



REPUBLIC OF KENYA



KENYA LAW
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Republic v Attorney General & 5 others; Wuomuga (Exparte Applicant) (Miscellaneous Application E004 of 2022) [2023] KEELC 16985 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16985 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

MISCELLANEOUS APPLICATION E004 OF 2022

E ASATI, J

APRIL 27, 2023

IN THE MATTER OF THE AMENDMENT TO REGISTRY INDEX MAP ON SHEET 5 RELATING TO PARCEL OF LAND KNOWN AS KISUMU/KONYA/5588

AND

IN THE MATTER OF SUBDIVISIONS RELATING TO PARCEL OF LAND KNOWN AS KISUMU/KONYA/2778

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER IS OF THE CONSTITUTION OF KENYA, 2010, ARTICLES 22(1), 23(3), 40(1), (2) AND (D), 47(1), (2), (3), 50(1), 60(1)(B)

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012, SECTION 9,, 14(1) AND (2), SECTION 16, SECTION 79

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015, SECTION 3, 4, 7, 9, 10(1), 11

AND

IN THE MATTER OF SECTION 45(1) OF THE LAW OF SUCCESSION ACT

AND

IN THE MATTER OF CIVIL PROCEDURE RULES, ORDER 53, RULE 1

BETWEEN

REPUBLIC APPLICANT



AND

THE ATTORNEY GENERAL 1ST RESPONDENT
THE REGIONAL LAND SURVEYOR 2ND RESPONDENT
THE COUNTY LAND REGISTRAR 3RD RESPONDENT
JAMES RATENG' 4TH RESPONDENT
MARY ADHIAMBO JUMA 5TH RESPONDENT
MICHAEL OTIENO JUMA 6TH RESPONDENT

AND

JOSHUA EVANS ONYANGO WUOMUGA EXPARTE APPLICANT

RULING

1. The judicial review proceedings herein were commenced vide the notice of motion application dated October 14, 2022 after leave to file had been granted. In the reply to the application the 4th Respondent, James Rateng', raised a preliminary objection vide Notice of Preliminary Objection dated November 18, 2022, on the following grounds:
 - a. That the judicial review application by the ex parte applicant is time barred.
 - b. That the judicial review application offends section 9(3) of the *Law Reform Act* and order 53(2) of the *Civil Procedure Rules, 2010*. The *ex-parte* applicant seeks to review a decision which was issued on February 18, 2022. The ex parte applicant sought leave in September 2022 more than 6 months after the decision.
 - c. The application is frivolous, vexatious, bad in law and an abuse of the court process, the same should be struck out with costs to the 4th respondent.
2. Directions were taken on November 23, 2022 that the preliminary objection be disposed of first and by way of written submissions. Pursuant to these directions, written submissions dated March 8, 2023 were filed on behalf of the ex parte applicant and 25th November on behalf of the 4th Respondent.
3. The 4th respondent submitted that under the provisions of order 53 rule (2) *Civil Procedure Rules 2010*, time for applying for an order of certiorari is limited to six (6) months and that under the provisions of section 9(3) of the *Law Reform Act*, application for an order of *mandamus*, prohibition or certiorari shall in specified proceedings be made within six months, or such shorter period as may be prescribed after the act or omission to which the application for leave relates.

That the decision that the ex parte applicants seeks to challenge was made on the February 18, 2022. That the six months within which to institute the application ended on July 18, 2022. That the application was filed 44 days out of time. That the application is pegged on order 53 of the *Civil Procedure Rules*. That rule 2 of the order 53 *Civil Procedure Rules* presents the timelines within which such an application should be made. That the time presented is six (6) months from the date of the decision. That the ex parte applicant did not seek leave to file the application out of time.

Reliance was placed on the case of *Rosaline Tubei & 8 others v Patrick K Cheruiyot & 3 others* [2014] eKLR where the court held that where a party files an application for judicial review out of time, even



if leave to file the same is granted the leave can be challenged at the substantive hearing of the motion. The court noted that the door to access the remedy of judicial review was firmly shut by the lapse of the time lines prescribed and proceeded to dismiss an application for extension of time and for leave to instituted judicial review proceedings. Counsel also relied on the case of *Peter Orengo Migiro (Suing on behalf of the late Christopher Orengo Makori) v Samwel Omagwa James & 2 others* [2022] and *Wilson Osolo v John Ochola & another* [1995] eKLR where it was held that there is no provision for extension of time to apply for such leave.

4. The ex parte applicant submitted that only an application for an order of certiorari is subject to the limitation period and it is only limited to judgments, decrees, orders and court proceedings. That processes of administrative nature relating to amendment of registry index map are not included.

