Republic v Mbeere South Sub County Deputy Commissoner & 2 others; Ireri (Interested Party); Murage (Exparte Applicant) (Environment and Land Judicial Review Miscellaneous Application 6 of 2019) [2024] KEELC 3612 (KLR) (12 March 2024) (Ruling)

Neutral citation: [2024] KEELC 3612 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND JUDICIAL REVIEW MISCELLANEOUS APPLICATION 6 OF 2019

A KANIARU, J

MARCH 12, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

MBEERE SOUTH SUB COUNTY DEPUTY COMMISSONER .... 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING .... 2ND RESPONDENT

ATTORNEY GENERAL .... 3RD RESPONDENT

AND

FELISIO NGARI IRERI .... INTERESTED PARTY

AND

BERNARD KABATA MURAGE .... EXPARTE APPLICANT

RULING

1. This ruling is on a motion on notice dated 16th February, 2023 and filed on 22nd February, 2023. It is expressed to be brought under sections 1A, 1B, and 3A of *Civil Procedure Act*, sections 3, 18 and 19 of the *Environment and Land Court Act* no. 19 of 2011, and all other enabling provisions of Law. The

motion came with three (3) prayers but prayer 1 is now spent, which leaves prayers (2) and (3) only for consideration. Prayers (2) and (3) are as follows;

> Prayer 2: That the interested party /Applicant herein be granted leave to file his replying affidavit to the application dated 21/5/2021 out of time.
>
> Prayer 3: That the costs be in the cause.

2. There were various grounds advanced in support of the motion including that the interested party mistakenly thought he had responded to the application, that failure to respond was an oversight on the counsel's part, and that it is only fair that a response be admitted before a decision is made. The grounds are further explicated in the supporting affidavit that came with the motion.

3. The interested party opposed the application via a replying affidavit filed in court on 21/3/2023 and dated 13/3/2023. The replying affidavit gives some background and antecedents relating to the matter. It is then deposed that the motion filed raises issues that cannot be entertained in these proceedings; that the replying affidavit meant to be filed essentially confirms impunity on the part of the interested party who has had dealings relating to the disputed land despite knowing that the proceedings are pending; that such actions are meant to pre-empt fair hearing; that the interested party has been busy engaging in activities to defeat justice and that that is why he couldn't respond on time; that granting leave as sought does not serve the interests of justice as it may serve to delay the matter; and finally that the application is frivolous , scandalous, and an abuse of the court process.

4. The respondents did not oppose the motion.

5. The motion is canvassed by way of written submissions. The interested party's submissions were filed on 6/6/2023. He submitted that failure to respond in time to the application for judicial review was not intentional or deliberate. It was due to an oversight. The exparte applicant, he submitted, will not be prejudiced in any way if the application is allowed. He sought to rely on Article 159, (2) (d) of *the Constitution* of Kenya which urges that there should not be undue regard to procedural technicalities in matters pertaining to justice. He then invoked sections 3 and 19 of *Environment and Land Court Act* and sought reliance on the decided case of Supreme Institute Vs. Attorney General & 9 Others [2021] KESC 25 [KLR].

   Mistake of counsel, it was further submitted, should not be visited on the client as that may cause denial of the right to plead the case.

6. The exparte applicant's submissions are dated 2/6/2023. According to the Exparte applicant, the interested party had ample time to respond but did not. The reason given for not responding was said not to be sufficient and the interested party was said to have failed to get time to respond because he was allegedly busy engaging in activities calculated to defeat justice in this case. For persuasion and /or guidance, the case Hunker Trading Company Limited Vs Elf Oil Kenya Limited CA Application no. 6 of 2010, Nairobi; [2010] eKLR was cited and quoted. Also cited was the case of Joseph Maritim Vs. The Chairman Ndanai Land Disputes Tribunal & 2 Others; ELC JR No 60 Of 2017, Kericho [2020] eKLR where, while sitting at Kericho at the time, I dismissed an application seeking to file a response to judicial review application on the ground that the response intended to be filed mainly focused on the merits of the matter instead of focusing on the issue of jurisdiction.

   The exparte applicant also faulted the intended response on the ground that it tried to address the merits of the matter which should not be the case in a judicial review.

7. I have considered the application, the response filed, and the rival submissions. There is proffered an explanation that counsel for the interested party mistakenly thought that he had responded to

the application for judicial review. I perceive the counsel to be forth right in his explanation and his innocent mistake is in my view excusable. This contrasts sharply with the Joseph Maritim's case (Supra) where I found the applicant to be wanting in honesty.

8. I have also had a look at the replying affidavit intended to be filed. It is not correct to say it focuses on the merits of the case.

9. The respondent is actually responding mainly to the issues raised in the application for judicial review. I am not persuaded therefore that the interested party should be denied an opportunity to have his day in court. He has explained himself well and he should not be driven from the seat of justice.

10. I take this position because it is a very serious thing to deny a party the right of hearing or pleading in a case. In Philip Keipto Chemwolo & another Vs. Augustine Kubende [1986] KLR 495 the court of appeal observed thus:

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits."

11. Further, in the Ugandan case of Banco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, the apex court of Uganda expressed itself thus:

> " The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from pursuit of his right and unless lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."

12. These two cases underscore the special place that the right of pleading and hearing occupy in court processes.

13. The upshot, in light of the foregoing, is that the merits of the application before me have been found to be demonstrated. I therefore allow the application. Costs in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 12TH DAY OF MARCH, 2024.

In the presence of the Applicant, Mutua for Kiongo for respondent, the interested party, and in the absence of Andande for the interested party, and Ombachi for exparte applicant.

Court Assistant: Leadys

Interpretation: English /Kiswahili

A. KANIARU

JUDGE-ELC, EMBU

12/3/2024