



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC JR NO. 13 OF 2016

MUTUNGA IGWATHU

Alias KUBAI M'IGWATHU KITHARA.....EXPARTE APPLICANT

AND

THE DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER TIGANIA EAST.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JAMES KIRANGAINTERESTED PARTY

RULING

1. A chamber summons application was filed on 9.5.2016 (dated 26.4.2016) seeking leave to institute Judicial Review proceedings for orders of certiorari, mandamus and prohibition in respect of respondent's decision made on 22.8.2014. There after two Preliminary Objections were filed, one is dated 30.5.2016 filed by the Attorney General and another dated 31.5.2016, filed by the Interested Party.

2. The grounds raised in the Preliminary Objection of the Attorney General are that the Applicant's chamber summons offends the express provisions of section 9 (3) of Cap 26 laws of Kenya, order 53 rule 2 of civil procedure rules and section 7 of the Civil procedure Act.

3. The grounds raised in the Preliminary objection of the Interested party are that the application is Res-Judicata and time barred and therefore, the grant of leave and stay is not appropriate.

4. On 31.5.2016, directions were given for the preliminary objections to be canvassed by way of written submissions. The interested party and the respondent have duly filed their submissions in respect of the preliminary objection. The exparte applicant has however filed submissions in respect of the application of 26.4.2016 yet the orders of 31.5.16 have never been varied.

5. I will write a ruling based on the directions given on 31.5.2016. I will also deal with the two preliminary objections simultaneously since the gist of the matter is whether this suit is properly before the court.

6. The ex-parte applicant has admitted that he had made a similar application before the high court, the same being Miscellaneous Application No. 33 of 2014. The application for leave was allowed and ex-applicant was granted 21 days to file the substantive motion. The final orders made in that matter were as follows;

“The High Court Miscellaneous application no 33 of 2014 is dismissed and any orders granted at the exparte stage are hereby set aside. In view of the fact that the opposite notice of motion had not been filed or served upon any of the parties, no costs are awarded to any of the parties in this matter. .The executive Officer should ensure that this file is closed and the matters be removed from the list of cases pending in this court”.

7. This ruling was delivered on 14.3.2016, one year and five months from the time the former suit was filed on 15.10.2014.

8. It is after the dismissal of the former suit that the ex-applicant approached the court vide a similar application, the one now filed on 9.5.2016.

9. In **Mburu Kinyua versus Gichini Tuti (1987) KLR 69**, a case cited by the interested party, it was held that **“Although the Judge had not referred in his ruling on the first application to the appellants application to file a further affidavit, the appropriate mode of**

testing the Judge's decision on that application was to appeal against his ruling rather than to make another application to set the Judgement aside".

10. Section 7 of the Civil Procedure Act provides that *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"*.

11. Order 53 rule 2 of the Civil Procedure Rules provides that; *"An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on"*.

12. In the instant case, the decision of the respondent which is the subject matter of the application was made on 22.8.2014. Promptness is a factor in the filing of an application for Judicial Review. I have taken into account that in the case that was dismissed, the ex parte applicant had done nothing for a period of almost one and a half years. In **Odinga & others versus Nairobi City Council (1990 – 1994) EA 482**, a case cited by the interested party, an application that was filed after a lapse of 14 months was declared to be time barred.

13. The ex parte applicant, has submitted at length on why his application should be allowed. However, even the authorities he has cited are in favour of dismissal of his applications. I find it necessary to extract word for word the holding in **Polycarp Wathuka Kanyugo & 2 others Versus County Government of Kirinyaga (2014) eKLR**; **"It is now settled that the requirement that leave must be sought and obtained before making an application for Judicial review is designed to protect the court process from abuse by mischievous litigants who may want to waste precious judicial time by filing frivolous applications which have no chance of success Judicially"**.

14. My conclusion is that the chamber summons application filed on 9.5.2016 is not only Res judicata, but the same is also time barred as the decision sought to be quashed was given one year and 9 months earlier on 22.8.2014. The two preliminary objections therefore have merits.

15. The application dated 26.4.2016 and filed on 9.5.2016 is hereby dismissed with costs to respondent and interested party.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 11th APRIL, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

K. Gitonga holding brief for C.B Mwangela for Exparte Applicant – present

A.G for Interested Party - present

HON. LUCY. N. MBUGUA

ELC JUDGE