



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPLN. NO. 137 OF 2008**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KITUI PRINCIPAL MAGISTRATE.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**JOSPHAT NDELEVA KYANGANGU .....INTERESTED PARTY**

**NYAMAI MANG'OLE.....EX-PARTE APPLICANT**

**RULING**

1. In the Notice of Motion dated 21<sup>st</sup> November, 2014, the Ex-parte Applicant is seeking for the following orders:

**a. That this Honourable Court be pleased to review the orders of Hon. Mr. Justice Lenaola issued on 2<sup>nd</sup> August, 2010.**

**b. That leave granted by this Honourable Court to the Ex-parte Applicant to apply for orders of certiorari be restored and the time fixed to filing the Notice of Motion dated 23<sup>rd</sup> September, 2008 be enlarged and the said Notice of Motion be deemed properly on record.**

**c. That execution of the Decree issued on 18<sup>th</sup> October, 2010 in Kitui PMCC Land Case No. 13 of 2008 be stayed pending the hearing and determination of this Application.**

2. The Application is premised on the grounds that the delay in filing the Substantive Motion was occasioned by the previous advocates who did not act promptly in applying for the prerogative order of certiorari to remove to this court for quashing the decision of the Tribunal in Kitui District Land Disputes Tribunal Land Case No. 64 dated 22<sup>nd</sup> February, 2008.

3. In his Affidavit, the Applicant has deponed that the Application dated 7<sup>th</sup> July, 2008 was struck out by the court for being filed out of time; that this court should extend time and grant him leave to apply for Judicial Review and that the land was allocated to him vide Succession Cause No. 63 of 2007.

4. The Interested Party filed Grounds of Opposition and averred that under Sections 8(3) and 8(5) of the

Law Reform Act, and 8(5) of the Law Reform Act, once Judicial Review orders are made, they become final and only subject of appeal; that this court does not have jurisdiction to set aside orders made in Judicial Review proceedings and that the delay of six (6) years is manifestly inordinate and unreasonable.

5. The Applicant's counsel submitted that the court should review its decision and afford the Applicant to be heard; that Section 80 of the Civil Procedure Act allows for review of the orders of the court and that the filing of the substantive Notice of Motion out of time does not render the Motion a nullity.

6. The Interested Party's advocate submitted that Order 53 of the Civil Procedure Rules does not provide for the review of the orders made in Judicial Review and that the provisions of the Civil Procedure Act do not apply in this case.

7. The Applicant in this matter obtained leave to apply for the prerogative order of certiorari to remove to the court, for purposes of being quashed, the decision of the Kitui District Land Disputes Tribunal in Case No. 64 of 2007. The Applicant was required by law to file the substantive Motion within twenty one (21) days from the date when the said leave was granted.

8. However, the Notice of Motion dated 23<sup>rd</sup> September, 2008 was not filed within time. Consequently, on 16<sup>th</sup> December, 2008, the court struck out the said Motion and vacated the leave granted on 12<sup>th</sup> August, 2008.

9. The Applicant now wants this court to set aside the orders of 16<sup>th</sup> December, 2008 and enlarge the time within which the said Notice of Motion should be filed.

10. There have been variant arguments as to whether the court can enlarge time within which the Notice of Motion should be filed.

11. On one hand, it has been argued that Judicial Review proceedings, being *sui generis* in nature, cannot employ the provisions of the Civil Procedure Act and Rules, except Order 53 of the Civil Procedure Rules. (*See R vs. Kahindi Nyafula & 3 others ex-parte Kilifi South East Farmers Co-operative Society (2014) eKLR; Wamuludi vs. the Chairman Electoral Commission of Kenya (2002) KLR 285 and R vs. Kenya Bureau of Standards & others (2006) E.A 345*).

12. Indeed, in the case of *Ako vs. Special District Commissioner Kisumu & Another (1959) KLR 163*, the Court of Appeal held that the provisions of Order 50 Rule 6 of the Civil Procedure Rules which allows for enlargement of time by the court for doing of a particular act does not come to the ex-parte Applicant's aide neither does Article 159(2) of the Constitution.

13. Some of courts are of the view that in the interest of justice, leave to enlarge time within which the Notice of Motion may be filed can be granted by the court (*See R vs. District Land Registrar Thika, Ex-parte Stephen Kiongo Kairu (2014) eKLR and Mahanja vs. Kufwalo (1983) KLR 553*).

14. It would appear that in the interest of justice and under the new constitutional dispensation, courts are leaning towards allowing extension of time of filing Application for Judicial Review orders out of time. In the case of *Sitenda Sabalu vs. Sam N. Njumba and the Electoral Commission of Uganda (Supreme Court of Uganda Election Petition Appeal No. 26 of 2007)*, the Court held as follows:

**“...the inherent powers of the court can be resorted to so as to extend time, even where there is a law of limitation to an action.”**

15. The above decision was applied by Aburili J in the case of *R vs. Public Procurement Administrative Review Board Ex-parte Synerchemie Limited (2016) eKLR* where she held as follows:

**“82. In my view, the above decisions are entitled to respect for reasons that strictly enforcing Order 53 of the Civil Procedure Rules as a mandatory requirement diminishes the ability of the citizen to seek relief against administrative or other bodies exercising judicial or quasi**

**judicial authority and which this court has the constitutional mandate to supervise.”**

16. In the above case, the court was of the view that since Order 53 of the Civil Procedure Rules is not excluded from the operation of the Act and Order 50 Rule 3 which provides for the enlargement of time, the court has latitude to either invoke its inherent jurisdiction to prevent an injustice or hardship being occasioned to the parties, or to apply Order 50 Rule 6 of the Civil Procedure Rules.

17. Although this court had earlier on in its previous decisions taken the position that the period within to file the Notice of Motion for Judicial Review orders cannot be enlarged, the court is now of the view that where there are compelling reasons, and in the interest of justice, the court may extent time within which such a Motion can be filed.

18. I say so because Order 53 Rule 2 of the Civil Procedure Rules is subject to the provision of Section 3A of the Civil Procedure Act which provides that *“nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice.”*

19. But are there any compelling reasons to extend time within which the Ex-parte Applicant can file a Notice of Motion which was dismissed by the court on 16<sup>th</sup> December, 2008?

20. The only reason that the Applicant has given as to why he should be allowed to file the Notice of Motion out of time is that *“the delay was occasioned by my previous advocates who did not act promptly...”*

21. The incompetence or ignorance of an advocate in realizing that he needs to file pleadings within the requisite period cannot be a compelling reason for enlargement of time.

22. Having not given any good and compelling reason as to why the Notice of Motion seeking for prerogative orders was not filed within twenty one (21) days, I disallow the Applicant’s Application.

23. The other reason as to why the current Application cannot be allowed by this court is because the same was not filed within reasonable time. The Application having been dismissed by the court on 16<sup>th</sup> December, 2008, the Applicant had to wait for more than six (6) years to file the current Application. That in my view, are not actions of a party who desires the court to exercise its discretion in its favour.

24. For those reasons, I dismiss with costs the Application dated 21<sup>st</sup> November, 2014.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26<sup>TH</sup> DAY OF JANUARY, 2018.**

**O. A. ANGOTE**

**JUDGE**