



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION
MISC APPLICATION NO. 100 OF 2011

REPUBLIC PLAINTIFF

VERSUS

BUSIA MUNICIPALITY LAND DISPUTES TRIBUNAL DEFENDANTS

AND

RISPA ACHIENO WANYAMA INTERESTED PARTY

AND

ABSOLOM NAMANI WASIKE 1ST EXPARTE APPLICANT

JUSTO OUNDO OKUMU2ND EXPARTE APPLICANT

RULING

1. The application under consideration is a Notice of Motion dated 20/10/2015 and filed here on 1/7/2016. The application was brought under Section 3A of Civil Procedure Act, Order 24 Rules 1 & 3, Order 50 Rule 6, Order 51 Rule 1 of Civil Procedure Rules and all enabling provisions of law. The applicant is **CHARLES WANDERA OUNDO** who wants to join the case in place of his late father - **JUSTO OUNDO OKUMU**. The late **JUSTO OUNDO OKUMU** was the 2nd Exparte Applicant in an application seeking leave to file Judicial Review Proceedings. The 1st Exparte Applicant was **ABSOLOM NAMANI WASIKE**. Absolom is however shown to have given **JUSTO** authority to conduct the case on his behalf. This is shown vide a document filed in court on 2/6/2011 and dated 31/5/2011. The application herein is essentially against the Interested Party - **RISPA ACHIENO WANYAMA**.

2. Three prayers are sought in the application. They are as follows:

(a) That the late **JUSTO OUNDO OKUMU** who sued in the proceedings herein be substituted by the legal representative of his estate by name **CHARLES WANDERA OUNDO** and the main application and statement of facts be amended accordingly.

(b) That the honourable court be pleased to enlarge time to enable the applicant to file the main notice of motion.

(c) Costs of this application be provided for.

3. According to the applicant, the late Justo Oundo Okumu died while these proceedings were pending in court. The applicant then succeeding him and would like to take over these proceedings. It is averred that the Interested Party stands to suffer no prejudice.

4. It is clear that there was a contested application that sought leave to file Judicial Review Proceedings. The application was then heard and a ruling in favour of the two *ex parte* applicants was delivered on 31/7/2017. By then, the late JUSTO was ailing. He then passed on sometimes in October of that same year. It was alleged that the applicants never got to know of the ruling until much later. And by the time they got to know, the time within which they were supposed to file the substantive application for Judicial Review had lapsed. This is what seems to have made this application necessary.

5. The Interested Party responded vide a replying affidavit dated 9/3/2017 and filed on 10/3/2017. The application was said to be a sham, vexatious, and an abuse of the court process. According to the Interested Party, it is meant to deny her the fruits of her labour and should be dismissed with costs. The Interested Party averred that JUSTO died on 31/10/2013 long after leave granted to file the substantive application had expired.

6. The Interested Party averred further that the applicant has never been interested in prosecuting this matter. He delayed in obtaining a grant and he only acted after noticing that the Interested Party had started to implement the tribunal's award which the Judicial Review Proceedings were meant to challenge. She said that this is an old matter which should be concluded by dismissing this application.

7. The court heard the application *inter partes* on 24/7/2017. Wanyama for the applicant generally reiterated what the application contains.

8. The Interested Party responded by also reiterating what her written response contained.

9. I have considered the application, the response made, and the rival arguments presented during hearing. It appears to me that circumstances beyond the applicant's control stalled the proceedings. The dead second *Ex parte* Applicant - **JUSTO OUNDO** - was the one in conduct of the proceedings. He got sick and died. The Interested Party says he died suddenly in October 2013 but the Applicant avers he was ailing for about 8 months before he died in October 2013. I would believe the Applicant, not the Interested Party. The Applicant, who is son to JUSTO, was obviously closer to him than the applicant at or around that time. He knew better what was happening.

10. The court has power to enlarge time as the justice of the case may require. The overriding concern is that justice must be done and all litigants are entitled to have their cases heard. When non-compliance with set timelines is not intentional and/or willful, the court should consider any application to extend time kindly. The discretion to enlarge time however should be exercised judicially.

11. In this matter, a party got sick and died. That party had been given 21 days within which to file the substantive Judicial Review application. It appears to me that given the prevailing state of affairs, that party could not do much. And after the party's death, the process of obtaining a grant or ensuring legal representation for purposes of proceedings, had to be instituted. That, too, had to take time. It appears to me that the applicant could have acted faster to come on record but it's also clear that no matter how much he tried, he could not beat the 21-day deadline given by the court.

12. This application is generally brought under the provisions of Civil Procedure Act and Rules. It has been held time and again that Civil Procedure Act and Rules is inapplicable to Judicial Review proceedings. The argument behind all these is that what governs Judicial Review proceedings is contained in Law Reform Act (Cap 26) and Order 53 of Civil Procedure Rules, 2010. The rules in Order 53 are not made under Civil Procedure Act (Cap 21). They are made under the Law Reform Act (Cap 26). When the court is undertaking Judicial Review proceedings, it is not sitting under Civil or Criminal jurisdiction; it is sitting under special jurisdiction. **(See R V Commissioner of Co-operatives Ex parte**

FRANCIS N. KUBIA & Another: (2005) eKLR, R vs KISUMU LAND DISPUTES TRIBUNAL & Another: EXPARTE SOSPETER KITUTO OUSUDO & Another: HCC No. 36/2010 (J.R), KISUMU, and WELAMONDI vs THE CHAIRMAN ELECTORAL COMMISSION (2002) IKLR 486).

13. But it is also true that the applicant herein seeks to rely on other “enabling provisions of law”. Given this fact, I note that Article 159 (2) (d) enjoins that justice shall be administered without undue regard to procedural technicalities. An amplification of this is to be found in Section 19(i) of Environment and Land Court Act which stipulates that the court should act without undue regard to technicalities of procedure. The court is therefore not powerless where the imperative of justice require that a particular action be taken.

14. In this matter, I consider that the Interested Party will not suffer any grave prejudice. She will have all the time to participate in the case. Besides, she can be compensated with costs. Given all this, I allow the application herein. Costs of the application however are awarded to the Interested Party.

Dated, signed and delivered at Busia this 20th day of September, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs:

Defendants:

Interested Party:

Counsel: