



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

JUDICIAL REVIEW NO.9 OF 2018

REPUBLIC.....APPLICANT

AND

THE DISTRICT COMMISSIONER MAKUENI DISTRICT.....RESPONDENT

RONALD MUSAU NGAO

PHILIP MBATHA NGAO

ESTATE OF NZUNA NGAO (DECEASED).....INTERESTED PARTY

ALFONCE MULI KULEMBA (Legal representative estate of JAMES KULEMBA KITHAMBI)

RULING

1. What is before this court for ruling is the Exparte Applicant's Notice of Motion application expressed to be brought under Order 51 Rule 1, Order 1, Rule 10(1) of the Civil Procedure Rules, Sections 1 and 3A of the Civil Procedure Act for orders: -

- 1) THAT the honourable court be pleased to review set aside and/or vary the order issued on the 22nd November 2018 dismissing the Ex-parte Application for Judicial Review and re instate the same for hearing.**
- 2) THAT the Ex-parte Applicants be granted leave to file their submissions and the submissions filed herein be deemed as properly filed.**
- 3) THAT costs of this application be in the cause.**

The application is dated 10th December, 2018 and was filed in court on 22nd January, 2019. It is predicated on the grounds that:-

- (a) The advocates on record for the Ex-parte applicants were not aware that the matter was coming up for mention on the 22nd November, 2018 as the same had not been diarized.**
- (b) The ex-parte applicant's advocates had draft submission though not filed and the matter was dismissed on a day when it was coming up for mention and not the main hearing.**

It is also supported by the affidavit of Vincent M. Muia, the Exparte Applicant's advocate sworn at Nairobi on 10th December, 2018.

2. The Interested Party/Respondent has opposed the application vide the replying affidavit of Francis N. Sila, the Counsel for the Interested Parties/Respondents sworn at Machakos on 15th February, 2019.

3. On the 25th April, 2019 the Exparte Applicant and the Interested Parties/Respondents consented to dispose off the application by way of written submissions. The matter was fixed for mention on 31st May, 2019 to enable the parties highlight their submissions.

4. Mr. Muia has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of his supporting affidavit that his law firm filed this matter on behalf of the Exparte Applicants sometime in the year 2007 upon which the file was taken to the High Court in Nairobi under ELC No.3 of 2013 as can be seen from the notice from the Deputy Registrar Nairobi marked VMM1, that they could not trace the file for a long time when they checked in Nairobi and Machakos as can be seen from the copy of the letter marked VMM2, that when the file was availed, they appeared before Hon. Mr. Justice Odunga on 06th June 2018 whereupon the matter was transferred to this court, that the matter was mentioned before this

court where it was agreed that it be disposed off by way of written submissions, that the matter was fixed for mention on 24th September, 2018 to confirm filing of submissions but the court did not sit on the material day, that the matter was fixed for another mention date where a Mr. Mutuku appeared on their behalf, that the matter was inadvertently not diarized and such, Mr. Muia was not aware that the matter was coming up for mention and that his attention to the matter was drawn by Mr. P. Wasolo Advocate who was in court on 22nd November, 2018 on another matter on his behalf and saw this matter in the daily cause list. That Mr. Muia requested Mr. P. Wasolo to hold his brief on the matter and seek another date.

5. On the other hand, Mr. Sila deposed in paragraphs 2, 3, 4, 5, 6, 9 and 13 of his replying affidavit that the application dated 10th December, 2018 is frivolous, vexatious, an afterthought, baseless and an abuse of the court process, that the Exparte Applicants filed the application for judicial review dated 23rd January, 2008 on 25th January, 2008, that since the filing of the application, the Applicants have never been serious in prosecuting the same and the same is borne out by the history of the matter from the court file, that the Exparte Applicants only fixed the application once for hearing on 20th May, 2009, that thereafter the Interested Parties/Respondents through their advocates fixed the matter for mentions on 23rd July, 2009, 3rd November, 2009 and 16th March, 2010 and mention notices were duly served upon the Applicants' Advocates as can be seen from copies of the mention notices marked FNS, that owing to the age of the matter, the same was fixed for dismissal on 06th June, 2018 by the court on its own motion and a notice to show cause served upon parties advocates and that the suit was rightfully dismissed by the court as the Applicants had failed to file their submissions within 14 days as ordered by the court on 10th July, 2018 more than four months since the directions on filing of submissions were issued.

6. The highlight of the submissions by the Exparte Applicants' Counsel were that the order for dismissal was given when the matter came up for mention on 22nd November, 2018. That the purpose of the mention was to confirm filing of submissions. That he wasn't aware of the said mention date until when he was alerted by Mr. Wasolo who held his brief in another matter. That Mr. Wasolo's application for further mention was declined and the matter was dismissed. He pointed out his supporting affidavit shows that the submissions were in draft form and were yet to be filed. That the date for mention when the matter was dismissed had not been diarized. He submitted that the act of dismissing the application was one of discretion by the court. He urged the court to exercise its discretion and review its orders. The Counsel cited the case of **Shah vs. Mbogo [1967] EA page 116**. The Counsel was of the view that since the matter was coming up for mention on the material day, the court should have exercised its discretion of giving a hearing date within which it would have dismissed the matter or in the alternative, it would have looked into the merit of the judicial review application and proceeded to make a substantive decision. That the rules of natural justice demand that no man should be condemned unheard. In support of his submissions, the Counsel further cited the cases of **CMC Holdings Ltd vs. James Mumo Nzioka [2004] eKLR** and **COTU vs. Benjamin K. Nzioka & others in Court of Appeal No.166 of 1993 (unreported)** and **Republic vs. National Land Commission and 2 others Exparte Kibwezi Muslim Associations [2018] eKLR**. The Counsel concluded by submitting that the Applicants having filed their submissions, it is only fair that the order for dismissal be set aside and the application be heard on merits.

