



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA JUDICIAL REVIEW CASE NO. 12 OF 2017

FORMERLY CHUKA JUDICIAL REVIEW CASE NO. 23 OF 2015

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF LAND ADJUDICATION FOR JUDICIAL ACT, CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF KIERA EAST MAGUTUNI ADJUDICATION SECTION AND IN THE MATTER OF DISTRICT LAND ADJUDICATION OFFICER MERU SOUTH/MAARA SUB COUNTIES

IN THE MATTER OF DECISION BY THE DISTRICT LAND ADJUDICATION OFFICER MERU SOUTH/MAARA

IN OBJECTION NO. 1271 LAND PARCEL NO. 1714 LOWER EAST MAGUTUNI ADJUDICATION SECTION AND

OBJECTION NO. 1274 LAND PARCEL NO. 1225 LOWER MAGUTUNI ADJUDICATION SECTION

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND ADJUDICATION OFFICER MERU SOUTH / MAARA

SUB COUNTIES.....RESPONDENT

THE COUNTY GOVERNMENT OF THARAKA NITHI....INTERESTED PARTY

GLADYS KAINDA MBAE.....1ST EX-PARTE / APPLICANT

FRANCIS KITHINJI NKANATA.....2ND EX-PARTE / APPLICANT

RULING

1. The ex-parte applicant filed a motion on **10th May, 2018** which seeks the following orders:

1. That an order of certiorari do issue to remove in to the high court for purposes of being quashed the decision of the District Land adjudication and settlement officer dated **3rd September, 2015** in objections numbers 1271 and 1274 relating to land parcels 1714 and 1225 lower east Magutuni adjudication sections respectively.

2. That the respondent and the interested party be prohibited from executing or implementing the decision of the respondent (DLASO) dated **3rd September, 2015** in respect (sic) objections numbers 1271 and 1274 relating to land parcels 1714 and 1225 lower east Magutuni adjudication section respectively pending the hearing and determination of the instant judicial review.

3. The cost of this judicial review be provided for.

2. The application has the following grounds:

- a. The findings of the district adjudication officer were not reflected in the decision of the respondent (DLASO).
- b. The decision was unfair and unjustifiable in that M’Nkanata Njiema was condemned alone to create land from the county council when such public land ought to have been contributed by the public.
- c. That the District land adjudication officer erred in fact by holding that the clan of “Mugacinga” contributed to the suit land for public use when in fact Nkanata Njiema had purchased the suit land from Gerrald Miriti of Igakiramba clan.
- d. The district land adjudication and settlement officer erred in fact by failing to appreciate that Nkanata Njiema was of the clan of Gana Na Njuki and when he purchased the land it became personal property and not clan land.
- e. The decision of the district land adjudication officer is not supported by the evidence on record.
- f. That the award by the district land adjudication officer was not read in open and the applicant’s had to go looking for the decisions at the lands office when all other decisions were being delivered in public at lower East Magutuni adjudication section.
- g. That the land adjudication officer erred in fact by treating 60 days objections as objections relating to ownership of land when they ought to be rectification of minor errors on the adjudication record.
- h. The district land adjudication officer erred in fact by holding that Nkanata Njiema did not object to county council of Meru being awarded the suit land.
- i. That the district land adjudication and settlement officer erred in fact by holding that Gana Na Njuki clan had donated the suit land for public use when the clan had denied this fact in writing.

Dated at Chuka this 12th day of October, 2015

I.C. MUGO & CO. ADVOCATES

FOR THE EX-PARTE/APPLICANTS

3. The Interested Party filed a Preliminary Objection dated **8th May, 2018** which is in the following form:

NOTICE OF PRELIMINARY OBJECTION ON POINTS OF LAW

TAKE NOTICE that when the Notice of Motion dated **12th October, 2015** comes up for hearing on **30th May, 2018** the Interested Party shall raise and argue the following grounds in opposition to the ex-parte applicant’s application;

1. That the ex-parte applicants filed their Notice of Motion for Judicial Review order of certiorari and prohibition 19 months after the expiring of twenty one (21) days leave and as such the application dated **12th October, 2015** should be struck out for being fatally defective by offending the provisions of order 53 of the Civil Procedure Rules.
2. That the applicants’ application is therefore, being fatally defective, improperly before this honourable court and should be dismissed with costs.
3. That the application by the applicants is frivolous, vexatious and an abuse of the court process.

Reasons wherefore the suit should be struck out with costs.

DATED AT MERU THIS 8TH DAY OF MAY, 2018

FOR: KIAUTHA ARITHI & CO.

ADVOCATES FOR THE INTERESTED PARTY.

4. The Preliminary Objection was canvassed by way of written submissions.

5. The Interested Party’s submissions dated **9th May, 2018** are reproduced herebelow in full:-

INTERESTED PARTY’S WRITTEN SUBMISSIONS

May it please Your Lordship, on behalf of the Interested Party, we elect to humbly submit as hereunder:

BACKGROUND AND EVIDENCE

The ex-parte applicants vide a Notice of Motion sought leave to file Judicial Review against the Respondents herein. The applicants were granted such leave on the **24th September, 2015** which leave was only operational for 21 days (we enclose a copy of the order for ease of perusal by the court). The applicants in their knowledge or lack of it decided not to file the substantive motion within the 21 days but rather decided to file the Notice of Motion dated **12th October, 2015** on the **23rd May, 2017** (We enclose a copy of the received motion) which is 19 months after leave expired thus the main motion is not properly on record and such delay cannot be excused under the law as the applicants never bothered to seek extension of the 21 days, which extension is not available anyway.

