



**Republic v Attorney General & another; Njue (Exparte Applicant); Raici (Interested Party) (Environment and Land Miscellaneous Application 20 of 2022) [2024] KEELC 7020 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7020 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 20 OF 2022  
A KANIARU, J  
OCTOBER 24, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE HON MINISTER FOR LANDS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**STEPHEN MAGARU NJUE ..... EXPARTE APPLICANT**

**AND**

**NJAGI RAICI ..... INTERESTED PARTY**

**RULING**

1. Before me for determination is a notice of motion dated 19.04.2023 and filed on 20.4.2023. It is expressed to be brought under Sections 1A, 1B and 3A of the [Civil procedure Act](#), Article 159(2)d of [the Constitution](#) of Kenya, Order 50 rule 6, Order 51 rule 13(2), Order 53 rule 1(1)(2), order 53 rule 2 and 3 of the Civil Procedure Rules and all enabling laws. The Applicant is Stephen Magaru Njue and he is the ex-parte applicant in the entire matter. He is seeking the following orders:
  - a. That the honorable court be pleased to extend and/or enlarge time within which the ex-parte applicant herein shall file a substantive suit for judicial review for the orders of certiorari, quashing the decision by the Special District Commissioner, made on the 22<sup>nd</sup> February 2022 in the Minister’s Land Appeal Case No. 118 of 1990.



- b. That the honorable court be pleased to order that the leave to apply for an order of certiorari to remove into the High Court and quash the decision by the Special District Commissioner made on the 22<sup>nd</sup> February 2022 in the Minister's Land Appeal case No. 118 of 1990 as issued by the Honorable Justice Cheron J, sitting at the Kerugoya, environment and land Court on the 4<sup>th</sup> August 2022 be and is hereby extended, such leave having since lapsed after the expiry of 21 days thereof.
2. The grounds in support of the application are set out on the face of the notice of motion and amplified in the supporting affidavit sworn by the said Stephen Maragu Njue on 19.04.2023. He deposed that the Environment and Land Court sitting at Kerugoya granted him leave to institute judicial review proceedings on 04.08.2022 through an ex-parte chamber summons filed on 25.07.2022. That notably the orders were granted in chambers but the registry staff at Kerugoya law courts failed to communicate the same to the relevant parties to the suit. That the judge had issued strict timelines of 21 days within which to file the substantive suit but by the time the advocate for the ex-parte applicant learnt that leave had been granted, the period of 21 days had already lapsed making it difficult to proceed with filing of the substantive suit.
  3. That on this basis, he asks this court to extend the stated period so as to allow the ex-parte applicant to file the said suit. That the intended suit raises pertinent legal and factual issues demanding adjudication by this court. That failure to extend the time will amount to unfairly locking the applicant outside the doors of justice, thus condemning him unheard. That the orders sought are not prejudicial to the adverse parties herein as they will be granted a chance to fully defend themselves from claims leveled against them at the hearing. That this court is vested with unfettered powers and jurisdiction to make such orders as may be necessary for the ends of justice and to spearhead the just determination of all suits before it.
  4. The application was responded to by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through grounds of opposition dated 5.5.2023. They opposed the application on grounds that the applicant has not advanced sufficient reasons for the extension of time and that he has been ignorant. That the applicant, despite being absent from chambers when the orders to file the substantive suit were granted, ought to have followed up to get the same from the registry. That due to his omission or indolence, time has already lapsed and he can no longer proceed to file the substantive suit for judicial review as equity aids the vigilant and not the indolent. That the applicant will not suffer any irreparable loss should the orders sought not be granted whereas the respondents will suffer irreparable loss if the same is granted. That the application is time barred and an abuse of the powers and jurisdiction of the court.
  5. The interested party equally filed grounds of opposition on 24.1.2024. It was their position that the application is frivolous, vexatious and an abuse of the court process. That the applicant had not attached the court order that they want this court to enlarge. That once the court pronounced itself on 04.08.2022, it became functus-officio and hence it does not have jurisdiction to entertain this application. That the substantive law governing prerogative orders does not provide for enlargement of time within which a party should file the substantive motion and therefore this court lacks the jurisdiction to issue the orders sought. That the interested party will suffer prejudice and substantive loss if leave is granted since he has already implemented the decision of the minister made on 22.2.2022.
  6. The parties canvassed the application by way of written submissions. The applicant submitted that this court has the jurisdiction to enlarge time within which the substantive motion ought to have been filed. They referred this court to the case of Republic V General Manager, Moi International Airport & Anor Ex-parte Jared Adimo Odhiambo & Anor (2014) Eklr where the court upheld the position that it has power to enlarge the 21 days period stipulated in order 53 Rule 3 of the Civil Procedure



