



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 20 OF 2017**

**IN THE MATTER OF AN APPLICATION BY ABDIFAISAL AMIN ABDULLAHI THE APPLICANT, FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT NO. 9 OF 1996**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012**

**AND**

**IN THE MATTER OF THE LAND ACT 2012**

**AND**

**IN THE MATTER OF PROCESSING AND ISSUANCE OF A PART DEVELOPMENT PLAN OVER PROPERTY PDP NUMBER 326/2017/18**

**AND**

**IN THE MATTER OF PROCESSING OF CERTIFICATE OF TITLE OVER PROPERTY PDP NUMBER 326/2017/18**

**AND**

**IN THE MATTER OF FRAUDULENT CLAIM TO LAND PROPERTY PDP NUMBER 326/2017/18 BY ALI BUNOW KORANE**

**AND**

**IN THE MATTER OF ABUSE OF POWER AND UNLAWFUL INTERFERENCE OF RIGHT TO OWNERSHIP OF LAND BY ALI BUNOW KORANE IN RESPECT TO PDP NUMBER 326/2017/18 AND PERSISTENT HARASSMENT METED ON ABDIFAISAL AMIN ABDULLAHI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF GARISSA.....2<sup>ND</sup> RESPONDENT**

DIRECTOR OF PHYSICAL PLANNING.....3<sup>RD</sup> RESPONDENT

COUNTY COMMISSIONER GARISSA COUNTY...4<sup>TH</sup> RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....5<sup>TH</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE.....6<sup>TH</sup> RESPONDENT

ALI BUNOW KORANE.....7<sup>TH</sup> RESPONDENT

AND

ABDIFAISAL AMIN ABDULLAHI.....EXPARTE APPLICANT

JUDGEMENT

**INTRODUCTION**

In an Exparte Chamber Summons dated 25<sup>th</sup> September 2017 brought under Order 53 Rules 1 and 2 Civil Procedure Rules, the Applicant sought the following orders:

**1. (Spent)**

2. That an order of temporary injunction be issued against the Respondents barring the Respondents by themselves, their agents, representatives, employees, undisclosed principal, servants, proxies or any other persons acting under their authority from trespassing in, entering, occupying, dealing in, and or in any manner howsoever interfering with the Exparte Applicant's ownership, occupation, possession, and use of all that land known as Plot GSA/2469 situate in Garissa County pending the hearing and determination of these summons.

3. That an order of temporary injunction does issue against the 7<sup>th</sup> Respondent barring the 7<sup>th</sup> Respondent by himself, his agents, representatives, employees, servants, proxies or other persons acting on his behalf from use of actual violence, threat to violence, intimidation, harassment and coercion against the person of Abdifaisal Amin Abdullahi, his agents, representatives, employees, servants, proxies or other persons acting on his behalf pending the hearing of these summons.

4. That an order of temporary injunction do issue against the 7<sup>th</sup> Respondent barring the 7<sup>th</sup> Respondent by himself, his agents, representatives, employees, servants, proxies or other persons acting on his behalf from use of actual violence, threat to violence, intimidation, harassment and coercion against the person of Abdifaisal Amin Abdullahi, his agents representatives, employees, servants, proxies or other persons acting on his behalf pending the hearing of the substantive judicial review application.

5. That an order of mandatory temporary injunction does issue against the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents to provide adequate security to the Applicant and the property herein from attacks and invasions pending the hearing and determination of these summons.

6. That an order of mandatory temporary injunction does issue against the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents to provide adequate security to the Applicant and the property herein from attacks and invasions pending the hearing and determination of the substantive judicial review application.

7. That leave be granted to the Applicant to apply for an order of certiorari quashing the decision of the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents allowing the 7<sup>th</sup> Respondent to use member of the National Police Service for his private matters more specifically the forceful possession of property GSA/2469.

8. That leave be granted to the Applicant to apply for an order of mandamus compelling the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to process and issue the Applicant with a Part Development Plan (PDP) PDP No. 326/2017/18 for property Plot No. GSA/2469.

9. That leave be granted to the Applicant to apply for an order of mandamus compelling the 1<sup>st</sup> Respondent to process and issue a certificate of title over property Plot No. GSA/2469 PDP No. 326/2017/18 to the Applicant.