We beg to rely on the case of **Republic v Kahindi Nyafula & 3 others Ex-parte Kilifi South East Farmers Co-operative [2014] eKLR** where Justice Angote stated thus:

The law provides that the substantive motion seeking for prerogative orders must be filed within 21 days. The Law Reform Act, which is the substantive law dealing with prerogative orders, does not provide for the enlargement of time within which a party should file the motion. In the case of AKO – vs- Special District Commissioner Kisumu & Another (1959) KLR 163, the Court of Appeal held as follows:

“The prohibition is statutory and absolute and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 Rule 5 (now order 50 Rule 6) which makes provision for the enlargement of time.”

Consequently, the provisions of Order 50 Rule 6 of the Civil Procedure Rules which allows the 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 of the Constitution. For the reasons I have given above, I strike out the Notice of Motion dated **26th March, 2013** for having been filed out of time with costs.

Now in conclusion, we urge this Honourable court to dismiss this instant suit as the same is dead on arrival – the court cannot have a dead baby on its laps and neither can it salvage a still birth.

We beg to rest!

That is all!

Dated at Meru this 9th May, 2018

FOR: KIAUTHA ARITHI & CO.

ADVOCATES FOR THE INTERESTED PARTY

6. The ex-parte applicant’s written submissions dated **16th June, 2018** are reproduced herebelow in full:-

1ST AND 2ND EX-PARTE APPLICANTS’ SUBMISSIONS IN RESPECT OF THE PRELIMINARY OBJECTION DATED 8TH MAY, 2018.

1. Your Lordship we concede that the substantive notice of motion was filed later than 21 days as required in law.
2. The explanation for filing the notice of motion outside the time limit was that immediately the leave was granted to apply for certiorari when the file was in Meru the same disappeared from the shelves only to access the same when the file was transferred to E & L Court at Chuka whereupon we immediately filed the notice of motion.
3. That the court has discretionally powers to admit the motion even if it was filed late. The court should be concerned with substantive justice rather than the rules of procedure although we are not saying that the rules of procedure are not important. The court has extended time in several occasions and in a number of occasions deemed a motion filed late as properly filed. We would urge the court to be persuaded by such authorities which include High Court of Kenya at Nairobi judicial review No. 480 of 2016.
4. Your lordship if this court is inclined to uphold the P.O we will urge the court to order that each party bear their cost. Section 27 of C.P.A is coached in the manner that although cost follows the event costs are discretionally to the court. If the P.O is allowed it means that the estate of Njiima Nkana will lose a chunk of land to create public markets by the interested party without any compensation whatsoever. It is for this reason that we urge the court to order that each party bear its own cost.
5. We rest our submissions and pray.

Dated at Chuka this 16th day of June, 2018

I.C. MUGO & CO. ADVOCATES

FOR THE EX-PARTE APPLICANTS

7. The Interested Party proffered the case of ***Republic Versus Kahindi Nyafula & 3 Others, Ex-parte Kilifi South East Farmers Co-operative [2014] eklr to buttress his assertions. In the suit, the Hon. Justice Angote, J,*** stated as follows:

“The law provides that the substantive Motion seeking for prerogative orders must be filed within 21 days. The Law Reform Act, which is the substantive law dealing with prerogative orders, does not provide for the enlargement of time within which a party should file the motion.”

8. The Interested Party also proffered the case of *Ako Versus Special District Commissioner Kisumu & Another* (1959) KLR 163 where the Court of Appeal held as follows:-

“The prohibition is statutory and absolute and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically Order 49 Rule 5 (now order 50 Rule 6) which makes provision for the enlargement of time.”

9. The ex-parte applicants’ have proffered the case of *Republic Versus Speaker of the County Assembly Nairobi & Another ex-parte Hon. Dr. Evans Kidero*. I find that the application in this case concerned an application to extend time made by the applicant. This is not a good authority in this suit. It deals with an application to extend time which is not the case here.

10. Judicial Review proceedings are a suit generis genre when juxtapositioned with other civil proceedings. If a litigant elects to go the Judicial Review way, he must abide by all required strictures. The requirement that the apposite Notice of Motion be filed within 21 days after leave is granted is not a procedural technicality. It is a legal imperative.

11. I have carefully considered the pleadings, the authorities and the submissions proffered by the parties in support of their diametrically opposed assertions. I find that the authorities submitted by the Interested Party are veritably relevant to this case and have, amongst other things, persuaded me that the Interested Party’s Preliminary Objection has merit. The case proffered by the ex-parte applicants, to wit, *Republic Versus The Speaker of the Nairobi County Assembly & 2 Others Ex-parte Hon. Dr. Evans Kidero (op.cit)* although a good authority is not relevant in the circumstances of this case.

12. In the circumstances, this Preliminary Objection is upheld.

13. The ex-parte applicants’ advocate has prayed that in the event that this Preliminary Objection is allowed, costs should not be granted against the ex-parte applicants as it would mean that the estate of NJIIMA NKANATA would lose a chunk of its land to create public markets by the Interested Party, the County Government of Tharaka Nithi. I have carefully considered this prayer and I am persuaded not to grant costs to any party in this suit.

14. Orders are hereby issued as follows:

1. The application for Judicial Review orders in this suit is struck out and this suit is dismissed.
2. No costs are awarded to any of the parties.

15. It is so ordered.

Delivered in open Court at Chuka this 27th day of June, 2018 in the presence of:

CA: Ndegwa

George Kamau h/b I.C. Mugo for the Ex-parte Applicant

Kijaru h/b Mungai for the Interested Party

AG absent for the Respondent

P.M. NJOROGÉ

JUDGE