



**Republic v Minister for Land & Settlement & 2 others; Luka & another  
(Exparte); Luka & another (Interested Parties) (Environment and Land Judicial  
Review Case 1 of 2021) [2023] KEELC 161 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 161 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2021  
CG MBOGO, J  
JANUARY 24, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MINISTER FOR LAND & SETTLEMENT ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT COMMISSIONER NAROK WEST ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR NAROK ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**KIARINE OLE LUKA ..... EXPARTE**

**SAMUEL LUKA (SUING THROUGH NEXT FRIEND KIRIANE OLE  
LUKA) ..... EXPARTE**

**AND**

**MEPUKORI OLE LUKA ..... INTERESTED PARTY**

**SIOTALO OLE LUKA (SUING AS THE NEXT FRIEND TO SAMUEL  
LUKA) ..... INTERESTED PARTY**

**RULING**

1. Before this court for determination is a notice of preliminary objection dated October 17, 2022 filed by the respondents in opposition to the notice of motion application dated March 2, 2021 and filed on March 17, 2021 on the grounds that: -



1. That the ex parte applicants' application offends the mandatory provisions of Order 53 Rule 3 (1) of the [Civil Procedure Rules](#) which provides as hereunder:-
 

“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 otherwise directed, be at least eight clear days between service of the notice of motion and the day named therein for the hearing.”
  2. That the [civil procedure rules 2010](#) order 53 is very clear on the timelines within which to file the substantive notice of motion. The order expressly provides for 21 days within which to file a substantive notice of motion.
  3. That the applicants having been granted leave to file the substantive motion on February 19, 2021 filed the substantive notice of motion on March 17, 2021; after 26 days thus outside the timeframe required under Order 53 Rule 3(1).
  4. That the applicants' notice of motion application dated March 2, 2021
  5. That the applicants failed to join the Attorney General as a party in this suit contrary to Article 156 of the Constitution thus rendering the suit fatally defective.
2. This court directed that the notice of preliminary objection be canvassed by way of written submissions. The respondents filed written submissions dated November 7, 2022. The respondents raised two issues for determination which is as below;
    - i. Whether the Applicants' application was filed within time.
    - ii. Whether failure to join the Attorney General renders the suit fatally defective.
  3. On the first issue, the respondents submitted that the ex- parte applicants were granted leave to file the substantive motion on February 19, 2021. They filed the substantive Notice of Motion on March 17, 2021; after 26 days thus outside the time frame required under Order 53 Rule 3(1). The respondents further submitted that Order 53 of the [Civil Procedure Rules](#) is very clear on the timelines within which to file the substantive notice of motion and that the Order expressly provides for 21 days.
  4. The respondents submitted that the applicants' application offends Sections 8 and 9 of the [Law Reform Act](#) and also contravenes Order 53 Rule 3 of the [Civil Procedure Rules](#). That in construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the legislature.
  5. The respondents further submitted that in interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it. The respondents relied on the case of [Republic versus Medical Laboratory Technologists Board Ex Parte Anastacia Ngithi Wabu & 177 Others](#) [2017] eKLR in which the court held that the words "shall be made" in Orders 53 Rule 3(1) of the [Civil Procedure Rules 2010](#) demonstrate that the time lines are mandatory rules of procedure that ought to be strictly adhered to." Reliance was also placed in the case of [Republic versus Attorney General & 2 Others; Hassan \(Exparte\); Mvurya & 20 Others \(Interested Party\)](#) (Judicial Review Miscellaneous Application 14 of



2020) [2021] KEHC 239 (KLR) (3 November 2021) where the court relied on the case of *Republic v Linda Wanjiku & 2 Others Ex Parte E.N (Applying as father and next of friend of sk (Minor)* [2017] eKLR in which the honourable court observed that; "...failure to comply with the order for leave on the time lines the substantive motion as filed is incompetent." Further, in the said case the court citing the Court of Appeal decision in *United Housing Estate Limited versus Nyals (Kenya) Ltd* Nairobi Civil Application No. 84 of 1996 stated that "what emerges from the decision of the Court of Appeal is that a party cannot unilaterally decide not to comply with the conditions attached to the exercise of discretion of the court in his or her favour on the ground that or she ought to have access to justice....Non-compliance with court order cannot be a procedural technicality curable by application of Article 159 of the *Constitution*."

