



Marisin v Naiguta & 4 others (Environment and Land Judicial Review Case 2 of 2021) [2023] KEELC 18090 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18090 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KILGORIS

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2021

EM WASHE, J

JUNE 20, 2023

IN THE MATTER OF AN APPLICATION BY KIPNGENY MASIRIN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE LAND ADJUDICATION AT, CAP 284

AND

IN THE MATTER OF THE ENVIRONMENT & LAND COURT ACT NO.19 OF 2011

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE CIVIL PROCEDURE ACT, CAP 21, LAWS OF KENYA

IN THE MATTER OF APPEAL TO THE MINISTER CASE NO. 121 OF 1999 & 268 OF 1998.

IN THE MATTER OF THE LAND DISPUTE PLOT.NO. 72 & PLOT.NO. 117

BETWEEN

KIPNGENY ARAP MARISIN APPLICANT

AND

MEPOE OLE NAIGUTA 1ST INTERESTED PARTY

THE DISTRICT LAND REGISTRAR, TRANSMARA 2ND INTERESTED PARTY

DEPUTY COUNTY COMMISSIONER, TRANSMARA 3RD INTERESTED PARTY

DIRECTOR OF LAND ADJUDICATION 4TH INTERESTED PARTY

ATTORNEY GENERAL OF KENYA 5TH INTERESTED PARTY



RULING

1. The *ex-parte* applicant (hereinafter referred to as “the applicant”) filed a notice of motion dated January 9, 2023 (hereinafter referred to as “the present application”) against the ruling of this honourable court pronounced on the December 5, 2022 seeking the following orders; -
 - i. That the application be certified urgent.
 - ii. That pending the hearing and disposal of the application, there be a temporary stay of ruling dated December 5, 2022.
 - iii. That the honourable court may be pleased to review and or set aside the ruling dated December 5, 2022 upon such terms as deem fit.
 - iv. That the honourable court may be pleased to reinstate the amended notice of motion application dated August 19, 2022 and direct that the same to be heard and determined on merit and in the interest of justice.
 - v. Any other order may be issued as deem fit.
2. The prayers in the present application are premised on the grounds contained therein and further expounded in the supporting affidavit sworn by the applicant.
3. A summary of the grounds relied upon by the applicant in support are as follows; -
 - a. The preliminary objection dated September 12, 2022 overlooked, isolated and/are ignored the provisions of order 53 rule 4 (2).
 - b. The provisions of order 53 rule 4 (2) of the [Civil Procedure Rules](#), 2010 granted the honourable court jurisdiction to allow an amendment of the statement accompanying the application.
 - c. Once an application for judicial review proceedings has been filed within the prescribed time under order 53 rule 4 (2) of the [Civil Procedure Rules](#), 2010, then such an application can be amended in terms of the verifying affidavit, the statement accompanying the judicial review application as well as the reliefs sought therein.
 - d. The only time a respondent can raise the defence of limitation of time is when the said application seeking leave to institute judicial review proceedings is done outside the prescribed time.
 - e. However, in this present application, the application seeking leave to institute a judicial review application was duly filed within the prescribed time and therefore the preliminary objection dated September 12, 2022 was misplaced.
 - f. Further to that, the applicant herein was of the view that there was no express provision of the statute that in case an *ex-parte* applicant wanted to amend its verifying affidavit, statement and/or relief thereof, fresh leave should be obtained.
 - g. The *ex-parte* applicant herein having been granted leave to institute judicial review proceedings on the October 15, 2020 challenging the decision of the Deputy County Commissioner pronounced in the Minister’s Land Appeal Case No 268 of 1998, then the pleadings filed in the substantive judicial review application can be amended with leave of the court.



- c. In essence therefore, the amended notice of motion dated August 19, 2022 was lawful and there will be no prejudice caused to the 1st respondent if the same is reinstated as they will have time to respond to the same.
 - d. The applicant urged the court to grant the orders sought in the present application.
7. The parties thereafter filed their written submissions with the applicant filing his submission on February 24, 2023, the 1st interested party on the March 27, 2023 and the 2nd to 5th interested parties on the April 6, 2023.
 8. This honourable court has gone through the present application, the replying affidavit, the further affidavit and the submissions of all the parties herein and identify the following issues for determination.

Issue No 1- What is the jurisdictional scope of order 53 rule 4(2) of the *Civil Procedure Rules*, 2010?

Issue No 2- has the applicant provided sufficient grounds for a review and/or setting aside of the ruling pronounced on the December 5, 2022?

Issue No 3- who bears the costs of the present application?

9. The honourable court having identified the above issues for determination, the same will now be discussed hereinbelow as follows; -

Issue No 1- What is the jurisdictional scope of order 53 rule 4(2) of the Civil Procedure Rules, 2010?

