



**Malika v Registrar of Lands (Judicial Review E178 of 2023)
[2024] KEHC 374 (KLR) (Judicial Review) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E178 OF 2023
JM CHIGITI, J
JANUARY 26, 2024**

BETWEEN

SUSAN MALIKA EXPARTE APPLICANT

AND

REGISTRAR OF LANDS RESPONDENT

RULING

Background

1. The Applicant is a joint proprietor of a property known as Nairobi Block 50/197 and Nairobi Block 50/198.
2. The Applicant applied to the Respondent for lodging of a caveat/ caution for the reason that the Applicant’s joint owner was to deprive her of her property rights but the same has never been lodged.
3. Being dissatisfied with the foregoing, the applicant filed an application before this court the Chamber Summons Application dated 1st November 2023 wherein the applicant is seeking the following orders;
 - a) That the Applicant be granted an order of Mandamus to compel the Registrar of Lands, by himself, his agents, servants or otherwise to register a caution on the suit premises.
 - b) That cost of this application be provided for.

Applicants Case

4. The Judicial Review application was filed through G. Kogo and Company Advocates.
5. The new advocates on record prayed that the Statutory Statement be allowed and that the applicant be granted leave to file a Supplementary Affidavit.



6. Counsel for the Respondent opposed the application on the basis that application lacked a Statutory Statement and that the Application be struck out.

a. Whether the Applicant has a right to file a Supplementary Affidavit

7. In the case of *Fidelity Shield —vs- Cyrus Ombuna Machini*, High Court of Kenya at Nairobi held as follows:

“In the premises, I am convinced that it would be fair and in the interest of justice to have the supplementary affidavit of Sammy Kamau Wanjiku to be admitted in this court.

In the end, the Motion dated June 2, 2022 is found to be meritorious and it is allowed”.

8. In the case of *Blue Nile E.A Ltd —Vs- Lydia Gode Yusuf & Another* it was held as follows:

“The right to be heard is a constitutional right provided for under Article 48 of *the Constitution* of Kenya, and in all circumstances it will be in the interest of all parties to hear a matter on merit...”

b. Whether the applicant's statutory statement should be adopted as filed?

9. It is trite law that mistake of counsel shall not be visited on the client or litigant. This particular statutory statement was in the expertise of the advocates previously on record and therefore, the applicant does not deserve to suffer any penalty or punishment as a result of her former counsel's mistake and negligence.

10. In the case of *Phillip Chemeno & another —Vs- Augustine Kubende* it was held as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits...The Court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”

11. *The Constitution* under Article 159 states that justice shall be administered without undue regard to technicalities.

12. The same was emphasized in *James Marvell Musoo v. Ezetec Limited* Cause Number 1263 of 2012 where court allowed the applicant to file his application.

13. For the ends of justice to be met premised on the grounds as articulated above, to wit — mistake of counsel not to be visited on the litigant and justice to be administered without undue regard to technicalities.

Respondents case

14. The respondents filed grounds of opposition dated 4th December 2023 opposing the application on the grounds that: -

- a. The Chamber Summons application dated 1st November 2023 is fatally defective for failing to comply with the mandatory provisions of Order 53 Rule (1) & (2) & (4)
- b. The application does not contain a statutory statement the same is not among the documents filed with the application for leave.



- c. Order 53 Rule (1) & (2) provides that an application for mandamus, prohibition and certiorari may only be made after leave has been granted and that the application for leave must be accompanied by a statement setting out the grounds upon which the relief is sought.
 - d. The requirement for the statement is mandatory at the leave stage and at the time of serving the main motion.
 - e. In the absence of the statutory statement the application for leave is incompetent, fatally defective and capable of being struck out in limine.
 - f. an application for prerogative orders filed without a statutory statement is not a suit.
 - g. the Applicant is seeking for the substantive prerogative order of Mandamus at leave stage.
15. The application for leave ought to have been accompanied by a statutory statement failure to which the application for leave ought to have to be struck out.
 16. Secondly, order 53 rule 4 requires that a statutory statement accompany the application for leave at the leave stage and at the time of serving the main motion.
 17. Without it there will be no cause for a judicial review court to intervene and interrogate actions or omissions of a public body.
 18. Reliance is placed on the case of Hassan Adan Diblow Fidhow vs The AG Nairobi JR E051 of 2023 where Justice Ngaah struck out an application for failure to file a statutory statement.

Analysis and determination:

c. Whether the suit offends the mandatory provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules 2010, Laws of Kenya.

19. In the case of *James Mangeli Musoo v Ezeotec Limited* [2014] eKLR it was held that:

“A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue Regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.”
20. I am in full agreement that mistake of a counsel should not be visited upon a client.
21. The applicant's counsel realized that there was an omission and a failure to file the statutory statement and moved the court with due dispatch to cure the lapse. It is my view that the omission on the part of the applicant can be cured through Article 159(d) which states:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (d) justice shall be administered without undue regard to procedural technicalities”.
22. However, that be as it may, there is a bigger problem, the applicant has not sought for leave of the court to apply for the prerogative order of mandamus rather she has sought for the Mandamus order at the leave stage.



23. Order 53 rule 1 of the *Civil Procedure Rules* provides that:

“Applications for mandamus, prohibition and certiorari to be made only with leave. 1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

24. The reason for leave was discussed in the case of *County Council of Kwale & Another Ex-Parte Kondo & 57 Others* (supra) case, where the court further held that leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant; the test being whether there is a case fit for further investigation at a full inter parties hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court’s discretion, but as always it has to be exercised judiciously.

25. In this regard, the Supreme Court decision in *Raila Odinga vs. the Independent Electoral and Boundaries Commission and 3 Others* [2013] EKLK is instructive.

26. In its decision, the Supreme Court had this to say:

“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of *the Constitution* which obliges a court of law to administer justice without undue regard to procedural technicalities. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.”

27. We do not tire to remind litigants that mandatory rules of procedure, as is Order 53 Rule 1 of the Civil Procedure Rules, are not merely a cosmetic add-on to substantive law. They cannot be likened to a pack of cherries from which one’s choice to pick is as good as the choice not to. Indeed, the observance of such rules is mandatory, and for good reason.

28. As Kiage JA, observed in this Court’s decision in *Nicholas Kiptoo Arap Korir Salat vs. the Independent Electoral and Boundaries Commission and 6 Others* [2013] eKLR:

“I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”



We have said enough of this matter, which to some might appear trivial, though fundamental in the determination of the issue as to whether the appellant’s Motion for review of the 1st Respondent’s decision stood the competency test weighed against mandatory rules of procedure. Having carefully considered the appeal before us, the judgment of the High Court and the respective positions of the parties considered against *the Constitution*, the statute and judicial precedents relevant to the issue, we reach the inescapable conclusion that the appellant’s appeal must fail. It is hereby dismissed with costs to the respondents.”

Disposition:

29. I am bound by the said decision of the Court of Appeal, that in Judicial Review proceedings, obtaining leave of court is mandatory before filing the substantive application.

Order:

30. The Application dated 1st November 2023 is defective for want of leave, and the same is struck out with cost.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2024

.....

J. CHIGITI (SC)

JUDGE

