

affidavit.

Mr. Areba for the applicant submitted that under Order 8 rule 3 the court can allow any amendment for purposes of determining issues in controversy. He argued that the motion is a pleading in itself which can be amended and that the interested party will not be prejudiced as he will have an opportunity to respond.

Mr. Onchiri opposed the application on behalf of the 2nd interested party. He submitted that the order relied upon does not include amending judicial review proceedings. There was no substantive motion filed within 21 days as the order of leave given to the applicant. He also submitted that Order 50 Rule 6 does not apply as judicial review in decision of the superior courts do not enjoy the provisions of extension of time. He submitted the interested party will suffer prejudice as he has been waiting for the determination of this matter. He argued that this court lacks jurisdiction to extend time or allow the amendment. He prayed for the application to be dismissed with costs. He relied in the case of Muriuki Mburu vs. Kwale Land dispute Tribunal Hc. Misc. Civ. Appl. No. 83 of 2000 at Mombasa.

There are two issues for determination before this court as brought in prayer 1 and 2 of the application. The first is whether this court can grant leave to the applicant to amend his notice of motion dated 17.12.10 and secondly whether the court can extend time for filing the substantive motion seeking orders of certiorari.

I have looked at the application dated 17.12.10 that is sought to be

ammended. The application essentially sought leave to commence judicial review proceedings. It is therefore not right as Mr. Areba argued that they are only seeking to remove the word 'leave'. If even if this word is removed, it will not cure the problem as the prayer to be quashed will obviously not be clearly stated. I agree with Mr. Onchiri that no substantive motion was filed within the 21 day period as per the order granting leave. The applicant is trying to have extension of time through the back door by seeking ammendment.

Under section 9 (3) of the Law Reform Act imported in our order 53 in the Civil Procedure Rules, order 3 (1) provides that the application for orders of certiorari, mandamus or prohibition is to be made within 21 days from the date of granting leave. The order sought to be quashed was given on 14th September 2010 vide Kimilili SRMCC land case no. 18 of 2009. Leave to commence judicial review proceedings was made within the six month window as required by order 53 rule 2. Instead of filing the substantive motion within the 21 days, they filed another application seeking leave. This in my view was a very serious omission/mistake of counsel. Can this court then exercise its discretion to extend time so as not to visit the mistake of counsel on his client? I wish to point out that the case cited (Muriuki Mburu vs. The Kwale LDT) is partially different from the instant case because in that case extension of time was sought to make an application for leave outside of the six months.

Extension of time has been held in several case law as a discretion of

the court and such discretion can be exercised even where there are time-lines set by law. The court is required to analyze either the length of delay, reason for it, chances of the case succeeding or the degree of prejudice occasioned to the respondent(see case of Leo Sila Mutiso vs. Rose Hellen Wangari Civ App nai no. 251 of 1997)

I find in the instant case the reason for the delay is on the basis of mistake of the advocate. It will be unjust to punish applicant for mistake of his advocate who filed the wrong application prejudice to the interested party can be mitigated as he will participate in the subsequent proceedings. I therefore allow prayer 2 of the application extending time within which to commence the proceedings. I however dismiss prayer 1. The applicant to file the substantive motion within 7 days from date of this ruling. Costs of the application is awarded to the 2nd interested party.

RULING DATED, SIGNED, READ and delivered in open court this 3rd day of June 2013.

**A. OMOLLO
JUDGE.**