10. That leave be granted to the Applicant to apply for an Order of Prohibition against the Respondents by themselves, their agents, representatives, employees, undisclosed principal servants, proxies or any other persons acting under their authority from trespassing in, entering, occupying, dealing in, and or in any manner howsoever interfering with the Exparte Applicant's ownership, occupation, possession and use of all that land known as Plot No. GSA/2469 situate in Garissa County.

11. That grant of leave hereby operates as a stay barring the Respondents their agents, representatives or proxies from in any way whatsoever dealing in land Plot No. GSA/2469 PDP No. 326/2017/18.

**12. That all necessary and consequential orders or directions be given.**

**13. That the costs of this application be in the cause.**

That application is support by grounds shown on the face of the said application, statement of facts and a verifying affidavit sworn by the Exparte Applicant the same date.

The application is supported by numerous attached documents. When the application was placed before the duty court, the same was certified urgent to be heard in the first instance.

The court also granted leave to the Exparte Applicant to file the substantive motion within 21 days from the date thereof. The court further ordered the lave so granted do operate as a stay in terms of prayers 1, 2 and 11 of the chamber summons pending the hearing and determination of the substantive motion.

On 01/11/2017 the Applicant filed the substantive notice of motion pursuant to Order 53 Rules 1 and 3 of the Civil Procedure Rules, section 7 of the Fair Administrative Actions Act 2015 and all enabling provisions of the law.

In that notice of motion the Applicant is seeking the following orders:

**1) An order of certiorari do issue to remove into this court and quash the entire decision by the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents allowing the 7<sup>th</sup> Respondent to use members of the National Police Service for his private matters more specifically the forceful possession of property GSA/2469.**

**2) An order of mandamus do issue directed at the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to process and issue the Applicant herein, Abdifaisal Amin Abdullahi with a Part Development Plan (PDP), PDP No. 326/2017/18 for property Plot No. GSA/2469.**

**3) An order of mandamus do issue compelling the 1<sup>st</sup> Respondent to process and issue a certificate of title over Plot No. GSA/2469, PDP No. 326/2017/18 to the Applicant herein, Abdifaisal Amin Abdullahi.**

**4) An order of prohibition against the Respondents by themselves, their agents, representatives, employees, undisclosed principals, servants, proxies or any other persons acting under their authority from trespassing in, entering, occupying, dealing in, and or in any manner howsoever interfering with the Applicant's ownership, occupation, possession and use of all that land known as Plot No GSA/2469 situate in Garissa County.**

**5) All the necessary and consequential orders or directions be given.**

The Application is supported by grounds on the face of the application and an affidavit sworn by the Applicant on 23<sup>rd</sup> October, 2017.

On 20<sup>th</sup> November, 2017 the 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Respondent instructed the firm of Garane & Somane Advocates to appear for them wherefore they filed a Notice of Appointment the same date. The said firm of advocates also filed a Notice of Preliminary Objection to the Applicant's Notice of Motion. The gist of that objection is that the Applicant filed the Notice of Motion outside the 21 days directed by the court and that no leave was sought and obtained.

On 16/01/2018, the Applicant filed a Notice of Motion under Articles 22, 47 and 159 of the Constitution of Kenya 2010, section 9 of the Fair Administrative Actions Act 2015, section 59 of the Interpretation and General Provisions Act seeking leave to enlarge the time and to deem the Notice of Motion filed on 1<sup>st</sup> November 2017 to be properly on record.

When the counsels appearing for Exparte Applicant and the 2<sup>nd</sup> and 7<sup>th</sup> Respondents appeared in court on 16/1/2018, they agreed by consent to dispose of the preliminary objection dated 20/11/2017 and the application for extension of time by way of written submissions.

#### **SUBMISSIONS BY THE APPLICANT:**

The Applicant through his counsel submitted that the fact that a default clause has been imposed by a court does not necessarily deprive a court of its jurisdiction to extend time. He submitted that as a general principle where the court fixes time for doing a thing it always retain power to extend time for doing the act until it has made an order finally disposing of proceedings before it.

The learned counsel stated that Article 47 of the Constitution guarantees the Applicant the right to administrative action that is expeditious efficient, lawful reasonable and procedurally fair. He also cited Article 159 where it is provided that the courts and tribunals shall be guided by the principles that justice shall be administered without undue regard do procedural technicalities.

The learned counsel cited the following cases in support of the application and in opposition to the preliminary objection.