- Rules. They further submitted that Order 50 rule 6 of the civil procedure rules on enlargement of time is applicable to judicial review applications and even if it was not so, this court retains its inherent power to extend the time limited by Order 53 Rule 3.
7. It was submitted also that there was no inordinate delay in bringing the application. That though there was delay, the same was satisfactorily explained to this court and the court was urged to accept the same. That in *Belinda Murai & others V Amos Wainaina* (1978) KLR 278 cited with approval by Nyeri CA 18/213 *Richard Ncharpi Leiyagu V IEBC & 2 others*, it was stated that a party ought not to be denied an opportunity to ventilate his grievances as that would oust them from the judgement seat. That if the applicant is not granted the orders sought, he will suffer more injustice than the respondents and interested party who are by law expected to perform their constitutional mandate in accordance with the stipulated legal framework.
  8. That the inconvenience caused to the respondents and interested party can be adequately compensated by an award of costs. It was urged that the application be allowed with costs to the applicant. Among the cases proffered in support of the applicants submissions are the cases of *Republic Procurement Administrative Review Board Ex-parte Syner-Chemie Ltd* (2016) Eklr, *Ivita V Kyumba* (1984) KLR 441, *Nicholas Arap Korir Salat V IEBC & Others SC Application No 16 of 2014* among others.
  9. The 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand submitted that the application as drawn offends the provisions of Order 50 rule 1, rule 13(2) (though notably rule 13 (2) does not exist); that Order 53 does not provide for extension of the time within which the 21 days can be enlarged or extended, and therefore the application is incompetent and an abuse of the court process. That the applicant has also failed to attach the orders on which he wishes this court to enlarge time. That also court orders are not issued in vain and whenever an advocate by his inexcusable delay deprives a client of his cause of action, the proper recourse for the client is to claim damages against the advocate. That the 21 days stipulated under Order 53 rule 3 of the civil procedure rules is not elastic, hence it cannot be enlarged as it is fixed by statute.
  10. It was submitted further the principles applicable on extension of time were laid down in the case of *Aviation and Allied Workers Union V KQ Ltd* and in *Nicholas Arap Korir Salat V IEBC & 7 Others SC Application No 16 of 2014*. That in applying those principles the application was filed way out of time and the same cannot be saved. It was urged that the application be dismissed with costs to the Respondents. Further cases that were made reference to were those of *Cecilia Karuru Ngayu V Barclays Bank of Kenya & Anor* (2016) Eklr, among others.
  11. The interested party submitted that he will suffer substantive loss that cannot be compensated by way of damages as he has already implemented the decision of the minister. He says that he was awarded land parcel *Evurore/ Nthambu 2103* in the said decision which he assumed possession and has been living up to date. That under Order 53 Rule 13 of the civil procedure rules, once leave has been granted the court cannot grant more of it. The court was referred to the case of *Republic V Moca Land Disputes Tribunal & 2 others Exparte John Muchiri Magundu* (2010) Eklr. It was further submitted that the power to enlarge time is discretionary in nature and the applicant has not shown good cause to warrant them being granted the orders sought.
  12. Having considered the application, the grounds of opposition as well as the party's rival submissions, I find that the issue for determination is whether the court can enlarge the 21 day period given to the applicant to file the substantive motion.
  13. The applicant is said to have approached this court on 25.7.2022 by way of Ex-parte chamber summons seeking leave to institute judicial review proceedings for the order of certiorari, quashing the decision by the Special District Commissioner made on the 22.2.2022 in the Minister's Land Appeal Case No.



