



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

MISC. CIVIL APP. NO. 3 OF 2012 (JR)

**IN THE MATTER OF AN APPLICATION BY MICHAEL THIONGO GATETE FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

AND

**IN THE MATTER OF LANDS DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (NOW
REPEALED)**

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF KIOGORO LAND DISPUTES TRIBUNAL (KEUMBU DIVISION)

AND

IN THE MATTER OF KISII CMCC MISC. APP. NO. 120 OF 2011

BETWEEN

MICHAEL THIONGO GATETE APPLICANT

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

KIOGORO LAND DISPUTES TRIBUNAL 2ND RESPONDENT

THE CHIEF MAGISTRATE COURT – KISII 3RD RESPONDENT

AND

DAVID MACHUKA ONTONYI 1ST INTERESTED PARTY

NAFTAL MABEYA ONTONYI 2ND INTERESTED PARTY

RULING

1. The applicant vide a Notice of Motion dated 7th October 2016 inter alia seeks the following orders:-

i. That the honourable court be pleased to grant a stay of the execution of its orders dated 30th September 2016 pending the hearing of this application.

ii. That the honourable court be pleased to set aside its orders made on the 30th September 2016 dismissing the applicant's substantive application dated 13th February 2012.

iii. That the honourable court be pleased to extend time required by the applicant herein to deposit the security by 45 days and the security deposited herein be deemed to have been duly deposited and the honourable court be pleased to determine the applicant's substantive application on its merit.

2. The application is supported on the grounds set out on the face of the application and on the supporting affidavit sworn by the applicant dated 7th October 2016. The applicant explains that he was not able to place the deposit as ordered by the court within the period ordered as the court file was unavailable. The applicant further explains that following the intervention of Hon. Justice Okongo he was allowed to pay the amount ordered to be deposited for security notwithstanding that the period within which the deposit was to be paid had elapsed. The applicant's counsel Zablon Muruka Mokuha has sworn an affidavit dated 7th October 2016 explaining the efforts his firm had made to have the court file retrieved to enable the applicant to comply with the order requiring the applicant to place the security deposit. Copies of letters dated 13th May 2015 and 9th June 2015 marked "MTGI" seeking the retrieval of the court file are annexed. The applicant states the failure to place the security deposit within the time allowed was not deliberate and was occasioned by factors that were not within his control.

3. The interested parties filed a replying affidavit sworn by Naftali Mabeya Ontonyi (2nd interested party) dated 25th October 2016 in opposition to the applicant's application. The interested parties averred that the applicant was by the order of Hon. Justice Okongo dated 17th April 2015 required to place a security deposit of KShs. 50,000/= within 30 days of the order failing which the earlier order of stay granted with the leave would stand discharged and if any substantive application for judicial review had been filed would stand dismissed. The interested parties contend that the applicant failed to comply with the terms of the court order of 17th April 2015 with the result that the order of stay lapsed and the application of judicial review stood dismissed. It is the interested parties further contention that the applicant has not put forth any sufficient grounds to warrant the court to set aside the judgment delivered on 30th September 2016 dismissing the applicant's judicial review application dated 13th February 2012.

4. The judgment delivered by the court on 30th September 2016 was predicated on the fact that the applicant had failed to comply with the terms of the order of 17th April 2015 to deposit the security deposit within 30 days of the order as required. The applicants have explained that they were not able to meet the terms of the order owing to the non-availability of the court file after the ruling was delivered. The letter dated 13th May 2015 addressed to the Deputy Registrar and received in the court on the same day confirms that the applicants' advocates had indeed been looking for the file. Part of the letter reads as follows:-

"Since the ruling date above the file cannot be traced in the court registry to enable us to comply with the said orders. Though we have been ready since then.

The purpose of this letter therefore is to inform you of our predicament and urgency of the matter and request you if you can make alternative arrangements so that we can comply with the said orders taking in mind the time limit given by the court."

5. The applicant deposes that he sought the intervention of Hon. Justice Okongo who directed the security deposit to be received after the Deputy Registrar had declined to have the same received. The applicant however avers that the direction by the Hon. Judge was not given in writing and that he omitted to make

an application for a formal extension of the period for the deposit of the security. Having reviewed the circumstances, I am satisfied that the applicant was prevented by factors that were not within his control from complying with the order of 17th April 2015. I believe the applicant that the court file was unavailable and therefore he could not place the security deposit within the time allowed. While the applicant could have sought an extension of the period, failure to do so does not appear to have been deliberate given the engagement that is evident was there with the court. The applicant has demonstrated that he had the intention to comply with the order of 17th April 2015 and he infact placed the security deposit on 1st July 2015 albeit out of time.

6. The applicant's judicial review application has not been heard on merits as the judgment rendered on 30th September 2016 was based on a technicality that the applicant had not satisfied the conditions set by the court on 17th April 2015 and consequently the applicant's Notice of Motion dated 13th February 2012 had following the default been dismissed. I have been urged by the applicant to set aside my judgment dated 30th September, 2016 and in consequence extend the period for the placing of the security deposit and allow the judicial review application to be heard on its merits.

7. I have considered the applicant's application and the opposition thereto and I am satisfied the interested party will not suffer any prejudice that cannot be compensated in costs if I set aside the judgment. The essence of exercising discretion is to do justice to the parties and in the present matter my view is that justice will be served by allowing the judicial review application dated 13th February 2012 to be heard on its merits.

8. In the premises, I will exercise my discretion in favour of the applicant and allow the Notice of Motion dated 7th October 2016 on the following terms:

i. That the judgment delivered on 30th September 2016 is hereby set aside.

ii. That the order for placing of the security deposit is deemed to have been extended to 1st July 2015 when the applicants deposited the sum of kshs. 50,000/=.

iii. That the applicant's Notice of Motion dated 13th February 2012 be fixed for hearing at the court registry.

iv. That the applicant pays the interested parties thrown away costs assessed at kshs. 15,000/= within thirty (30) days from the date of this ruling.

Ruling dated, signed and delivered at Kisii this 21st day of April, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Moracha for Mokuu for the applicant

N/A for the respondents

Ms. Mireri for Omwega for the interested parties

Milcent Court assistant

J. M. MUTUNGI

JUDGE