



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

MISC. CIVIL APP. NO. 225 OF 2000

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS DIRECTOR DATED 10TH JUNE, 2013**

IN THE MATTER OF: THE REGISTERED LAND ACT, CAP 300

IN THE MATTER OF: THE LAND (GROUP REPRESENTATIVES) ACT

AND

IN THE MATTER OF: LAND ADJUDICATION ACT, CAP 284

REPUBLIC

VERSUS

COMMISSIONER OF LANDS.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

VERSUS

ISANGA WISHI GROUP RANCH.....INTERESTED PARTY

EX- PARTE

EDWARD LENJO MUSAMULI

PASCAL SHOLOO

MILTON MASALE MWIWAWI

RICHARD MWABILI

BERNARD NDOLE MBAYA

NOBERT LENJO MSHAMBA

RULING

1. By a notice of motion dated 22nd July, 2015, the ex parte applicant has moved this Court under section

59 of the Interpretation and General Provisions Act, Order 42 Rule 6, Order 50 Rule 6 of the Civil Procedure Rules and Article 159 of the Constitution. The applicant prays for the following orders;

1) The Court be pleased to enlarge the time for filing a reference against the taxation dated 14th December, 2011.

2) That the Costs of the application be provided for.

2. The application is supported by 12 grounds listed on the face of the motion inter alia that the applicant had made a request to highlight their submissions in respect to the application dated 22nd October, 2012. They had hoped that the ruling date would be deferred in view of that request hence their advocate did not attend Court on 11th February, 2015 when the ruling was scheduled to be delivered and only learnt about it on 20th April, 2015.

3. The ex parte applicants stated that they should not be punished for an oversight on the part of their advocates and that the interested party will suffer no prejudice if time is enlarged to file an appeal against the ruling delivered on 11th February, 2015 and also to file a reference against the taxation. The application is further supported by the affidavit of Mr. Gikandi Ngibuini advocate which reiterated the grounds pleaded on the face of the application.

4. The application is opposed by the interested party vide his grounds of opposition filed on 31st July, 2015. The grounds inter alia states that the application is res judicata; it is contrary to Rule 11 of the Advocates Remuneration Order; the applicant are guilty of laches and the application is an abuse of the Court process.

5. Parties made oral submissions. The interested party also filed written submissions which I have considered. Mr. Gikandi advocate for the ex parte applicants submitted that the applicants should not be burdened of paying taxed costs without getting an opportunity to challenge the same on appeal. He submitted that his mistake to be present in court on 11th February, 2015 when the ruling was made enlarging timeto file a reference should not be visited on his clients. That the applicant are willing to comply with the timelines that may be set by this court.

6. Mrs. Umara in opposing this application submitted the same is res judicata the application dated 22/10/2012. That the interested party's Costs were taxed on 16th December, 2011 and no notice was served on the taxing master contrary to the requirements of section 11 of the Remuneration Order. Further she submitted that litigation should come to an end. She urged the court to dismiss the application.

7. The applicant seeks enlargement of time to file a reference against a taxation made on 14th December, 2011. In the application dated 22nd October, 2012 at prayer (e), they had sought leave to file a reference out of time. When that application came up for hearing, the same proceeded by way of written submissions which the court considered before allowing the said prayer vide a decision rendered on the 11th February, 2015.

8. When the said application came up for hearing on the 26th November, 2014 the same was adjourned with an order that parties do highlight their submissions on 9th December, 2014. On the 26th November, 2014 Mr. Mawasi advocate held brief for Mr. Gikandi for the 2nd -6th ex parte applicants. On 9th December, 2014 Mr. Odongo walked in as Mrs. Umara was confirming to the Court that all parties had filed their submissions and she prayed for a ruling date. Mr. Odongo had no objection to the ruling date being given and there was no representation by Mr. Gikandi advocates so the Court set down the delivery of the ruling for 11th February, 2015.

9. I therefore find it misleading for Counsel for the applicants to state that they requested for time to be

allowed to highlight their submissions vide their letter dated 19th December, 2014. The Court had given a date for highlighting of the submissions and chose not to do so on the date set particularly the 2nd -6th ex parte when they failed to be present in Court on the 9th December, 2014.

10. Be that as it may, does the applicant merit the orders sought? The interested party submits that this application is res judicata the application of 22nd October, 2012. Mr. Gikandi on his part submits that they have never sought for enlargement of time before. Is there a difference when an application is made to file a reference out of time as was done in the application of 22nd October, 2012 and the request for enlargement of time as is being made in the present application?

11. My answer to the above question is that there is no difference. The only thing new Mr. Gikandi has done is to state that the delay in filing the reference within the timelines given by the decision of the 11th February, 2015 was occasioned by his mistake. The subject matter remains whether this court can still determine an application seeking to enlarge time which matter was already determined in the earlier application. To this extent I agree with the interested party that the issue is res judicata.

12. The applicants referred to article 159 of the Constitution. I do not see how this article can assist the applicant as there is no undue regard to procedural technicalities made. Justice has not been delayed as the Court had given them an opportunity to appeal which opportunity they allowed to lapse. Order 42 rule 6 of Civil Procedure Rules is unapplicable as there is no application for stay of execution sought. The provisions of section 59 of Cap 2 and order 50 of Civil Procedure Rules are similar and had been dealt with in the application of 22nd October, 2014.

13. I find no reasonable explanation given why counsel did not follow up on the fate of his application on the 11th of February, 2015 or soon thereafter. He is therefore guilty of delay and such guilt should not be used to punish the interested party who is yet to receive a penny of his costs. The ex parte applicants should not use a blanket defence that they should not be made to suffer for the mistake of their advocates where such mistake does not have any justification. The application before Court is to enlarge time to file a reference and not enlarge time to file an appeal against the order issued on 11th February, 2015.

14. In conclusion I dismiss this application for lacking in merit and also as being res judicata. The costs of the motion is awarded to the interested party.

DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of June, 2016.

A. AMOLLO

JUDGE

In the presence of:

..... for the Respondent

..... for the Interested Party

Court Assistant