Counsel relied on the case of *Republic v Kenya National Highway Authority & 2 others ex parte Amica Business Solution Limited* [2016] eKLR where the Court of Appeal held that the six months limitation period would not apply to decisions made by administrative bodies which fall outside the purview of the definition of decisions, judgement, order, decree or other proceedings as contemplated under order 53 Rule 2 of the *Civil Procedure Rules*. Counsel submitted that amendment to the Registry Index maps purportedly undertaken on February 18, 2022 does not constitute a judgment, decree, order of proceedings. That the limitation of six (6) month is computed where certiorari is sought to nullify an act deemed to be a judgement or decree order or proceedings from the point when the ex parte applicant became aware of the decision sought to be nullified and not when the decision itself was undertaken. That the ex parte applicant got to know of the alleged amendment of the Registry Index Map on March 18, 2022. Counsel Submitted further that here the decision sought to be nullified is itself a nullity, the could would not be prohibited in its exercise of jurisdiction by the fact that the impugned decision was undertaken more than 6 months before the Judicial Review application was presented in court.

5. Counsel submitted further that the present application has not only been presented under the provisions of order 52 rule 2 of the *Civil Procedure Rules* and section 9(3) of the *Law Reform Act* but also the provisions of articles 22(1), 23(3), 40(1), (2) and (3), 47(1)(2) and (3), 50 (1), 60(1) and the *Fair Administrative Action Act 2015* Section 3,4,7,9, 10(1) and 11.

That the constitutional provisions cited grant the court a right to every person to approach the court to protect his/her fundamental rights as set in the *Constitution* and to have any such issues. That under article 23(1) and (3) and (4) of the *Constitution*, one of the ways of approaching the court to protect fundamental rights is by Judicial Review. That in this case, the fundamental right that the *ex-parte* applicant seeks to put up through the judicial review proceedings is the right to acquire and own property under Article 40.

That the *Constitution* gives an independent and exclusive right to enforce the ex parte applicant's fundamental right to protect his property under article 40 and there is no limitation period within which any person can seek Judicial Review to enforce fundamental rights. That the *Constitution* as the superior law supersedes all statute laws including order 53 rule 2 *Civil Procedure Rules* and section 9(3) *Law Reform Act*.

6. Counsel relied on the cases of *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 3 others Ex parte Malulu & 8 other* [2004] eKLR and *Joyce Chesop Kaspandoy & 609 others v Kenya Power & Company* [2019] eKLR to submit that where a citizen citing violation of the *Constitution* or violation of the constitutional right cannot be locked out by the time limit specified in order 53(2) of the *Civil Procedure Rules*.
7. The sole issue for determination is whether or not the judicial review proceedings herein are subject to the Limitation period provided in order 53 *Civil Procedure Rules* and section 9 of the *Law Reform Act*



cap 26 Laws of Kenya. I have considered the various authorities relied upon by the parties to advance their respect arguments on the matter. I have noted that the application is brought, in addition to the provisions of order 53 of the *Civil Procedure Rules*, under rule 3 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* and several other provisions of the *Constitution* and other statutes inclusive of the Fair Administrative Action Act.

8. I have noted that the 4th Respondent's submissions relate to proceedings brought under order 53 *Civil Procedure Rules* and section 9 of the *Law Reform Act* only.
9. The ex parte applicant's complaint concerns breach of his constitutional rights under article 40 of the *Constitution*. It is on this basis that the leave to bring the substantive application was granted. In the case of *Republic v Kenya Revenue Authority, Ex Parte Stanley Mombo Amuti* [2018] eKLR in allowing an application for extension of time to bring judicial review proceedings the High Court observed that

“the entrenchment of the power of judicial review as a constitutional principal should of necessity expand the scope of the remedy and the discretion and the power of the court to in such cases be guided by the purposes, values- and principles of the Constitutional dictates to develop the law on that front. First, parties who were once denied Judicial Review on the basis of public-private power dichotomy, should now access Judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function that is likely to affect his rights. Second, the right to access the court is now constitutionally guaranteed. It would require a compelling reason that would pass an article 24 analysis test to deny a litigant the right to approach the court.”

10. On the foregoing reasons I find that the judicial review application was not filed out of time and that the preliminary objection lacks merit. The same is hereby dismissed. Costs to abide the substantive judicial review application.
11. It is so ordered.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 27TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

Ragot Advocate for the Ex Parte Applicant.

Ariho holding brief for Ogonda for the 4th Respondent.

Orege for the 1st & 3rd Respondents

Munuang'u for the Interested Party.