7. On the other hand, the Counsel for the Interested Parties/Respondents submitted that it is the Interested Parties/Respondents who have been pushing for the determination of their matter ever since the Judicial Review application was filed way back on 25th July, 2008. The Counsel added that the Exparte Applicant has not been serious in prosecuting the application and that his inertia runs contrary to the overriding objective stated in section 1A, 1B and 3A of the Civil Procedure Act.

8. The Counsel termed the Supporting affidavit by the Exparte Applicants Counsel as one that does not offer any plausible explanation on why the Exparte Applicants never filed their submissions as ordered by the court. He said that the date for confirmation of filing of submissions was on 24th September, 2018 and not 22nd November, 2018 when it was dismissed. The Counsel pointed out the court had issued notices to show cause to all the parties and that he received his copy. Regarding the statement by the Exparte Applicants' Counsel that he never diarized the date, the Counsel for the Exparte Applicants pointed out that there was no annexure of the page of the diary. He went on to submit that although the Counsel for the Exparte Applicants has purported that he was unwell, no medical documents were annexed to show that he was unwell from 24th September, 2018 when submissions ought to have been filed upto 22nd November, 2018 when the application was dismissed.

9. Regarding the submissions to the judicial review application dated 23rd January, 2008 that the Exparte Applicants have purported to file, the Counsel for the Interested Parties/Respondents submitted that the same ought to be struck out for having been filed in respect of a non-existent application since it was dismissed on the 22nd November, 2018.

10. The Counsel termed the delay by the Exparte Applicants in filing their submissions as one that was inordinate and beyond acceptable limits. He termed the delay as one that is inexcusable, intentional and breach of the court's order made on the 10th July, 2018. He added that the delay amounts to abuse of the court process and one that has caused grave injustice to the Interested Parties/Respondents who have been denied the use of the ancestral land by the Exparte Applicants who have filed numerous court cases and failed to prosecute them. The Counsel pointed out that it is not the duty of the court to assist the indolent but to serve justice to both parties and that justice should be served by dismissing the application for reinstatement. The Counsel cited the case of **Anthony Kaburi Kario & 2 others vs. Ragati Tea Factory Co. & 10 others [2014] eKLR** which discusses the principles of exercising court's discretion.

11. In reply, the Counsel for the Exparte Applicants submitted that the supporting affidavit shows that the court file went missing while it was at Machakos and the steps that he took to follow up on the issue. That they started taking steps when the file was brought from Machakos. That as at the time of dismissal of the matter on the mention date, he had not diarized and that he never received the notice to show cause otherwise he would have brought the application on that basis.

12. The Counsel pointed out the submissions are in draft form and have been annexed to their submissions and referred the court to paragraph 11 of the supporting affidavit.

13. The Counsel submitted that after going through the authorities and rules of natural justice, the court will find that the application has merits and added that it is not true that the Interested Parties/Respondents are suffering since the Exparte Applicants are the registered owners of the suit premises and in any case, that is an issue to be considered if the main application is heard.

14. Having read the application as well as the replying affidavit and the submissions filed and having heard the highlight of the written submissions by the Counsel on record, my finding is as follows:-

15. Article 159 (2) (b) of the Constitution requires that justice should not be delayed. Equally, Section 1A of the Civil Procedure Act provides for the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. Under Section 1A (3) parties and advocates for such parties are under duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the processes of the court and to comply with the directions of the court. Viewed from this position, it would appear that the Exparte Applicant and his advocate failed to live up to the dictates of Section 1A of the Civil Procedure. As was correctly pointed out by the Counsel for the Interested Parties/Respondents, the advocate for the Exparte Applicants neither annexed the extract of the diary nor records to show that he misdiarized the date or he was sick on the material day. This would lead credence to the submissions by the Counsel for the Interested Parties/Respondents that the Exparte Applicant has not endeavoured to prosecute his application and that it is the Interested Parties/Respondents who have been keen on the matter. However, it is not in dispute that this file was at one time sent to Nairobi from Machakos. I will take judicial notice of the fact that in or around the year 2007 and 2008, administrative directions were issued to the effect that all judicial review matters were to be heard in Nairobi. The attendant confusion that arose out of these directions is well known to all. The long and short of this is that this might also have caused delay in concluding this matter. It is also apparent that the advocate for the Exparte Applicants appears to have a role in the delay once this file was forwarded to this court as he did not comply with the court's direction and order to file the Exparte Applicants' submissions within the time frame provided. This begs the question should the mistake of an advocate be visited upon his client? Case law suggests that the answer should be in the negative. Bearing in mind that the Constitution requires substantive justice to be done to all, I am inclined to exercise my discretion in favour of the Exparte Applicants on condition that the Ex-parte Applicants meet the costs of the application. In the circumstances, therefore, I will allow the Notice of Motion application dated 10th December, 2018 and filed in court on 22nd January, 2019 in terms of prayers 1 and 2. The Exparte Applicants' submissions dated 10th December, 2018 and filed in court on 07th March, 2019 are deemed properly filed.

Signed, Dated and Delivered at Makueni this 26th day of September, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. V. M. Muia for the Ex-parte Applicant

Mr. Mwongela holding brief for Mr. Sila for the Interested Party

Mr. Kwemboi – Court Assistant

MBOGO C. G., JUDGE,

26/09/2019.