6. The respondents submitted that a party cannot decide to disobey a court order and then approach the court like nothing happened and pray for orders which they are presumed to have abandoned. Further that non-compliance of a court order is not a mere technicality and cannot be cured by relying on Article 159 of the *Constitution*. The respondents relied on the case of *Republic v Public Procurement Administrative Review Board & Another; Mer Security & Communications System Ltd/ Megason Electronics & Control 1978 (JV) & Another (Interested Parties); Exparte Magal Security Systems Ltd/Firefox Kenya Limited (JV)* [2019] eKLR where Justice Mativo (as he then was) upheld the Preliminary objection filed by the Interested party. The court held that; - "Article 159 (2) (d) of the *constitution of Kenya 2010* enjoins courts to determine cases without undue regard to technicalities. I must however point out that Article 159 of the Constitution is not a panacea for all problems. It is not lost to this court that the provisions of Order 53 Rule 3 (1) of the *Civil Procedure Rules, 2010* are couched in Mandatory terms. The applicant cannot seek refuge under Article 159 (2) (d) of the *constitution* under the present circumstances in view of the mandatory and express provisions cited above. 59. Additionally, the ex parte applicant disobeyed an express court order. Article 48 of the Constitution cannot be used as a shield where a party flouts a court order. Above all, Access to Justice cuts both sides. The Respondents and the Interested Parties are equally entitled to access justice. Access to Justice is equally flouted when a Respondent is drugged to court unnecessarily. 61. In view of my conclusions herein above, and my finding that section 9 (3) of the *Law Reform Act* and Order 53 Rule 3(1) of the *Civil Procedure Rules, 2010* are couched in mandatory terms, and, also, my finding that Article 159 (2) (d) of the *Constitution* cannot be of help to the ex parte applicant under the circumstances of this suit, I find and hold that the preliminary objection succeeds. 63. Consequently, the ex parte applicant's Chamber summons dated June 8, 2018 is hereby dismissed. Further, the ex parte applicant's Notice of Motion dated May 22, 2018 is struck off for being incompetent and or for being improperly on record and for having been filed out of time. 64. Further, the Notice of Preliminary Objection filed by the second Interested Party dated June 8, 2018 is hereby allowed."
7. On the second issue the respondents submitted that the applicants' failed to join the Attorney General as a party in this suit thus rendering the suit fatally defective. Further, that the Attorney General should have been sued on behalf of the Respondents as envisaged under Article 156 of the *Constitution* as read together with the Office of the Attorney General Act. They relied on the case of *Maina Gitonga versus Catherine Nyawira Maina & Another* [2015] eKLR, where the honourable Judge held that; "The other issue is whether failure to enjoin the Attorney General renders this application fatally defective. Wendoh J in the already cited case of Republic vs Attorney General & Another was of the view that failure to make the Attorney General one of the Respondents in an application like the one before me would be fatally defective." I find that it was necessary for the Petitioner to name the Attorney General in these proceedings (in addition to naming the public body in question). In any event, Article 156 (2) (b) of the *Constitution of the Kenya 2010* provides that "the Attorney General shall represent the national Government in court or in any other legal proceedings to which the national government



- is a party, other than criminal proceedings” while Section 5 (1) (i) of the Office of the Attorney General Act[10] clearly provides for the functions of the office of the Attorney General among them „representing the national government in all civil and constitutional matters in accordance with the Government Proceedings Act. In view of my findings above, I find that the Petition as drawn is defective.”
8. The ex-parte applicants filed written submissions dated January 18, 2023. Two issues were raised for determination which is whether the notice of motion application dated March 2, 2021 is fatally defective and whether failure to join the attorney general renders the suit fatally defective.
  9. On the first issue, the ex-parte applicants submitted that the judiciary e-filing system was down and the registry staff could not assess the application for filing. They further submitted that they received the assessment and fees payable on March 16, 2021 and received the stamped copy on 17<sup>th</sup> March, 2021. Further, that judicial review has its origin in common law and therefore the question is whether the common law can override the spirit and letter of our 2010 Constitution and that Article 159 (2) of the Constitution is clear that in exercising judicial authority, the courts and tribunals shall be guided by principles and administer justice without undue regard to technicalities. The *ex-parte* applicants relied on the case of Bremer Vulcan Schiff bar and Maschinen Fabrick versus South Indian Shipping Corporations Limited [1981]AC 909. The *ex-parte* applicants further submitted that a strict application of the rule as stipulated in Order 53 of the Civil Procedure Rules would not be a legitimate restriction on the right of access to justice which is a constitutional right stipulated in Article 48 of the Constitution. To buttress this submission, the *ex-parte* applicants relied on the case of Equity Bank Limited versus West Link Mbo Ltd Civil Application (Appeal) no 78 of 2011, Republic versus County Assembly of Nakuru & 2 Others Exparte Samuel Waitbuku Njane & 21 Others Nakuru JR App 19 of 2016 and James Gacheru Kariuki & 22 Others versus Kiambu County Assembly & 3 Others [2017] eKLR.
  10. The *ex-parte* applicants further submitted that the right to fair administrative action is a fundamental right included in the Bill of Rights as it was held in the case of Kiscoba Association (acting through John Maina- Chairman James Ndiba-Organisation Secretary versus Nairobi City county Government [2018] eKLR.
  11. On the second issue, the *ex-parte* applicants submitted that failure to enjoin the attorney general is curable by amendment. The *ex-parte* applicants relied on the case of Republic Exparte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers versus Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another, Civil Appeal (Application) No. Nai. 281 of 2005 and Eliud Buku Thuku versus Paul Kariuki Mwangi & 2 Others [2009] eKLR.
  12. I have carefully analysed and considered the notice of preliminary objection and the written submissions filed by the parties. The issue for determination is whether the preliminary objection ought to be upheld pursuant to the grounds raised therein.
  13. Order 53 Rule 3 (1) of the Civil Procedure Rules, 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 to the high court, and there shall, unless the judge granting leave otherwise directed, be at least eight clear days between service of the notice of motion and the day named therein for the hearing.”
  14. From the above provision of the law, the substantive application ought to be made within twenty-one days from the date when leave was granted. In this case, this court granted the *ex-parte* applicants’ leave to file and serve the substantive notice of motion within 21 days on February 19, 2021. From the record, nothing transpired until December 6, 2021 when the deputy registrar slated the matter for a mention date on February 15, 2022 with directions that a mention notice to issue. The *ex-*



