



**Republic & another v National Land Commission; Milicoins Limited & another (Interested Parties) (Environment and Land Case Judicial Review Application 31 of 2018) [2023] KEELC 18380 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18380 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION 31 OF 2018**

**CA OCHIENG, J**

**JUNE 29, 2023**

**IN THE MATTER OF AN APPLICATION BY RIDGEWAYS  
INTERNATIONAL LIMITED FOR LEAVE TO APPLY FOR  
JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF THE NATIONAL LAND  
COMMISSION ACT NO. 5 OF 2012 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAND ACT NO. 6 OF 2012, LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 3, 4, 6, 7, 10 (1) AND 12 OF  
THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF ARTICLES 10, 12, 23(3) (F), 40, 47, 48,  
50, 61, 64, 67 AND 159 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**RIDGEWAYS INTERNATIONAL LTD ..... EXPARTE APPLICANT**



AND

NATIONAL LAND COMMISSION ..... RESPONDENT

AND

MILICOINS LIMITED ..... INTERESTED PARTY

DASAHE INVESTMENT LIMITED ..... INTERESTED PARTY

## RULING

1. What is before Court for determination is the 2<sup>nd</sup> Interested Party's Notice of Preliminary Objection dated the 5<sup>th</sup> December, 2022 opposing the Judicial Review Application filed by the ex parte Applicant seeking an order of mandamus directing and compelling the Respondent to issue the decision/determination on the legalities of the properties L.R No. 337/4762 and L.R No. 337/4763 in Mavoko, Machakos resulting from the inquiry proceedings that were concluded on 18<sup>th</sup> February, 2016.
2. The Preliminary Objection filed by the 2<sup>nd</sup> Interested Party was based on the following grounds;
  - a. That the Honourable Court lacks jurisdiction to entertain the Application pursuant to Section 8 of the *Fair Administrative Action Act* No. 4 of 2015 as the file herein was filed in 2018 and no determination has been rendered four (4) years later which is way past the statutorily contemplated ninety (90) days.
  - b. That pursuant to Section 8 of *Fair Administrative Act* No. 4 of 2015 upon which the Application is anchored, the jurisdiction to determine the Application lapsed through operation of law and any further consideration is contra-statute and a nullity.
  - c. The proceedings offend the holding in Nairobi Civil Appeal No. E039 of 2017 - *Arprim Consultants v Parliamentary Service Commission & Others* where the Court of Appeal held that a Judgment delivered by the High Court outside the mandatory timelines as provided under Section 75 of the *Public Assets and Disposal Act* was a nullity and not binding upon the parties.
  - d. The Application is untenable and incurably defective as the prayer of mandamus being sought is not available in view of the fact that the Applicant asserts the Respondent gave a decision through its letter dated the 7<sup>th</sup> October, 2015 and no other order of certiorari can quash the same. As per the holding of *R v Kenya National Examination exparte Gathenji & Others* [1997] eKLR, that only an order of certiorari can quash a decision made.
  - e. The Application be struck out with costs.
3. The Preliminary Objection was canvassed by way of written submissions.

### Submissions by the 2<sup>nd</sup> Interested Party

4. The 2<sup>nd</sup> Interested Party submitted that the objection was purely on a matter of law hence competently filed. It insisted that the Court should not act in vain. To support its averments, it relied on Section 8 of the *Fair Administrative Action Act* as well as the following decisions: *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and *Arprim Consultants v Parliamentary Service Commission & Others*.



### Submissions by the 1<sup>st</sup> interested Party

5. The 1<sup>st</sup> Interested Party also filed submissions in support of the Preliminary Objection. It contended that this court lacks jurisdiction by dint of Section 8 of the *Fair Administrative Act* to handle the Judicial Review. It argued that Section 8 of the *Fair Administrative Act* No. 4 is coined in mandatory terms and determination of the Judicial Review ought to be made within ninety days of filing. It reiterated that the jurisdiction of this court lapsed over four (4) years ago and that the Application should be dismissed. To support its arguments, it relied on the following decision: *Owners of Motor Vehicle Vessel Lilian S v Caltex Oil (Kenya) Limited*.

### Submissions by the Ex-parte Applicant

6. The ex-parte Applicant submitted that the Judicial Review Application dated the 15<sup>th</sup> July, 2019 was not solely anchored on the provisions of the *Fair Administrative Actions Act* of 2015 but also on other provisions of the law including the *Civil Procedure Rules*, *Lands Act*, *Law Reform Act* and the *Constitution* of Kenya. It contended that if the Application had been solely anchored on the *Fair Administrative Actions Act* of 2015, they would not have gone through the trouble of seeking leave of court before instituting the proceedings. It argued that the Chief Justice is yet to promulgate the Rules and/or Practice directions to the procedure to be adopted in relation to Judicial Review Applications brought under the *Fair Administrative Action Act*, citing with approval the case of *James Gacheru Kariuki & 22 Others v Kiambu County Assembly & 3 Others* [2017] eKLR. It further submitted that the case cited by the 2<sup>nd</sup> Interested Party in support of their objection, Nairobi CoA No.E039 of 2017 *Asprim Consultants v Parliamentary Service Commission*, was totally different from the case at hand and that the two cannot be comparable. To support this, it relied on the case of *Republic v Kenya Revenue Authority Ex parte Stanley Mombo Amuti* [2018] eKLR. It insisted that by allowing the instant Preliminary Objection would open a can of worms since there are many Judicial Review Applications still pending in court and allowing the said Preliminary Objection would have ramifications on many other litigants denying them justice. Further, that the foundation of the proceedings before this court is Section 8(2) of the *Law Reform Act* which empowers the High Court to issue orders of mandamus, certiorari and prohibition and Order 53 of the *Civil Procedures Rules* which provides the procedure to be adhered to.

