



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**ATNAIROBI**

**ELC MISCELLANEOUS CASE NO. 237 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE**

**PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER**

**SECTION 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 OF KENYA**

**AND ORDER 53 OF THE CIVIL PROCEDURE RULE 2010, LAWS OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 40, 60 & 67 OF THE CONSTITUTION OF KENYA**

**AND**

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

**AND**

**IN THE MATTER OF THE PREROGATIVE WRITS OF CERTIORARI AND**

**PROHIBITION TO REVIEW THE DECISION OF THE NATIONAL**

**LAND COMMISSION BY THIS HONOURABLE COURT**

**AND**

**IN THE MATTER AN APPLICATION BY GEORGE MAKWATTAH**

**FOR LEAVE FOR ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**GEORGE MAKWATTAH.....APPLICANT**

**-VERSUS-**

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

**REGISTRAR OF TITLES, NAIROBI...2<sup>ND</sup> RESPONDENT**

**ANN NJERI WACHIRA.....1<sup>ST</sup> INTERESTED PARTY**

**RULING**

On 15<sup>th</sup> February, 2017 this court granted leave to the applicant to file an application for judicial review. The court made a further order that the application be filed and served within 21 days from the date of the order. In accordance with the said order, the application for judicial review should have been filed by 10<sup>th</sup> March, 2017.

The applicant did not file the application as was ordered by the court. On 5<sup>th</sup> June, 2017 after a period of over three (3) months, the applicant brought an application under Articles 23 and 159(2) of the Constitution of Kenya, Order 53 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya for extension of time within which to file the judicial review application. The application that was brought by way of Notice of Motion dated 5<sup>th</sup> June, 2017 was premised on the grounds that the applicant who is an elderly man of ill health was unable to review and attest the affidavits in support of the judicial review application that his advocates intended to file due to illness and that the court has jurisdiction to extend time within which to file the application. When the application came up for hearing before me on 26<sup>th</sup> September, 2017, the same was opposed by the respondents and the 1<sup>st</sup> interested party who had been served with the application.

In his submission in support of the application, the advocate for the applicant argued that the court had jurisdiction to grant the orders sought. The applicant's advocate cited one decision of the High Court in support of his submission on this issue. In his submission in response, the 1<sup>st</sup> respondent's advocate submitted that it was not necessary for judicial review application to be accompanied by a fresh affidavit. The 1<sup>st</sup> respondent's advocate argued that the affidavit that was filed in support of the application for leave was sufficient. The 1<sup>st</sup> respondent's advocate argued that the explanation that was given by the applicant for the delay in filing the judicial review application was not reasonable in the circumstances. The 1<sup>st</sup> respondent's advocate argued further that the applicant's application had no basis in law. He submitted that the court has no jurisdiction under Order 53 of the Civil Procedure Rules and Article 159(2) of the Constitution to extend the time within which an application for judicial review is to be filed.

The advocate for the 2<sup>nd</sup> respondent concurred with the submissions by the advocate for to the 1<sup>st</sup> respondent that the court has no power under Order 53 of the Civil Procedure Rules and Article 159(2) of the Constitution of Kenya to extend the time within which to file an application for judicial review.

On his part, the advocate for the 1<sup>st</sup> interested party submitted that the time which the applicant has sought to extend is provided for under sections 8 and 9 of the Law Reform Act, Chapter 26 Laws of Kenya. He argued that the court has no jurisdiction to extend the time within which a judicial review application should be filed. He argued that when the applicant failed to file the application for judicial review within 21 days, the leave that was granted to him lapsed and as such there was no basis for the extension of time sought. The 1<sup>st</sup> interested party's advocate relied on a number of authorities in support of his submission.

I have considered the application and submissions of counsel. I have also considered the case law cited in support of the submissions. My view on the matter is that the application before me has no merit. It is not disputed that the applicant was granted leave on 15<sup>th</sup> February, 2017 to file judicial review application within 21 days. It is also not disputed that the applicant did not file the application within the prescribed time. I am in agreement with the respondents and the interested party that there is no power under Order 53 of the Civil Procedure Rules to extend the time limited under order 53 Rule 3(1) of the Civil Procedure Rules for filing judicial review application. I am also in agreement with the respondents that Article 159(2) of the Constitution cannot confer upon the court power that it does not possess.

The Court of Appeal dealt with a similar matter in the case of Republic -vs- Chairman Amagoro Land Disputes Tribunal & Another, Ex parte Paul Mafwabi Wanyama (2014) eKLR that was cited by the interested party. In that case, the Environment Law Court had extended time to the respondent to enable him file judicial review application outside the 21 days provided for in Order 53 Rule 3(1) of the Civil Procedure Rules. The respondent had filed the judicial review application three (3) days after the lapse of the prescribed period of 21 days. The court extended the time and deemed the application to have been properly filed and served. On appeal, the Court of Appeal found that judicial review jurisdiction is a special jurisdiction and that the court had made an error in importing the provisions of the Civil Procedure Rules dealing with extension of time to the proceedings that were before him. The Court of Appeal stated as follows:

“We agree with the learned counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do. This appeal is therefore allowed with the consequence that the order extending time for filing judicial review proceedings is hereby set aside.”

I have no reason to depart from that decision of the Court of Appeal. Consequently, I find no merit in the Notice of Motion dated 5<sup>th</sup> June, 2017. The application is dismissed accordingly. Each party shall bear its own costs of the application.

**Delivered and Dated at Nairobi this 19<sup>th</sup> day of April, 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Wachira h/b for Maringa for the Applicant

Terrell for Mbulu for 1<sup>st</sup> Respondent

Mr. Terrell for 2<sup>nd</sup> Respondent

Mr. Tulati for 1<sup>st</sup> Interested Party

No appearance for 2<sup>nd</sup> Interested Party

Wareru Court Assistant