**1) Republic v Nema & Another [2012] eKLR.**

**2) Kenya Bureau of Standards & 3 Others v Kenya Maritime Authority, Exparte Car Importers Association [2014] eKLR.**

3) *Republic v Public Procurement Administrative Review Board Exparte Syner Chemice Ltd [2016] eKLR.*

#### SUBMISSIONS BY 2<sup>ND</sup> AND 7<sup>TH</sup> RESPONDENTS:

The 2<sup>nd</sup> and 7<sup>th</sup> Respondents through the firm Garane & Somane Advocates decided to base their submissions in opposing the affidavit in support of the Notice of Motion for leave to extend time sworn by **Charles Lewa Madowo** stating that the affidavit is incompetent defective and irregular. He cited the following cases:

1) *Francis Kimutai Bil v Kausugu (K) Ltd [2016] eKLR.*

2) *Nicholas Kipchirchir Kimaiyo v Wilson Kibet Kimutai & Another [2014] eKLR*

3) *Barrack Ogulo Otieno v Instarect Limited [2015 eKLR.*

***Whether the Notice of Motion dated 23<sup>rd</sup> October, 2017 may be admitted when it was filed out of time? It is not in dispute that the Applicant's Notice of Motion dated 23<sup>rd</sup> October, 2017 was filed out of time?***

I have considered the submissions by counsel for the Exparte Applicant and the rival submissions by counsel for the Respondents. I have given equal consideration to the respective parties' written and oral submissions supported by Constitutional Case Law and Statutory Enactments.

The main issues for determination in this application are:

**(1) Whether this court has jurisdiction to enlarge time within which the substantive Notice of Motion ought to have been filed?**

**(2) If the answer in (1) above is in the affirmative, whether there was inordinate delay which is prejudicial to the Respondents?**

**(3) What orders should this court make?**

**(4) Who should bear the costs of this application?**

What emerges from the two rival positions advanced by counsels is that there is no settled position currently as regards the 21 days period stipulated in Order 53 Rule 3 of the Civil Procedure Rules.

In that regard, it is my view that Order 53 Rule 3 (1) CPR is couched in mandatory terms to the effect that the substantive motion pursuant to leave granted must be filed within 21 days.

Although Article 159 (2) of the Constitution requires the court to administer justice without undue regard to procedural technicalities, that provision does not imply in my respective understanding that all procedural requirements of moving the court are thrown out of the window.

In a similar case as the instant one **Waki J.** (as he then was) in *Re-An Application by the Owners of the Motor Vessel "GLOBE YOUR" [1998] eKLR* held that, ***"there was no room for the exercise of any discretion under Order 53 Rule 3 as it is drafted in mandatory terms (hereby affecting the jurisdiction of the court)."***

The same position was taken by **Angole J** (as he then was) in *Malindi ELC JR No. 3 of 2013* between **Republic v Kahindi Nyafula & 3 Others Exparte Kilifi South East Farmers Co-operative** where he held that, ***"the extension cannot be effected even with the aid of Article 159 (2) of the Constitution."***

The Court of Appeal in *Commissioner of Lands v Kunste Hotel Ltd CA No. 234 of 1995 in Nakuru* held as follows:

***"When the high court exercising jurisdiction under Order LIII of the Civil Procedure Rules, it is neither civil nor criminal but a special jurisdiction donated by section 8 and 9 of the Law Reforms Act. The provisions that apply to the civil proceedings are not available in the judicial review proceedings."***

In that regard, Order 50 Rule 6 CPR which allows the enlargement of time by the court for doing of a particular act does not come to the aid of the Exparte Application and neither does Article 159 (2) of the Constitution.

In the premises, without jurisdiction to consider an application filed out of the stipulated period, this court would be wasting its judicial time to delve into the merits or otherwise of the motion dated 24<sup>th</sup> November, 2017.

In the end I find there is no competent Notice of Motion filed before this court which is capable of being adjudicated upon by application of the law. In the final analysis the Notice of Motion dated 24<sup>th</sup> November, 2017 is hereby struck out with each party to bear its own costs.

DATED, READ AND DELIVERED IN OPEN COURT AT GARISSA ON 19<sup>TH</sup> DAY OF MARCH, 2018.

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HON. E.C. CHERONO

E.L.C. JUDGE

*In the presence of:*

1. Mr. Madowo for Applicant
2. Court Clerk: Ijabo