



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**JUDICIAL REVIEW CASE NO. 9 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF CERTIORARI**

**AND**

**IN THE MATTER OF:**

**BENJAMIN KYAMBI MBEVI (s/o MBEVI**

**NGUTU, Deceased).....EX-PARTE/APPLICANT**

**VERSUS**

**THE COUNTY DIRECTOR OF LAND**

**ADJUDICATION & SETTLEMENT**

**(MAKUENI COUNTY).....1<sup>ST</sup> RESPONDENT**

**THE MINISTER HOUSING & LANDS**

**THRO' THE DEPUTY COUNTY**

**COMMISSIONER – MAKUENI SUB-COUNTY.....2<sup>ND</sup> RESPONDENT**

**AND**

**GRACE KATILO NGELI (w/o KATILO NGELI**

**KITENGE, DECEASED).....INTERESTED PARTY**

**RULING**

1) On the 27<sup>th</sup> September, 2019, the Counsel for the Ex-parte Applicant filed an ex-parte notice of motion application dated 26<sup>th</sup> September, 2019 seeking the following orders: -

**1. THAT leave be granted to the Ex-Parte Applicant herein to bring forth an application for Judicial Review in the nature of CERTIORARI directed against the Respondents herein AND Quashing the said Respondents' Judgement in his Land Case Appeal No. 216 of 2000 in respect of land parcel Plot No.299 situated within Iuani Adjudication Section which judgement was given and read to the parties on 31<sup>st</sup> July, 2019.**

**2. THAT the leave granted do operate as a stay of any further dealings on the said parcel of land, Plot No.299 situated within Iuani Adjudication Section pending the hearing and determination of the Judicial Review proceedings.**

**3. THAT the costs of this application be in the cause.**

2) The application was accompanied by a statement dated 26<sup>th</sup> September, 2019 and a verifying affidavit and an affidavit both sworn at Nairobi on 26<sup>th</sup> September, 2019 by Benjamin Kyambi Mbevi, the Ex-Parte Applicant herein.

3) The application was brought under Order 53(1), 2 and 3 of the Civil Procedure Rules.

4) The application was placed before the Deputy Registrar who fixed it for hearing before me on 30<sup>th</sup> October, 2019 when the Counsel who had held brief for Mr. Nzavi for the Ex-parte Applicant told the court that he had no instructions to proceed with the matter. Consequently, the matter was fixed for mention on 09<sup>th</sup> December, 2019 when the Counsel for the Ex-Applicant was expected to appear in court. Come the 09<sup>th</sup> December, 2019 Mrs. Nzau who held brief for Mr. Nzavi told the court that the latter needed 21 days to amend the ex-parte application. The application for adjournment was granted and the matter was fixed for further mention on 06/02/2020 but the court did not sit on the material day. However, the Ex-Parte Applicant fixed a hearing date of 21<sup>st</sup> April, 2020. The matter was not mentioned on 21/04/2020 for the obvious reasons that are within the public knowledge that the court's operations had been downscaled due to covid-19 pandemic which struck Kenya in mid-March of this year.

5) On the 17<sup>th</sup> July, 2020 the Ex-Parte Applicant fixed the matter for mention on 06<sup>th</sup> October, 2020 when he successfully sought for leave to file an amended chamber summons application. The matter was fixed for mention on 13<sup>th</sup> October, 2020 when the Counsel for the Ex-Parte Applicant informed the court that they had filed a chamber summons application dated 09<sup>th</sup> October, 2020 and abandoned the notice of motion application dated 26<sup>th</sup> September, 2019.

6) **Order 53 Rule 1 (1) of the Civil Procedure Rules** provides as follows: -

*“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.”*

**Sub rule (2) of Rule 1** provides as follows: -

*“An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.....”*

7) My reading of the above rule is that on the 27<sup>th</sup> September, 2019, the Ex-Parte Applicant ought to have filed a chamber summons application instead of a notice of motion application. The latter could only be filed once leave to file an application for an order of certiorari was granted by this court. No such leave had been granted and as such, the Ex-Parte Applicant ought not to have filed a notice of motion application.

8) By purporting to abandon the notice of motion application dated 26<sup>th</sup> September, 2019, it seems to me that the chamber summons application dated 09<sup>th</sup> October, 2020 will have no legs to stand on since the said application was filed outside the six months' window period from the date of the judgement sought to be quashed as is provided for under Section 9(3) of the Law Reform Act chapter 26 of the Laws of Kenya and Order 53 Rule 2 of the Civil Procedure Rules. Be that as it may, the chamber summons application dated 09<sup>th</sup> October, 2020 ought to have been an amendment of the notice of motion application dated 26<sup>th</sup> September, 2019 as provided for under **Order 8 Rule 7(2) of the Civil Procedure Rules**. The aforementioned rule provides as hereunder: -

*“All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.”*

9) For the reasons that I have given, I would agree with Mr. Mulei for the Interested Party that by abandoning the notice of motion application dated 26<sup>th</sup> September, 2019 instead of filing an amended chamber summons application, this file is as good as closed and hence there is no application for leave to file an application for an order of certiorari for consideration by this Court. Consequently, the application is struck out with costs to the Interested Party.

**Signed, dated and delivered in open court at Makueni this 19<sup>th</sup> day of October, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**In the presence of: -**

Mr. Hasan holding brief for Mr. Nzau for the Ex-Parte Applicant

Ms. Kyalo for the Interested Party

Ms. C. Nzioka – Court Assistant

**MBOGO C. G., JUDGE,**

**19/10/2020.**