*parte* applicants' filed a substantive notice of motion application dated March 2, 2021 on March 17, 2021. The *ex-parte* applicants' ought to have filed and served the substantive motion at least by the March 12, 2021. Instead, they filed the same a week later on March 17, 2021. The submissions by the *ex-parte* applicants that the judiciary e-filing system was down is not persuasive. They have not annexed the email communication to confirm that indeed the assessment was done on the March 16, 2021 and filing and stamping of the substantive notice of motion on March 17, 2021. It is upon the *ex-parte* applicants to show that indeed the court's registry is to blame as opposed to making a general statement.

15. The orders of my brother Kullow J issued on February 19, 2021 were express and more particularly order 4 which was to the effect that the applicants file and serve the application within 21 days. A perusal of the records also indicates that service of the substantive notice of motion was effected more than a year later on June 16, 2022 as can be deduced from the affidavit of service sworn on June 20, 2022.
16. It has been stated over and over again that where the court has issued orders and or given directions the same ought to be strictly complied with failure to which the orders lapse. I am of the view that the applicants are casual in their approach to this court. They disobeyed court directions and instead of seeking enlargement of time to file the substantive motion, they went ahead, filed and served the substantive motion without any regard to this court's previous orders. In the case of *United Housing Estate Limited versus Nyals (Kenya) Ltd* Civil Application No. Nairobi 84 of 1996 where the Court of Appeal pronounced itself as follows:

“A party who obtained an order of a court on certain specified conditions can only continue enjoying the benefits of that order if the conditions attaching to it are scrupulously honoured and in the event of a proved failure to comply with the attached conditions, the court has inherent power to recall or vacate such an order.”

17. On the second issue, the respondents contended that failure to join the attorney general as a party in the suit is contrary to Article 156 of the Constitution which renders the suit fatally defective. Order 1 Rule 3 of the *Civil Procedure Rules* provides as follows as who is may be joined in a suit as a defendant or respondent:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

18. The duties of the Attorney General are set out under Article 156 (4) of the Constitution as follows:

“(4) The Attorney-General—

- (a) is the principal legal adviser to the Government;
- (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
- (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.”

19. In the instant case, the attorney general is the legal representative of the respondent in court proceedings. The attorney general is usually added as a party, in addition to the principal party it



represents, for purposes of notification of civil proceedings affecting the national government, and for purposes of service of pleadings and court documents in this regard.

20. In *Civicon Limited versus Kivuwatt Limited & 2 Others* [2015] eKLR the court of appeal observed as follows: -

“The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.....

From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10(2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed.”

21. Having stated the above and as far as these proceedings are concerned, they are defective to the extent that the attorney general has not been made a party to. However, the same does not go into the substance of the application and is not fatal. I place reliance in the case of Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers versus Charles Lutta Kasamani t/a Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 where the court of appeal stated as follows:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...”

22. Arising from the above, I do find merit in the notice of preliminary objection dated October 17, 2022 in terms of ground 1. The substantive notice of motion dated March 2, 2021 and filed in court on March 17, 2021 is hereby dismissed. Each party to bear its own costs. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 24<sup>TH</sup> DAY OF JANUARY, 2023.**

**HON. MBOGO C.G.**

**JUDGE**

**24/1/2023.**

