



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPLN. NO. 141 OF 2014**

**THITU WAMBUA.....APPLICANT**

**VERSUS**

**THE MINISTER FOR LANDS.....1<sup>ST</sup> RESPONDENT**

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

**AND**

**SAMUEL MUTUA MAKAU.....INTERESTED PARTY**

**RULING**

1. The Applicant moved the court via a Motion dated 8<sup>th</sup> September, 2014 seeking leave to apply for orders of certiorari to quash the Judgment of the Minister dated 30<sup>th</sup> December, 2011. The Application is based on the provisions of Order 53 Rule 1(1) (2) and 4 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act.
2. The Application is further based on the grounds that the 1<sup>st</sup> Respondent acted in excess of his powers and had no jurisdiction to arbitrate. The Application is supported by the Affidavit sworn by the Applicant on 8<sup>th</sup> September, 2014, a Verifying Affidavit sworn by the same Applicant on 8<sup>th</sup> September, 2014 and the Statement of Fact dated 8<sup>th</sup> September, 2014.
3. The decision of the Minister was made on 30<sup>th</sup> December, 2011 and the Application for leave was filed on 8<sup>th</sup> September, 2014 a time span of about three (3) years.
4. The Applicant and the Interested Party agreed to canvass the Application by way of written submissions.
5. The Respondent raised two (2) substantive Grounds of Opposition which may dispose the instant Application. It was argued that the Application is brought by way of a Notice of Motion instead of a Chamber Summons as prescribed by Order 53 Rule 1 (2) of the Civil Procedure Rules 2010. The Interested Party also submitted that there was no Verifying Affidavit accompanying the Chamber Summons. However, there is a Verifying Affidavit on record sworn on 8<sup>th</sup> September, 2014 by the Applicant.
6. The second ground raised by the Interested Party is that the Application was filed out of the prescribed time. The Interested Party submitted that due to the aforesaid breaches of the rules, the Application is fatally defective.
7. The Interested Party relied on the case of *AKO vs. Special District Commissioner Kisumu & Another (1989) KLR 163* which held that “for an Application for orders of certiorari, leave under Section 9(3) of Law Reform Act Cap 26 cannot be granted unless the Application for leave is made within six (6) months after the date of Judgment.”
8. Also in *Republic vs. Principal Magistrate Muranga & 4 others ex-parte Wanderi & Another (2013) eKLR*, the court held that “the Application is fatally defective as time cannot be enlarged after the lapse of six (6) months from the date of Judgment impugned.”
9. On the issue of form of the Application, the Applicant submitted that the cited provisions are clear that the Application was intended to be a Notice of Motion; that the filing of a Chamber Summons and not a Notice of Motion is a mere technicality and that the court can deem the Motion to be a Chamber Summons. The Applicant urged the court to be mindful of the content of Article 159(2) d of the Constitution and do justice devoid of procedural technicalities.
10. On the issue of whether the Application is time barred, the Applicant submitted that the provisions of Order 53 of the Civil Procedure Rules and Section 9(3) of the Law Reform Act prescribe for an Application like the instant one to be filed within six (6) months from the

date of the impugned Judgment. However, he justified the delay on the ground that the Judgment was made on 30<sup>th</sup> December, 2011 but the proceedings were not given to the Applicant until 30<sup>th</sup> July, 2014. The Applicant urged the court to rely on the case of **Apex Finance International Ltd & Another vs. Kenya Anti-Corruption Commission (2012) eKLR** where High Court held that “six (6) months statutory period was a technicality which can be disregarded under Article 159(2) d of Constitution of Kenya 2010.”

11. After going through the pleadings, the Affidavits and submissions, I find the following to be the issues arising:

*i. Whether the Application is fatally defective for want of form?*

*ii. Whether the Application is incompetent for being filed outside the six (6) months period from the date of the impugned Judgment.*

12. On the first issue, the court finds that there is a Verifying Affidavit on record accompanying the Application and the Statement of Fact. Further, styling the Application as a Motion in lieu of a Chamber Summons is a mere form which under Article 159(2) (d) of the Constitution is curable by reading in the words Chamber Summons instead of a Notice of Motion.

13. On the issue of limitation of time, the Motion was filed without any Application to enlarge time. Without an Application for enlargement of time, the provision of Section 9(3) of the Law Reform Act prevails. The issue of limitation of time is not a procedural technicality because it goes to the root of the jurisdiction of the court.

14. In the circumstances, the Notice of Motion dated 8<sup>th</sup> September, 2014 is struck out with costs to the Interested Party.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF OCTOBER, 2018.**

**O.A. ANGOTE**

**JUDGE**