10. The basis of the present application is the interpretation of order 53 rule 4(2) of the *Civil Procedure Rules*, 2010.
11. The applicant strongly submits that according to the provisions of order 53 rule 4 (2) of the *Civil Procedure Rules*,2010, the court has jurisdiction to grant leave for the amendment of the verifying affidavit, the statement in support of the substantive judicial review application as well as the reliefs in a judicial review application that is properly filed.
12. The applicant further submitted that once an ex-parte applicant filed an application for leave to institute judicial review proceedings within the prescribed time and the leave is granted, then this honourable court had jurisdiction to grant leave for the amendment of the verifying affidavit, the statement in support and the reliefs sought in the substantive judicial review application.
13. An ex-parte applicant need not to file another application for leave to enable him bring in the amendments that he or she wishes to introduce in the substantive judicial review application.
14. The applicant relied on a number of authorities including Nbi HCC JR ELC No. 9 of 2012 (*Republic v Commissioner of Lands & 2 Others- Exparte Jimmy Mutinda*), *Republic v Permanent Secretary, Ministry Of Planning & National Development, Exparte Mwangi.s Kimenyi* (2006) eKLR & *Risley v Nairobi City Council* (2002) 1 EA 241.
15. In all the authorities cited above, the courts held the view that a substantive judicial review application could be amended.
16. For avoidance of doubt, this honourable court concurs fully with the findings of my brothers and sisters in the above-mentioned authorities.



17. Turning to the present application, this honourable court through its ruling dated December 5, 2022 declared the leave granted on the October 15, 2020 to institute the judicial review application herein annulity and set-aside the same.
18. The leave issued on the October 15, 2020 is what facilitated the filing of the notice of motion dated November 9, 2020 and the subsequent amended notice of motion dated August 18, 2022.
19. It is not disputed by any party in this proceeding that the leave granted on the 15th of October 2020 was to enable the review of the decision by the Deputy County Commissioner in the Minister's Appeal No. 121 of 1999 involving the Land Parcel No. Transmara/olosakwana "B"/1117 and Transmara/olosakwana "B"/72.
20. The prayers sought in the substantive Judicial Review Application dated 9th November 2020 filed by the Ex-parte Applicant read as follows; -
 - (1) An Order of Certiorari to remove into the High Court for purposes of its being quashed the decision of the Deputy County Commissioner, Transmara West in the Land Appeal to the Minister Case No. 121 of 1999 involving the land Parcel Number Transmara/olosakwana "B"/1117 and Transmara/olosakwana "B"/72 pronouncing that the Parcel Number Transmara/ Olosakwana "B"/1117 and Transmara/olosakwana "B"/72 both belong to Meboe Olesirir Naiguta, the original owner of the land.
 - (2) Costs of this application be provided for."
21. On the 30th of June 2022, the Applicant herein filed an Application dated 28th June 2022 seeking to amend the Judicial Review Applicant 9th November 2020 the Statement in Support and the Verifying Affidavit.
22. The main ground in the application for amendment was to incorporate pertinent points of issue before it goes for trial.
23. The Application dated 28th June 2022 was allowed by this Honourable Court on the 20th of July 2022 upon which the Applicant filed the amended Judicial Review Application dated 18th August 2022.
24. It is upon filing of the Amended Judicial Review Application dated 18th August 2022 that the 2nd to 5th Interested Party filed the Preliminary Objection dated 14th September 2022 on the following grounds; -
 - a. The Applicant's suit offends the provisions of section 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya.
 - b. The suit also offends the mandatory provisions of order 53 rule 2 of the Civil Procedure Rules, 2010.
25. This Preliminary Objection dated 14th September 2022 was heard on its merit and this honourable court pronounced its ruling on the 5th of September 2022.
26. The ruling of 5th September 2022 by this Honourable Court made the following findings; -
 - I. The Applicant herein had filed an Application seeking leave to institute Judicial Review proceedings against the decision of the Deputy County Commissioner, Transmara West in the Minister Appeal No. 121 of 1999 involving the land Parcel Number Transmara/olosakwana "B"/1117 and Transmara/olosakwana "B"/72 pronouncing that the Parcel Number Transmara/ Olosakwana "B"/1117 and Transmara/olosakwana "B"/72 both belong to Meboe Olesirir Naiguta, the original owner of the land.



