REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 90 OF 2006

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI BY DAVID KOMENDA TUMBO AND NELSON ONGOI NYABUTI

BETWEEN

REPUBLIC ……………………………………………………..………………………………… APPLICANT

VERSUS

NYAMIRA LAND DISPUTE TRIBUNAL …………………………..……………. 1ST RESPONDENT

KEROKA SENIOR RESIDENT MAGISTRATES COURT ……….……..…... 2ND RESPONDENT

AND

ELIZABETH GISARE NYANG'AU ……………...........……………………….……... INTERESTED PARTY

AND

DAVID KOMENDA TUMBO

NELSON ONGOI NYABUTI …………………........................……………………………. EX PARTE APPLICANTS

RULING

1. The ex parte applicants herein, **David Komenda Tumbo** and **Nelson Ongoi Nyabuti** (hereinafter referred to only as "**the applicants**") brought an application herein by way of Notice of Motion dated 26th July 2006. The application was filed in court on the same date. In the said application, the applicants sought an order of certiorari to quash the decision of the 1st respondent that was made on 2nd May 2006 and its adoption by the 2nd respondent as a judgment of the court on 11th May 2006. The application was listed for hearing on 16th November 2006 and 28th May 2007 but for one reason or the other the same was not heard.

2. On 31st July 2007, the application was transferred to the Constitutional and Judicial Review Division of the High Court of Kenya, Nairobi, for hearing and disposal following a direction by the Chief Justice that was contained in Legal Notice No. 300 of 2007 that required all judicial review applications to be heard in Nairobi. The applicant's advocates were notified of this transfer on 29th August 2007. Upon transfer to Nairobi, the application was given a new number namely, JR Misc. Application No. 923 of 2007. It appears as if no further steps were taken in the matter until 9th December 2009 when the application was transferred back to the High Court of Kenya at Kisii for hearing and disposal following the revocation of the Chief Justice's earlier direction by another Gazette Notice No. 1756 of 27th December 2009.
3. The transfer of the said application from the High Court of Kenya at Kisii to the High Court in Nairobi and back was carried out by the court of its own motion following the Gazette Notices aforesaid. Whereas the applicant was notified of the transfer of the application to High Court in Nairobi, no notice was given to the applicant when the matter was transferred back to the High Court at Kisii. It is not clear from the record as to when the file was received back at the Kisii High Court. On 30th August 2010, the court of its own motion again dismissed the applicants' application aforesaid for want of prosecution under Order XVI rule 6 of the repealed Civil Procedure Rules.
4. The applicants were aggrieved by this order of dismissal and moved the court by way of Notice of Motion application dated 10th February 2012 seeking the setting aside of the said order and the reinstatement of the application for hearing on merit. This is the application which is the subject of this ruling. The applicants brought this application on the ground that they were not given a notice to appear before court to show cause why the application should not be dismissed before the same was dismissed on 30th August 2010. In his affidavit in support of the application sworn on 10th February 2012, David Komenda Tumbo stated that, once the application was transferred to Nairobi and given a new case number, their advocates on record made several attempts to set down the application for hearing but were unable to do so because the court file could not be traced. He stated that it was sometimes later that their advocates on record discovered that the application had been transferred back to the High Court of Kenya at Kisii for hearing and disposal. He stated further that attempts by their advocates on record to set down the application for hearing at the High Court at Kisii similarly did not bear fruit because once again the file could not be traced. It was until much later that the court file was traced and upon perusal of the same by their advocates on record, they learnt that the application had been dismissed for want of prosecution on 30th August 2010. David Komenda Tumbo stated further that their advocates on record were not served with a Notice to Show Cause as required by the law before the application was dismissed and that failure to prosecute the application was not deliberate.
5. The application was opposed by the interested party. The respondents did not oppose the same. In her replying affidavit sworn on 3rd April 2012, the interested party stated that the applicant's application was lawfully dismissed. The interested party stated that the application that was dismissed had not been served upon her and that the applicants have not given plausible reason why they failed to prosecute the application expeditiously. The interested party termed the application herein as incompetent and fatally defective.
6. On 7th April 2014, the parties agreed to argue the applicant's application herein by way of written submissions. By the time the matter came up for mention on 16th March 2015 for a ruling date, only the applicants had filed their submissions which submissions were filed on 19th June 2014. I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit that was filed by the interested party in opposition to the application. Finally, I have considered the submissions by the applicants' advocates and the authorities cited in support thereof.
7. Order XVI rule 6 of the repealed Civil Procedure Rules did not require a Notice to Show Cause to be served upon the parties before a suit was dismissed by the court for want of prosecution. Such notice was only necessary where the suit was to be dismissed for want of prosecution under Order XVI rule 2 of the said rules. It was therefore proper for the court to dismiss the applicants' judicial review application under Order XVI rule 6 of the repealed Civil Procedure Rules without any notice to the applicants provided the conditions of that order were met. A suit could only be

dismissed under Order XVI rule 6 aforesaid if no application had been made or step taken for a period of three years with a view to proceeding with the same. As I have stated above, the applicant's judicial review application was filed on 26th July, 2006. Between 31st July, 2007 and 9th December, 2009, the application was transferred from the High Court of Kenya at Kisii to the High Court of Kenya in Nairobi and back to the High Court at Kisii without the applicants' involvement. When the application was dismissed by the High Court at Kisii on 30th August, 2009, it was hardly a year from the time it was transferred from the High Court in Nairobi. From the foregoing, it could not be said that no application had been made or step taken in the matter for a period of three years. The application could not therefore be dismissed under Order XVI rule 6 of the repealed Civil Procedure Rules. The dismissal of the application sought to be reinstated was not proper in the circumstances. A party against whom an irregular order has been made is entitled as of right to have the same set aside. The court has no discretion in the matter. In any event, from the history of the said application that I have narrated above, I am satisfied that the delay in the prosecution of the same has been adequately explained by the applicants and is excusable.

8. The upshot of the foregoing is that the applicant's application dated 10th February 2012 has merit. The same is allowed in terms of prayers (b) and (c) thereof. The cost of the application shall be in the cause.

Delivered, Dated and **Signed** at **Kisii** this **8th day of May 2015.**

S. OKONG'O

JUDGE

In the presence of:

Miss Moguche h/b for Mutiria	for the applicant
N/A	for the 1st and 2nd respondents
N/A	for the Interested Party
N/A	for the Ex parte applicants
Mr. Bosire	Court Clerk

S. OKONG'O

JUDGE