### Analysis and Determination

7. I have considered the instant Notice of Preliminary Objection as well as the rivalling submissions, the only issue for determination is whether the said Notice of Preliminary Objection is merited.
8. I wish to highlight the provisions of Section 8 of the *Fair Administrative Actions Act* which provides that:

“An application for the review of an administrative action or an appeal under this Act shall be determined within ninety days of filing the application.”
9. From a reading of this legal provision, it is evident that an Application for Judicial Review ought to be determined within the stipulated time. The Interested Parties insist this Court does not have jurisdiction to handle a Judicial Review Application after ninety days.
10. Ouko, JA observed in *Nicholas Salat v IEBC & 6 others*, CA (Application) No 228 of 2013) as follows:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of



justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.” Emphasis Mine

11. It is trite that the foundation of the proceedings of Judicial Review before this court is Section 8(2) of the *Law Reform Act* which empowers the High Court to issue orders of mandamus, certiorari and prohibition and Order 53 of the *Civil Procedures Rules* which provides the procedure to be adhered to. To my mind Section 8 of the *Fair Administrative Action Act* cannot be read in isolation. Further, it is my considered view that since the provisions of the *Fair Administrative Action Act* are anchored in Section 47 of the *Constitution*, the said article cannot be disregarded.

12. The Court of Appeal in *Ransa Company Ltd v Manca Francesco & 2 others* [2015] eKLR emphasized this in the following words.

“Jurisdiction in Judicial Review matters is like a straight jacket. It has very limited scope and application. It is not amenable to expansion. It is a sui generis jurisdiction, which, unlike civil or even criminal jurisdiction, does not accord a Judge discretion to invoke inherent jurisdiction.”

13. While in Civil Appeal No. E039 of 2021, *Aprim Consultants v Parliamentary Service Commission and Another* the Court of Appeal held as follows:

“Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus any judgement returned outside time would be without jurisdiction and therefore a nullity, bereft of any force of law. That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or practicality can invest a decision made without jurisdiction with any legal authority.”

14. From a reading of Section 8 of the *Fair Administrative Action Act*, it does not indicate that a Judicial Review Application not heard within the stipulated period, should be dismissed. Article 50 of the *Constitution* is clear on a party’s right to be heard. To my mind the 2<sup>nd</sup> Interested Party seeks to place the burden of the timeline in hearing the Judicial Review Application upon the litigant and actually seeks to drive the *ex parte* Applicant from the seat of justice. I note in the aforesaid *Aprim Consultants v Parliamentary Service Commission and Another* the Court had also observed that:

“Without a doubt, there are serious practical difficulties with meeting timelines set by the Act, and it may well be that given the sheer numbers of such judicial review matters that get filed before the relevant division of the High Court; the limited number of judges to handle them; and numerous other matters. Besides, as public procurement is but one of the areas in administrative law that spawns judicial review applications, the wisdom of so short a timeline may be fairly questioned. One may wonder whether a situational analysis or any other scientific, data-based research was done to determine the reality on the ground and



inform the time that is practical to effectuate the legitimate desire for timelines in disposal of public procurement and disposal disputes. It would seem quite basic that before imposition of timelines sort in section 175 of the Act, there should have been a robust engagement with stakeholders, foremost of whom would be the Judiciary leadership and specifically the judges and registrars of the relevant division. We very much doubt that such engagement did occur given the patently unrealistic timelines in the provision.”

15. I wish to distinguish the Nairobi Civil Appeal No. E039 of 2017 - *Arprim Consultants v Parliamentary Service Commission & Others* with the circumstances at hand. In the said case, the Court of Appeal was emphatic that Judgment delivered by the High Court outside the mandatory timelines as provided under Section 75 of the *Public Assets and Disposal Act* was a nullity and not binding upon the parties. However, in this instance, the issue in dispute herein revolves around the *Land Act* and the *National Land Commission Act* and no timeline is provided therein. Further, I note the Chief Justice has not promulgated Rules of Procedure to be adhered to, where Judicial Review Applications are brought under the *Fair Administrative Actions Act*.
16. See also the case of *James Gacheru Kariuki & 22 others v Kiambu County Assembly & 3 others* [2017] eKLR.
17. Based on the facts before me while associating myself with the decisions quoted, I find that the 2<sup>nd</sup> Interested Party seeks to rely on procedural technicalities by challenging the instant Judicial Review and this cannot stand in the current Constitutional dispensation.
18. The upshot of this is that the Notice of Preliminary Objection dated 5<sup>th</sup> December, 2022 is unmerited and is disallowed.

Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29<sup>TH</sup> DAY OF JUNE, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