- II. The Prayer contained in the substantive Judicial Review Application filed on the 9th of November 2020 sought for an Order of Certiorari for purposes of its being quashed the decision of the Deputy County Commissioner, Transmara West in the Land Appeal to the Minister Case No. 121 of 1999 involving the land Parcel Number Transmara/olosakwana “B”/1117 and Transmara/olosakwana “B”/72 pronouncing that the Parcel Number Transmara/ Olosakwana “B”/1117 and Transmara/olosakwana “B”/72 both belong to Meboe Olesirir Naiguta, the original owner of the land.
 - III. However, during the hearing of the Preliminary Objection dated 14th September 2022, it became clear and was not contested by the Applicant that the Minister’s Appeal No. 121 of 1999 had in fact not be heard and/or determined and therefore no lawful decision existed to warrant the issuance of leave to file Judicial Review proceedings.
 - IV. The Applicant admitted that indeed, the proceeding which had been heard and concluded was the Minister’s Appeal No. 268 Of 1998 instituted by the 1st Respondent thereof.
 - V. It was on the basis of this realisation that the Applicant sought to Amend the Judicial Review Application dated 9th November 2020, its Statement in Support and the Verifying affidavit as contained in the Amended Judicial Review Application dated 18th August 2022.
 - VI. The Honourable Court was therefore of the view that the Leave granted to the Applicant on the 15th of October 2020 to institute Judicial Review Proceedings against the decision of the Minister’s Appeal No. 121 of 1999 was annulity as no such decision exists or existed at the time the same was issued.
 - VII. As a consequence of this annulity, the substantive Judicial Review Application filed on the 9th of November 2020 was of not lawful and or no legal effect.
 - VIII. As a result of this illegality both the Judicial Review Application dated 9th November 2020 and the amended Judicial Review Application filed on the 18th August 2022 were struck out.
 - IX. The Honourable Court was further of the view that the Applicant has never sought leave to institute any judicial review proceedings in relation to the decision in the Minister’s Appeal No. 268/1998 which is a separate proceeding from the Minister’s Appeal No. 121 of 1999 which is still pending determination thereof.
 - X. In essence therefore, the Applicant’s attempt to substitute the decision removed to this Honourable Court for Judicial Review determination from the Minister’s Appeal No. 121 of 1999 to the Minister’s Appeal No. 268/1998 was irregular and unlawful for none compliance with sections 8 and 9 of the Law Reform Act, Cap 26 and order 53 rule 2 of the Civil Procedure Rules, 2010.
27. This Honourable Court having extensively outlined the history of this suit and the findings in its Ruling pronounced on the 5th of December 2022, it is clear there was no existing decision pronounced in the Minister’s Appeal No. 121 of 1999 capable of being granted leave to institute judicial review proceedings.
 28. The Applicant’s attempt to substitute and/or amend the decision to be reviewed from the initial Minister’s Appeal No. 121 of 1999 to 268 of 1998 was illegal as no leave was granted for the decision in the Minister’s Appeal No. 268 of 1998 to be a subject of any Judicial Review Application.
 29. It is therefore the Honourable Court’s considered view that the purported substitution and/or amendment of the decision to be a subject of a Judicial Review Application can not be done by way of



order 53 rule 4 (2) as this particular provision seeks to allow new and/or further facts within the same decision to be placed before the court for proper determination of the dispute.

30. In conclusion, this case is distinguishable to the authorities submitted by the Applicant in support of his application.

Issue No. 2- Has The applicant provided sufficient grounds for a review and/or setting aside of the ruling pronounced on the 05/12/2022 and reinstate the application dated 18/08/2022?

31. Referring to the face of the present Application, the Applicant has invoked the provisions of order 45 rule 1 of the *Civil Procedure Rules*, 2010 in urging the Court to grant the Orders sought therein.

32. The provisions of order 45 rule 1 provide as follows; -

- “(1) Any person considering himself aggrieved—
- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

33. In the case of *Republic v Public Procurement Administrative Review Board & 2 Others* (2018) eKLR, the Court observed as follows; -

“section 80 gives the power of review and order 45 sets out the *rules*. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

34. In another case of *Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya* (2019) eKLR, the Court outlined various guidelines which should be considered in determining applications for Review Under Order 45 of the *Civil Procedure Rules*, 2010; -

- i. A court can review its decision on either of the grounds enumerated in order 45 rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in order 45 rule 1 has to be interpreted in the light of other specified grounds.



- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the [Civil Procedure Code](#) provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in order 45 rule 1 must be taken into consideration. Section 80 of the [Civil Procedure Code](#) does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
35. Turning to the present application before the Honourable Court, the grounds provided therein do not disclose any new and/or important facts that the Applicant has discovered from the time the Ruling dated 5th of December 2022 was pronounced.
36. Similarly, there is no error on the face of the record before the Court that which would require a review of the ruling pronounced on 5th December 2022.
37. Lastly, there is no other sufficient reason advanced by the Applicant which would compel this Honourable Court to review its decision pronounced on the 5th December 2022 and reinstate the Judicial Review Application dated 18th August 2022.

Issue No. 3- Who bears the costs of the present application?

38. The Honourable Court having made negative findings on issues No. 1 and 2 hereinabove, the orders sought in the present application are not merited.
39. As a result of this determination, the costs of the present application shall be borne by the Applicant herein.



40. In conclusion therefore, the Application dated 9th January 2023 be and is hereby determined as follows;

**A. THE NOTICE OF MOTION APPLICATION DATED 9TH JANUARY 2023
BE AND IS HEREBY DISMISSED WITH COSTS TO THE RESPONDENTS
HEREIN.**

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 20TH JUNE 2023.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Ngeno

Advocate for the 2nd -5th Interested Party/applicant:

Mr. Shira holding brief Ms. Nyakora

Advocate for 1st Interested Party/respondent: Mr.shira

Advocate for ex-parte applicant/respondent: Mr. Rono.

