



**REPUBLIC OF KENYA**

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

**CHUKA ELC MISC. CASE NO. 6 OF 2020**

**JOSEPH NYAGA MWIKAMBA.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF THARAKA NITHI.....RESPONDENT**

**RULING**

1. The application which is dated 22/5/2020 is brought to court under Order 37 rule 6, Section 3A of the Civil Procedure Act and all enabling provisions of the Law, it states as follows:

**EXPARTE ORIGINATING SUMMONS**

**(Under Order 37 Rule 6, Section 3A of the Civil Procedure Act and all enabling provisions of the Law)**

**TAKE NOTICE** the Honorable Court will be moved on the ..... day of.....2020 at 9.00 O'clock in the morning, in the forenoon or soon thereafter as counsel for the Applicants may be heard for **ORDERS THAT:**

1. THAT the applicant be granted leave to commence Judicial Review proceedings against the Respondent out of the stipulated time.
2. The Cost of this application be provided for.

**ON THE GROUNDS;**

1. **THAT** the time within which to institute judicial review proceedings has lapsed.
2. **THAT** the applicant's case is merited and wishes to quash an unlawful decision of the Respondents.

**WHICH APPLICATION** is supported by the annexed supporting affidavit of JOSEPH NYAGA MWIKAMBA and other reasons as may be adduced at the hearing hereof.

**DATED** at CHUKA this 22<sup>nd</sup> Day of July 2020.

**WENDY MAKENA**

**ADVOCATE FOR THE APPLICANT**

2. The court directed the parties to canvass the application by way of written submissions.

However, only the applicant filed written submissions. These submissions are reproduced in full herebelow without alteration whatsoever:

**APPLICANT'S WRITTEN SUBMISSIONS**

May it please your Lordship.

**Introduction**

The applicant filed Originating Summons on the 22<sup>nd</sup> day of July 2020 seeking leave to commence judicial review against the decision of the **District Commissioner** made on the 6<sup>th</sup> day of July 2017. The application is supported by an affidavit sworn by the applicant on the 22<sup>nd</sup> day of July, 2020 and a further affidavit sworn on the 22<sup>nd</sup> day of October 2020. The applicant avers that the decision of the District Commissioner held that the respondent is the beneficial owner of Land Parcel No. 2375. The applicant in opposing the said decision avers in his supporting affidavit that the land parcel was his ancestral land having been passed to him by his late father. The decision of the District Commissioner deprived him of the said property hence the application before this Honourable Court. In his further affidavit the applicant avers that the reason why he was unable to commence judicial review against the decision on time is because the applicant in his supporting affidavit that he was unable to file the judicial review application immediately after the district commissioner's decision which stated that the Land Parcel No. 2375 belong to the respondent. That ever since the date of the decision the applicant has been in and out of hospital and has adduced evidence to that effect. In the further affidavit that has been filed before this Honourable Court, the applicant filed a further affidavit dated 22<sup>nd</sup> October 2020 in which he annexed his medical records which show that he has been in and out of hospital since the year 2016 and hence could not have fully prosecuted the matter effectively. The applicant has not yet healed completely as he is still undergoing eye treatment. It was not intentional for the applicant to delay.

### **Analysis of the law**

The Constitution of Kenya 2010 is the guide of the courts on matters of extension of the time frame for filling judicial review proceedings with courts decisions buttressing this argument. See **Republic v Public Procurement Administration Review Board ex parte Syner Chemie (2016) Eklr.**

The Fair Administrative Action Act 2015 which came in to implement article 47 of the constitution tries to cure the rigid application of the civil Procedure Rules and the Law Reform Act to obtain substantive justice especially in cases where it is shown that there, we would be no prejudice occasioned to the respondents. Your Lordship, we submit that no prejudice will be occasioned to the respondents if leave is guaranteed to allow the applicant to commence the judicial review proceedings. Further, it is applicant who stands to be prejudiced as the decision by the District Commissioner deprived him of his title to land without any objective reason. Therefore, the strict application of the Law Reform Act and the Civil Procedure rules Order 53 could directly prejudice the fair administration of justice if applied strictly because the law would exclude any possible room for enlargement of time. Where the applicant has given compelling reasons to explain the delay then it is only fair and just that such a person be given time in court to argue the case. Therefore, where necessary it might be necessary to construe or alter the law in place to comfort to the constitutional provisions.

In **Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] eKLR** the Learned Justice Mativo in paragraph 38 stated “...an order for Judicial Review is one of the reliefs for violation of fundamental rights and freedoms under Article 23(3) (f). Similarly section 7 of the Fair Administrative Action Act provides that any person that is aggrieved by an administrative action or decisions may apply for judicial review of the administrative action in accordance with section 8 of the same Act. Article 159 of the Constitution commands the courts to administer justice without undue regard to technicalities. Your Lordship it is our submission that the applicant has accounted for the delay that resulted in the lapse and we humbly urge this Honourable court to allow the application...”

Your Lordship, the applicant stands to suffer irreparable loss if the said orders are not granted as he would have been deprived of his land parcel without any form of compensation hence denying the applicant access to the courts would amount to an injustice denying him the right to peacefully enjoy his property rights as protected under the law. The decision by the District commissioner was arbitrarily made and the applicant was not afforded the opportunity to present his case.

### **Conclusion**

In lieu of the foregoing, we urge this Honourable Court to grant leave to the applicant to aid the process of attaining justice.

**DATED AT CHUKA THIS 22<sup>ND</sup> DAY OF OCTOBER 2020**

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**ANN WAHOME ADVOCATE**

3. I have carefully considered the pleadings filed by the applicant in this matter. I have also considered the authority proffered by the applicant in support of his assertions. It is the case of Republic of Kenya versus Kenya Revenue Authority Ex-Parte Stanley Mombu Amuti [2018] eKLR. In coming to my determination in this matter, I have taken into account this authority.

4. Although the applicant states that he has been suffering from ill health, it is noted that, the impugned decision may have been made around July, 2017. In his application and in his supporting affidavit, the applicant does not specify the date the impugned decision was made. The application for the order he seeks is supposed to be filed within 6 months after the impugned decision. The applicant in his Ex-parte Originating Summons admits that time to institute Judicial Review proceedings has lapsed.

5. Order 53 Rule 2 Civil Procedure Rules states as follows:

***“LEAVE SHALL NOT be granted to apply for an order of certiorari to remove any judgment, order, decree or other proceeding for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act and where the proceeding is subject to appeal and a time is***

*limited by law for the bringing of the appeal, the judge may adjourn an application for leave until the appeal is determined or the time for appealing has expired.”*

6. In the case of Telkom Kenya Limited versus John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd [2014] ECLR the Court of Appeal opined as follows:

*“The respondents are seeking umbrage under Article 159(2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. It does not avail them. We are content to state that the constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantial justice. As has been said before, the rules serve as hand maidens of the Lady Justice.”*

7. I find that the application goes against the extant procedural requirements. As opined by the Court of Appeal, statutory procedural requirements are handmaidens of Lady Justice. They are not mere procedural technicalities.

8. In the circumstances, I issue the following orders:

- a) This application is hereby dismissed.
- b) I issue no order as to costs

**Delivered at Chuka this 18<sup>th</sup> day of November, 2020 in the presence of;**

**CA: Ndegwa**

**Miss Wahome for the Applicant**

**Respondent and Advocate absent**

**P. M. NJORGE,**

**JUDGE.**