUTES TRIBUNAL CASE NO.18 OF 1990 (SIC) AND KISUMU SRMC LAND CASE NO.45 OF 2009

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE LAND DISPUTES TRIBUNAL, KISUMU.....1ST RESPONDENT

**SENIOR RESIDENT MAGISTRATE’S COURT, OYUGIS.....
.....2ND RESPONDENT**

AND

CHARLES OTIENO ADUKE..... INTERESTED PARTY

EX PARTE

FANUEL OKOTH ONYANGO

RULING

1. The ex parte applicant, **Fanuel Okoth Onyango** (hereinafter referred to only as “**the applicant**”) moved this court by an application dated 21st May, 2012 seeking leave of the court to apply for an order of certiorari to bring before this court and quash the decision of Nyanza Land Disputes Appeals Committee in Appeal No. 45 of 2009 and the decision of Oyugis Principal Magistrate’s Court in Misc. Application No. 7 of 2009. The applicant also sought a further order that leave if so granted do operate as a stay of the implementation or enforcement of the said decisions pending the hearing of the judicial review application. The applicant’s application was placed before R. Lagat Korir J. on 23rd May, 2012 who granted the orders sought as prayed and directed that the judicial review application be filed within 21 days. Following the grant of leave as aforesaid, the applicant filed the application for judicial review through Notice of Motion dated 12th June, 2012 on the same day. The application was served upon

among others, the interested party who filed a replying affidavit on 14th July, 2014 in opposition to the same.

2. What I now have before me is the interested party's application by way of Notice of Motion dated 23rd September, 2014 in which the interested party has sought an order for the dismissal of the applicant's judicial review application for want of prosecution. The interested party's application was brought on the grounds that although the applicant was granted leave on 23rd May, 2012 to file an application for judicial review, the applicant had failed to do so for over 2½ years. The interested party contended that in the circumstances, the applicant is not interested in continuing with these proceedings. In his affidavit sworn on 23rd September, 2014 the interested party deposed that although the applicant filed the judicial review application on 12th June, 2012, the same was not served upon him. The applicant did not also serve him with the stay order that was granted together with leave. The interested party deposed that he only came to know of these proceedings when the applicant lodged a complaint against him and had him arrested on 3rd June, 2014 for disobeying the stay order that was issued herein on 23rd May, 2012. Upon his arrest, he made inquiries at Oyugis Law Court and was informed of these proceedings. He thereafter perused the court file in respect of these proceedings and made copies of documents therein. The interested party has contended that the applicant's judicial review application has no merit and that is why he has lost interest in these proceedings. The interested party has contended that the appeal before Nyanza Land Disputes Committee was lodged by the applicant and as such he cannot be heard to complain about the jurisdiction of the said committee.

3. The interested party's application was opposed by the applicant through a replying affidavit sworn on 27th October, 2014. In his affidavit, the applicant stated that contrary to the interested party's claim that he was not served with the Notice of Motion application for judicial review, the said application was served upon him on the same day that it was filed on 12th June, 2012 by a process server, one, Naum Ochieng. The applicant stated that after filing the Notice of Motion application, his advocates did not fix it for hearing immediately because the Environment and Land Court had not been established. The applicant stated further that his advocates made attempts to list the judicial review application for hearing on 1st July, 2014 but did not succeed because the court file was not traced on that day. The applicant has contended that he is ready and willing to prosecute his judicial review application.

4. When the interested party's application came up for hearing on 3rd December, 2014, the parties relied on their respective affidavits in support of and in opposition to the application. The interested party in addition relied on written submissions dated 2nd December, 2014 that were filed in court on 3rd December, 2014 without leave of the court. I have considered the interested party's application together with the affidavit filed in support thereof. I have also considered the applicant's replying affidavit that was filed in opposition to the application. Finally, I have considered the interested party's written submissions that were filed herein on 3rd December, 2014. The interested party has sought the dismissal of the applicant's Notice of Motion application for judicial review for want of prosecution. What I need to determine in the present application is whether there has indeed been delay in the prosecution of the application and if there has been such delay, whether the delay has been inordinate and if it has been, whether the delay has been explained.

5. I would also consider if I find that the delay has been inordinate, whether justice can still be done despite the delay. The interested party's Notice of Motion application was filed herein on 12th June, 2012. The interested party filed a replying affidavit in response thereto on 14th July, 2014. There is a dispute as to whether the interested party was served with the application or not. The interested party has contended that he was not served with the application and that his replying affidavit was filed on the basis of a copy of the Notice of Motion application that he obtained from the court file. On the other hand, the applicant has maintained that the interested party was served with the Notice of Motion application on the same day that it was filed on 12th June, 2012. When service is contested, the only way to resolve the issue is to cross examine the process server who is said to have effected the service. I would not wish to adopt that procedure in the present application because the issue of service of the application is not directly in contention in the application before me. Furthermore, the process server who is said to have served the

interested party has not filed an affidavit of service in court upon which he can be cross-examined.

6. By the time, the interested party filed the present application, the applicant's Notice of Motion application had been pending for over 2½ years. For the entire duration of 2½ years, the applicant did not take any step with a view to proceeding with the application. The interested party's complaint that there has been delay in the prosecution of the applicant's application is therefore not without merit. The excuse that has been given by the applicant for the inaction is that the applicant's advocate was waiting for the establishment of this court. This cannot be true. This court was established by the enactment of the Environment and Land Court Act, 2011 which came into operation on 30th August, 2011. The court was constituted through the swearing in of the first group of judges in November, 2012. The court was fully operational by December, 2012. The applicant cannot therefore be taken seriously when he claims that from 12th June, 2012 up to 1st July, 2014 when he attempted for the first time to set down the application for judicial review for hearing he was waiting for this court to be established.

7. It is my finding therefore that there has been a prolonged delay in the prosecution of the applicant's application for judicial review and that the delay has not been adequately explained. This finding would have been sufficient to dispose of the interested party's application. However, the duty of the court is to do justice. Justice can only be done in the circumstances of this case by giving each party an opportunity to put his/her case before the court for consideration before the court makes a determination. Dismissal of a case for want of prosecution denies the plaintiff an opportunity to be heard. The power should therefore be exercised only in those cases where the delay has been inordinate, unexplained and justice cannot be done if the suit was to be allowed to proceed to hearing. See, **Ivita vs. Kyumbu [1984] KLR 441**. In the present case, I am in agreement with the interested party as I have stated above that there has been inordinate delay in the prosecution of the applicant's application. I am of the view however that justice can still be done to the parties if the application is spared the axe and allowed to proceed to hearing. The interested party has not contended to the contrary.

8. The upshot of the foregoing is that the interested party's application dated 23rd September, 2014 is not for granting. The same is dismissed but with costs to the interested party. The applicant shall take steps to set down his judicial review application for hearing within 45 days from the date hereof. Orders accordingly.

Delivered, dated and signed at Kisii this 6th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Applicant

N/A for the Respondents

The Interested party present in person

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE