Republic v Cabinet Secretary Ministry of Land and Physical Planning & 3 others; Catholic Mission Church (Being Sued Through the Diocese Of Meru South Registered Trustees) & another (Interested Parties); Gitonga & another (Exparte Applicants) (Environment and Land Miscellaneous Application E023 of 2022) [2023] KEELC 18395 (KLR) (26 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18395 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E023 OF 2022

CK YANO, J

JUNE 26, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE CABINET SECRETARY MINISTRY OF LAND AND PHYSICAL PLANNING ..... 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 2ND RESPONDENT

THE CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

CATHOLIC MISSION CHURCH (BEING SUED THROUGH THE DIOCESE OF MERU SOUTH REGISTERED TRUSTEES) ..... INTERESTED PARTY

KABURURU PRIMARY SCHOOL (BEING SUED THROUGH THE BOARD OF MANAGEMENT) ..... INTERESTED PARTY

AND

FREDRICK GITONGA ..... EXPARTE APPLICANT

M'NGERENI MATHAIYA ..... EXPARTE APPLICANT

RULING

1. The application for determination is the chamber summons dated November 15, 2022 in which he Ex-parte Applicants are seeking leave to commence Judicial Review Proceedings out of time. The application is supported by the affidavit of Fredrick Gitonga sworn on November 15, 2022 and is premised on the grounds that on April 14, 2022 the Ex-parte Applicants filed Judicial Review Application No. E005 of 2022 seeking orders of certiorari to quash the decision of the minister which their Advocate erroneously indicated as Appeal No. 125 of 2018 instead of No. 298 of 2017. That the mistake on the part of advocate was not intentional but was an honest mistake which was only realized when the court delivered Judgment in which it pointed out the said mistake and struck out the application. The Applicants aver that the application has been brought without inordinate delay, adding that the intended suit has chances of success once the application herein is allowed. A copy of the said judgment has been annexed.

2. The application is opposed by the Respondents who filed a replying affidavit sworn by E. Kendi, Senior Litigation Counsel in the office of the Attorney General. Briefly, it is the respondents contention that neither the *Law Reform Act*, cap 26 nor the *Civil Procedure Rules* provide for extension of time in such proceedings. The Respondents' counsel cited the provisions of section 9 of the *Law Reform Act* and order 53 rule 2 of the *Civil Procedure Rules* and argued that there is no law that entitles this Honourable court to enlarge time for filing of an application of certiorari outside the six (6) months limitation period. The Respondents relied on the case of *Republic v National Irrigation Board & Another Ex-parte Peter Muriithi Muriuki* (2021) eKLR and further contended that the intended Judicial Review proceedings will offend the doctrine of Res Judicata as captured under section 7 of the *Civil Procedure Act* as the intended Judicial Review Proceedings will involve the same parties that participated in Chuka ELC Judicial Review No. E005 of 2022 litigating under the same title.

3. The application was canvassed by way of written submissions. The Applicants submitted that with the enactment of *the constitution* of Kenya 2010, the courts have held that time for filing Judicial Review Proceedings can be extended. To buttress their argument, the applicants relied on the case of *Republic vs Public Procurement Administrative Review Board ex-parte Syner-Chemie* [2016] eKLR and cited The Fair Administrative Act which implements article 47 of *the constitution* to give effect to the right to fair administrative action which modifies the *Law Reform Act* and order 53 of the *Civil Procedure Rules* on flexibility in the application of the law to the circumstances of a particular case with the sole intention of achieving substantive justice for the parties and especially where no prejudice is shown to be occasioned to the Respondents or interested parties herein.

4. Counsel for the applicants submitted that no statute can be enacted with the sole intention of doing an injustice to parties and cited article 47 of *the constitution* which elevates fair administrative action from a common law action to a constitutional right under the Bill of Rights and article 20(3)(a) that commands that in applying a provision of the Bill of Rights like in this case, article 47 as invoked by the applicants, a court should "develop the law to the extent that it does not give effect to a right or fundamental freedom, and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom." The applicants also relied on the case of *Pharmaceutical Manufacturers Association of South Africa in re ex-parte president of the Republic of South Africa & Others* 2000(2) SA 674 (cc) at 33. They also cited article 23(3)(f) 24 and 159 of *the constitution*, and sections 7 and 8 of the *Fair Administrative Action Act*.

5. The Applicants further submitted that the matter is not res judicata because the previous suit was struck out for failure to attach the correct minister's proceedings and not on merits and the issues raised and that the parties were also different.

6. In their submissions, the respondents, cited the provisions of section 9(3) of the *Law Reform Act* and order 53 rule 2 of the *Civil Procedure Rules* and submitted that the language used are couched in mandatory terms hence leave no room for discretion. The Respondents relied on the case of *Republic vs National Irrigation Board & Another ex-parte Peter Muriithi Muriuki* [2021]eKLR; *Republic vs Council of Legal Education & Another Ex-parte Sabiha Kassamia & Another* [2018]eKLR which cited with approval the Court of Appeal case of *Wilson Osolo vs John Ojiambo Ochola & Another* [1995] eKLR, and *Republic vs Director of Land Adjudication and Settlement & 2 Others* [2017] eKLR. It is the Respondents submission that the Applicants counsel's mistake in failing to cite the correct minister's Appeal decision in prior Judicial Review application does not constitute a ground to depart from the explicit provisions of section 9(3) of the *Law Reform Act*. The Respondents urged the court to find that it lacks the power to grant the extension sought by the Applicants.

