



Republic v Kisii County Government & 4 others; Tumbo & 9 others (Exparte) (Environment and Land Judicial Review Case E001 of 2023) [2024] KEELC 4849 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023**

**M SILA, J
JUNE 13, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE KISII COUNTY GOVERNMENT 1ST RESPONDENT

**THE SUB-COUNTY ADMINISTRATOR, NYARIBARI MASABA 2ND
RESPONDENT**

NATIONAL LAND COMMISSION 3RD RESPONDENT

**CHIEF LAND REGISTRAR, MINISTRO OF LANDS AND PHYSICAL
PLANNING 4TH RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

AND

BENSON MAKENDO TUMBO EXPARTE

JAIRUS OMWOYO ORORI EXPARTE

EVANS MACHANI EXPARTE

HEZEKIAH OMBATI EXPARTE

**LUCY KEBWARO (AS ADMINISTRATOR IN THE ESTATE OF KEBWARO
SOMONI) EXPARTE**

**JERUSA MORAA MATUNDA (AS ADMINISTRATOR OF THE ESTAE OF
HEZEKIAH MATUNDA MUMA) EXPARTE**

**KEBIRA SAMSON (AS ADMINISTRATOR OF THE ESTATE OF NATAL
KEBIRA ATANDI) EXPARTE**



**JOB ONDIEKI (AS ADMINISTRATOR IN THE ESTATE OF JOEL ONDIEKI
MEROKA) EXPARTE**
**AGNES MOINDI (AS ADMINISTRATOR IN THE ESTATE OF MOINDI
GESIMBA) ORINA OMBOGA EXPARTE**
**GEORGE MOIBI MOSE (AS ADMINISTRATOR IN THE ESTATE OF MOSE
GETANDA) EXPARTE**

RULING

(Application to file main judicial motion out of time; leave granted to ex parte applicants to commence judicial review proceedings and given 21 days to file their main motion; motion not filed within time; applicants now seeking to have their motion filed out of time allowed and time be extended to that effect; whether time can be extended for filing main motion out of time can be allowed; court of opinion that it has discretion to do so where good reason is given; reasons given in this instance being that the applicants were looking for some documents and that the advocate thought that weekends are not counted in computation of days; court not persuaded of the reasons; any party filing a judicial review suit needs to be alive to the strict timelines therein; excuse that weekends are not to be counted not plausible because even if the weekends were to be ignored the motion was filed way out of time; application dismissed)

1. The application before me is that dated 12 January 2024 filed by the ex parte applicants. The ex parte applicants seek the following orders :
 - a. That the Honourable Court be pleased to extend the orders granted on the 14th November 2023 pending the hearing and determination of this application.
 - b. That the Honourable court be pleased to extend the 21 days period that was allowed for the filing of the substantive Notice of Motion of application by 38 days.
 - c. That the court does admit the Notice of Motion filed on 12 January 2024 as having been duly filed.
 - d. That the court grants such further or other reliefs that it may deem just and expedient to grant.
2. The background is that through a motion filed on 10 November 2023, the ex parte applicants averred to be the owners of certain plots of land in Kisii County which they developed. They complained that despite being owners, the 1st and 4th respondent directed them to vacate their parcels of land within 3 months in a notice dated 14 August 2023, which period was to lapse on 14 November 2023. Their contention was that the eviction notice was illegal. In the motion they asked for leave to commence judicial review proceedings for an order of certiorari to quash the decision of the 1st and 2nd respondent as contained in the eviction notice dated 14 August 2023, and mandamus to compel the 3rd and 4th respondents to survey and issue ownership titles to the ex parte applicants in respect of their plots. On 14 November 2023, the motion was placed before me and I gave leave to commence the intended proceedings. I also ordered that the grant of leave do operate as stay of the intended eviction and that the status quo be maintained. Importantly, I directed that the main motion be filed and be served within 21 days. The 21 days lapsed on 5 December 2023 without the main motion being filed. The main motion was instead filed on 17 January 2024 which was out of time. On the same date that the main motion was filed, the ex parte applicants filed the current application, seeking to have the motion admitted out of time.



3. The application is supported by the affidavit of Edna Achieng' Rweya, who is an advocate practicing in the law firm of M/s Meritad Law Africa LLP, who are on record for the ex parte applicants. She avers that after issuance of the orders of 14 November 2023, they focused on preparing the substantive motion and obtaining the requisite material to be relied on by the ex parte applicants, which process took considerable time and the 21 days lapsed without due compliance. She has added that the lapse was also occasioned by the mistaken belief that weekends are not included in the computation of time. She avers that the mistake of counsel should never be visited upon an innocent litigant and that the delay is excusable and not inordinate. She further avers that undue regard to procedural technicalities should not be a bar to the dispensation of justice and that no prejudice will be caused to the respondents if the application is allowed.
4. None of the parties filed a response to the application. However at the hearing of it, Mr. Wabwire, learned State Counsel, appearing for the 4th and 5th respondents, took a point of law and urged that under Order 53, there is no provision for extension of time after the initial leave has lapsed. He submitted that the only avenue is discretion of court after compelling reasons is given and that there were no compelling reasons in this instance. He asked that the application be dismissed. On her part, Ms. Magoma, holding brief for Ms. Rweya for the ex parte applicants, submitted that the delay was one of counsel and was not inordinate. She submitted that there is no prejudice to the respondents.
5. I have given the application due consideration. Order 53 Rule 3 provides for a time frame of 21 days to file the substantive motion. It provides as follows :