118 of 1990. Though this court was not sitting on that day, the said application was forwarded to the Environment and Land Court sitting at Kerugoya Law courts. My brother Honourable Justice Cheron J upon considering the said application, granted the applicant leave to file the substantive motion for judicial review on 27.7.2022 on condition that the same would be filed within 21 days from the date of the order.

14. It is said that the applicant's advocate was not made aware that the court had issued the said orders by the court registry staff and he puts blame on them for failing to file the substantive application within the period granted by the court. The applicant has now approached this court seeking for an enlargement of the 21 period granted by the court to file his substantive application. The respondents as well as the interested party oppose the said application on the grounds that the provisions of Order 53 of the civil procedure rules do not provide for enlargement of time and therefore this court does not have jurisdiction to enlarge the same.
15. The law on filing of the substantive motion within 21 days is set out in Order 53 Rule 3 of the Civil procedure Rules which provides as follows:

“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 in 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”.

16. The above provision is clear that once leave is granted to apply for Judicial Review orders of Certiorari, Prohibition or Mandamus, the Applicant is expected to file the substantive Notice of Motion within 21 days from the date of such leave. However, there is no settled position as to whether the period of 21 days stipulated in Order 53 Rule 3 of the Civil Procedure Rules can be enlarged. It is up to the court's discretion to either enlarge time or decline to do so.
17. While considering whether the court has jurisdiction to enlarge time stipulated under Order 53 Rule 3 of the Civil Procedure Rules, the Court of Appeal in the case of Wilson Osolo Vs John Ojiambo Ochola & the Attorney General: CA No 6 Nairobi of 1995 held that;

“It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the *Law Reform Act*. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, the procedure cannot be availed of the extension of time limited by statute, in this case, the *Law Reform Act*”.

The court went on further to say;

“It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15<sup>th</sup> February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules.” (emphasis: mine)

18. I also find good guidance in the case of Republic Vs General Manager, Moi International Airport & Another Ex-parte Jared Adimo Odhiambo & Another (2014) eKLR as proffered by the applicant



where it was held that the court has power to enlarge the 21 days period stipulated in order 53 Rule 3 of the Civil procedure Rules.

19. From the above authorities, this court has jurisdiction to enlarge time within which an application under Order 53 Rule 3 of the Civil Procedure Rule is to be filed, upon leave of court being granted. It is also in accord with the spirit of *the constitution* that a party ought to be granted an opportunity to be heard on merit unless it can be established that such a party is indolent. The applicant filed the instant application for enlargement of time on 20.04.2023, which is a period of about 8 months from the time he ought to have filed his substantive application. Though inordinate, the delay has been explained by his advocate, which explanation this court is willing to accept.
20. The interested party has expressed that he will be prejudiced if the applicant is granted leave to file his substantive application as he has already implemented the decision of the minister and has assumed possession of the suit property. However, I do not see how the orders sought by the applicant will interfere with his alleged possession as he can still continue being in possession of the said land pending the outcome of the substantive application.
21. The respondents and the interested party were also opposed to the applicant's application as they accused him of failing to attach the order on which he wanted the court to enlarge time. I also do not see how that would be fatal to applicant's application as the said order is part of the court record. What he can do is serve the same to the interested party who says that he is yet to be served with the same.
22. The upshot of the foregoing is that I allow the notice of motion application dated 19.4.2023. The applicant shall file and serve the substantive suit within 21 days from today. Costs shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. KANIARU**

**JUDGE – ELC, EMBU**

In the presence of Wanjiku Fatuma for Ms Mutegi for interested party, Ms Kiku for Kiongo for Respondent.

Court Assistant - Leadys

**24. 10.2024**