7. The Respondents further contended that the matter is res judicata in light of the decision by this court in Chuka ELC Judicial Review No. E005 of 2022 delivered on October 12, 2022. The Respondents' counsel cited the doctrine of res – judicata as set out in section 7 of the *Civil Procedure Act* and relied on the English case of *Henderson vs Henderson* (1843 – 60) ALL E.R. 378. It is also the Respondents submission that Judicial Review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible and relied on *Republic vs Mwangi Nguyai & 3 others ex-parte Haru Nguyai*, High Court at Nairobi, Constitutional & Judicial Review Division, Miscellaneous Application No. 89 of 2008 and urged the court to find that the application lacks merit and ought to be dismissed.

8. I have considered the application, the response and the rival submissions. The issues that I find for my consideration are whether the doctrine of Res Judicata is applicable in this case and whether this court has power to grant the extension sought by the Applicants.

9. The test for determining the application of the doctrine of res judicata in any given case is spelt out under section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

> "(a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) The former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

10. In the case of *Henderson vs Henderson* (1843) 67 ER 313 res judicata was described as follows:

> " In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent

jurisdiction, the court requires the parties that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time."

11. Similarly, in the case of *Attorney General & another vs ET* [2012] eKLR it was held that:

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177, the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to curt, then I do not see the use of the doctrine of res judicata."

12. In the former case, Chuka ELC Judicial Review No. E005 of 2022, this court struck out the application because the Applicants did not exhibit the correct decision by the minister. The Applicants pleaded and sought orders in respect of Land Parcel No. 795 and 796 Kamwimbi 'A' Adjudication Section in the minister's Appeal Case No. 125 of 2018 dated February 24, 2022, but in their affidavit in support of the application annexed proceedings in case No. 298 of 2017. The court noted that the failure to exhibit the correct decision was an honest mistake on the part of the Applicants or their advocate. It is clear, therefore that the former case was not heard and finally determined on merit. To that extend, the doctrine of res judicata cannot apply in the instant case.

13. With regard with the issue whether this court has power to grant the extension sought by the Applicants, it should be noted that section 9 of the *Law Reform Act* and order 53 rule 2 of the *Civil Procedure Rules* are very explicit in the time frame within which an order of certiorari may be applied. An application for leave must be made not later than six months from the date of the decision. However, it is clear from the authorities cited herein that there are two schools of thought on the issue whether or not the court should extend time. The first is the school which propagates that no such enlargement of time for filing of a substantive motion as envisaged in order 53 of the civil procedure rules while the second school of thought is that the court has no jurisdiction to enlarge the six months' period given by section 9(3) of the *Law Reform Act*.

14. While discussing the two positions, Mativo J (as he then was) in *Republic vs Kenya Revenue Authority ex-parte Stenley Mombo Amuti* [2018] eKLR stated as follows:

> " 31. The above decisions which adopted a rigid construction of the above provisions were rendered before the promulgation of the 2010 constitution. It should be recalled that sections 8 and 9 of the *Law Reform Act* are borrowed

from common law principles which traditionally governed exercise of Judicial Review jurisdiction. Order 53 of the Civil Procedure Rules, 2010 is borrowed from these provision.

32. The question that warrants a candid interrogation is whether the argument that the court upholds a statutory provision which is based on traditional common law Judicial Review Principles can now hold sway on the face of our current constitutional dispensation. *The constitution* of Kenya, 2010 fundamentally changed the legal land scape in this country. This court cannot shut its eyes on express constitutional dictates as discussed below and determine a matter on purely common law principles.

33. Article 47 provides for the right to a fair administrative action. To give effect to Article 47, parliament enacted the Fair Administrative Act. On the face of the above constitutional provision and the right to access justice guaranteed under Article 48, the right to enforcement of Bill of Rights under Article 22, and the authority of the court to uphold and enforce the Bill of Rights under 23, the question that arises is whether a citizen who has explained reasons for not approaching the court within time allowed by the court can be denied access to justice on the basis of the above provisions (which are borrowed from the traditional common law Judicial Review jurisdiction).

34. Section 7(1) of part two of the sixth schedule of *the constitution* provides that:

> (1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with this constitution."

35. All law must conform to the constitutional edifice. It follows that the provisions of section 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules must conform to *the constitution* or be construed with such adaptations, alterations, modifications so as to conform with *the constitution*.....

40. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by *the constitution*.

41. It is therefore my conclusion that in an application for extension of time such as the one before me, all that an Applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay. It will also be a consideration that the impugned decision seeking to be challenged violates or threatens to violate the Bill of Rights or violation of *the constitution*.

42. Provisions limiting access to courts must be read in a manner that conforms with *the constitution*. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, when *the constitution* must prevail..."

15. The court in the above case exercised its discretionary powers and granted the extension of time sought, and I am persuaded by that decision. In the instant case, the Applicants have explained that the mistake by their advocate led to the filing of a wrong decision, and not the one they intended to challenge. In my view, the Applicants have established sufficient cause for this court to grant the extension of time sought.

16. Accordingly, I allow the application dated November 15, 2022 and order that the substantive motion be filed and served within fourteen (14) days from the date of this ruling.

17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHIKA THIS 26TH JUNE, 2023.

C. K. YANO,

JUDGE.