3 (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.
6. It is indeed true, as submitted by Mr. Wabwire, that there is no provision in the rules for extension of time, and as can be seen from Order 53 Rule 3 above, the word 'shall' is used for the requirement that the main motion be filed within 21 days. The interpretation of Order 53 Rule 3 has seen two schools of thought, one of the opinion that there is no room for the court to extend this 21 day period, and another of the view that the court has discretion to extend this 21 day period. The two schools of thought were discussed at length by my sister Aburili J, in the case of *Republic v Public Procurement Administrative Review Board ex parte Cyner-Chemie Limited*, High Court at Milimani, Judicial Review Nos. 371 and 372 of 2015 (2016) eKLR. She eventually concluded that the court has discretion to extend time. I would also incline towards this view.
7. In the case of *Shah v Mbogo* (1967)EA 116 the court elaborated the manner in which it exercises its discretion and the following dictum was made :

“I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence; or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
8. Although the above dictum was made in the context of an application to set aside an ex parte judgment, the same is still apt, in describing the general approach of courts when exercising a discretion.



Such discretion is intended to be exercised “to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.” Where a party seeks discretion for extension of time one not only needs to give a plausible reason for the delay but the length of the delay is also to be considered. In cases of judicial review, it should also be remembered that judicial review are special proceedings which apply under strict timelines. Thus, the exercise of the court’s discretion to extend time within which to file the substantive motion, ought not to be liberally exercised so as to make a mockery of the strict timelines in judicial review. I would for example hesitate to allow an application for extension of time whose effect will be to extend the time for applying for prerogative orders beyond the 6 months period of the impugned decision. The court also needs to consider whether the applicants can still pursue an alternative procedure out of judicial review so that the failure to file a judicial review motion does not mean that the door is shut for them to access the seat of justice. In all this, a court should be slow to exercise its discretion where there is actually no genuine good faith reason given for the delay. The reason for the delay is therefore of critical importance. At the end of the day, each case needs therefore to be considered depending on its facts and circumstances.

9. In our case, the leave to file the main motion was made on 14 November 2023 and the application was therefore to be filed by 5 December 2023. The reason given for not filing the main motion in time is that counsel was waiting for some material from the ex parte applicants before filing the main motion and that counsel thought that weekends are not counted in computation of time. The first reason, in my opinion, is not a good reason for extending time. A litigant should be alive to the timeframes provided by law when making an option of which procedure to take. If a litigant opts for the procedure of judicial review, then the onus is on him to make sure that he has gathered all his material within the time frame given therein. He cannot choose a path of limited time then complain that the time given in law is not good enough for him. It is for him to tailor himself to the timelines given and not the law to be bent for his sake, otherwise everybody will then be at liberty to operate at their pleasure in total disregard of the time given in law. In any event, I have not seen an affidavit from the ex parte applicants themselves, explaining what it is that they were looking for and why it took them so much time to find it. All we have is an affidavit of counsel that is devoid of specifics and deposing on matters that would ordinarily be in the domain of the litigants themselves. I am not in the circumstances persuaded to exercise my discretion based on this ground.
10. The second reason is that counsel thought that weekends are not included in the computation of time. I am afraid that ignorance of the law is not an excuse. In any event, even assuming that 21 days would give one three weekends, the benefit will only be for six days, for there are two days in each weekend. If this was the genuine reason, you would expect that the application would be filed on or about the 11 day of December 2023 or thereabouts. This is not what happened in this case.
11. On the substantial justice aspect, judicial review is not the only procedure that can be employed by the ex parte applicants. They are not therefore shut out from the seat of justice.
12. For the foregoing reasons, I am not persuaded of the merits of this application and it is hereby dismissed with costs. The ex parte applicants will need to find an alternative path to present their grievances. They closed the door on themselves on the procedure of judicial review by not filing their main motion in time and they have not given this court any genuine reason that would entitle this court exercise its discretion in their favour and open the door for them out of time.
13. Orders accordingly.

DATED AND DELIVERED THIS 13TH DAY OF JUNE 2024

JUSTICE MUNYAO SILA



JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :-

Ms. Magoma h/b for Ms. Rweya for the ex parte applicants

Mr. Kaburi for the 1st and 2nd respondents

Mr. Ndiritu for the 4th & 5th respondents

N/A for the 3rd respondent

Court Assistant – David Ochieng’

