



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC.CIVIL APPLICATION. NO. 158 OF 2002

REPUBLIC APPLICANT

VERSUS

BUSINESS PREMISES TRIBUNAL RESPONDENT

PIUS MWANGI WAIRIA INTERESTED PARTY

EXPARTE MOSOP MARICHOR WOMEN GROUP

RULING

1. The Exparte Applicant ***Mosop Marichor Women Group***(the women group) instituted Judicial Review proceedings against the Respondent the Business Premises Tribunal (the tribunal) through a Notice of Motion dated 5th July, 2002 seeking mainly that an order of certiorari be issued to remove to the High Court the proceedings and decision of the Respondent dated 29th August, 2001 in Eldoret Business Premises Tribunal case No. 36 of 2000 for purposes of being quashed and an order of prohibition to prevent the implementation of the impugned decision.

2. The background to these proceedings is that the interested party ***Pius Mwangi Wairia*** was the Exparte Applicant's tenant in their parcel of land known as Eldoret Municipality Block 7/150 located in the Eldoret Central Business District. With the authority of the Exparte Applicant, the interested party put up sheds in the vacant plot he had rented from the women group which he leased out to some subtenants.

3. On 1st January 2000, the Exparte Applicant without notice purported to terminate his tenancy and locked out the interested party from his business premises. The interested party then filed a complaint against the women group in the tribunal. The tribunal in a ruling delivered by its chairman on 29th August, 2001 ruled in favour of the interested party and allowed him to break open the lock fixed by the Exparte Applicant in order to gain access to the premises.

4. The Exparte Applicant was aggrieved by that decision. This is what provoked the commencement of the instant judicial review proceedings. But before the hearing could take off, the interested party passed away. His son ***Stephen Gitau Mwangi*** (the Applicant) on 5th August 2014 filed a Notice of Motion dated 16th July, 2014 seeking leave to substitute his late father as an interested party in these proceedings. It is this application that is the subject of this ruling.

I have taken the trouble to elaborately narrate the background to the substantive motion and the prayers sought therein so that the nature of the interested party's interest in the proceedings and their outcome can be properly appreciated.

5. The application is premised on the main ground that the interested party died on 14th August, 2012 and that the Applicant sought and obtained letters of administration ad litem vide Nakuru High Court Probate and Administration case No. 340 of 2013 for purposes of being substituted with the interested party in this case as the legal representative to his estate.

6. The application is opposed by the women group but it is not opposed by the Respondent.

The chair lady of the Exparte Applicant **Ms. Susan Kipsees** wore a replying affidavit on 22nd November 2014 in which she deposed that the application was made in bad faith and was not merited; that no explanation has been given for the inordinate delay in making the application; that as the application was made more than one year after the death of the interested party, it cannot be allowed as the suit against the interested party had abated as provided for under **Order 24 Rule 4(3)** of the **Civil Procedure Rules**.

7. The application was argued before me on 22nd January 2015.

Learned counsel **Mr. Aseso** appeared for the Applicant, learned counsel **Mr. Ngumbi** for the Respondent while learned counsel **Ms. Kipsei** represented the Exparte Applicant.

In support of the application, **Mr. Aseso** urged the court to allow the application as the Applicant was the holder of a grant of letters of administration ad litem in respect of the deceased's estate; that the delay in filing the application was occasioned by the process of obtaining the said grant and that a decision to dismiss the application would be unjust as the outcome of the judicial review proceedings will affect the Estate of the Interested party.

8. In opposing the application, learned counsel **Ms. Kipsei** relied on the depositions in the Replying affidavit. She emphasized that the application was filed on 5th August 2014 long after the claim against the interested party had abated; that one year after the interested party's death expired on 14th August, 2013 after which the suit against the interested party abated as required by **Order 24 Rule 4(3)** of the **Civil Procedure Rules**. For this reason, learned counsel invited the court to dismiss the application.

9. In reply to these submissions, learned counsel **Mr. Aseso** urged the court to invoke the overriding principle under **Section 1 and 1A** of the **Civil Procedure Rules** and allow the application in the interest of justice; that if the application was allowed, the Exparte Applicant was not likely to suffer any prejudice.

10. I have carefully considered the application, the affidavits filed by the parties in support and in opposition to the application and the positions taken by the Applicant and the Exparte Applicant in submissions made by their learned counsel.

It is not disputed that the interested party passed away on 14th August 2012 and that the instant application though dated 16th July, 2014 was filed on 5th August 2014. I agree with learned counsel **Ms. Kipsei** that this was definitely over one year since the interested party's demise.

I am however unable to agree with her submission that the suit had by this time abated as against the interested party in view of the provisions of **Order 24 Rule 4(3)** of the **Civil Procedure Rules** for two main reasons. First, as the pleadings herein clearly shows, no suit was filed against the interested party that was capable of abatement. The late **Pius Mwangi Wairia** was enjoined in these proceedings as an interested party not as a Respondent; the Exparte Applicant's claim is against the tribunal which it accuses of having made a decision which adversely affected its interest without giving it an opportunity to be heard. Finally, no reliefs were sought against the interested party.

In the premises, even if the instant application was dismissed, the substantive motion for judicial review would still proceed against the Respondent.

11. Secondly, and more importantly, both learned counsel in this matter clearly proceeded on the wrong

assumption that the **Civil Procedure Act and Rules** applied to the instant application. The application under consideration was made in judicial review proceedings and not in an ordinary civil suit. And judicial review proceedings invoke the supervisory jurisdiction of this court which is neither civil nor criminal in nature. It is a special jurisdiction exclusively governed by **Section 8** and **Section 9** of the **Law Reform Act** being the substantive law and **Order 53 of the Civil Procedure Rules** which is the procedural law.

It is trite law that the **Civil Procedure Act** and **Rules** made thereunder or any other law have no application in judicial review proceedings. See: **Republic V Chairman Amagoro Land Disputes Tribunal & Another Ex parte Paul Mafwibi Wanyama Civil Appeal No. 41 of 2013 (2014) eKLR; The Commissioner of Lands V Kunste Hotel Limited Civil Appeal NO. 234 of 1995 (1997) eKLR.**

12. It is also worth noting at this juncture that **Order 53 of the Civil Procedure Rules** was promulgated under powers donated by Section 9 (1) of the **Law Reform Act** Chapter 26 of the Laws of Kenya to provide for a self-sufficient procedure of regulating the conduct of judicial review proceedings hence the inapplicability of the **Civil Procedure Rules**.

It is consequently my finding that the Ex parte Applicant's opposition to the instant application is not well founded.

13. Be that as it may, I agree with the Ex parte Applicant that there has been considerable delay in making the instant application. The delay has been explained by the claim that it was caused by the processing of the grant of letters of administration ad litem. But this is not sufficient explanation considering that the said grant was issued on 10th December, 2013- See exhibit marked "**SGMS**".

There was therefore a delay of about six months which has not been explained at all by the Applicant.

However, given the background to this matter and the nature of the interest the Estate of the late **Pius Mwangi** has in these proceedings as demonstrated earlier in this ruling, I will in the wider interests of justice allow the application since doing so will not cause any prejudice to the Ex parte Applicant that cannot be compensated for by way of costs.

14. In the result, the application dated 16th July, 2014 is hereby allowed in terms of prayer (b) with costs to the Ex parte Applicant. Orders accordingly.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11th DAY OF MARCH 2015.

In the presence of:-

Mr. Mathai for the Applicant

Ms. Tigoi for the Ex parte Applicant

No Appearance for the Respondent.