



**County Government of Kericho v National Land Commission & 3 others (Judicial Review Application E002 of 2023) [2023] KEELC 19086 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19086 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
JUDICIAL REVIEW APPLICATION E002 OF 2023**

**E ASATI, J**

**JULY 27, 2023**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS AGAINST THE DECISION OF THE NATIONAL LAND COMMISSION (NLC) VIDE GAZETTE NOTICE OF 1.3.2019 VOL.CXXI-NO.27 FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLE 67 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 13(7) OF THE ENVIRONMENT AND LAND COURT ACT**

**AND**

**IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF THE LAND PARCELS L.R NO.3977 AND L.R. NO3978**

**AND**

**IN THE MATTER OF SECTIONS 4, 7, 8 AND 11 OF THE FAIR ADMINSTRATIVE ACTIONS ACT, 2015**

**BETWEEN**

**COUNTY GOVERNMENT OF KERICHO ..... APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**TOM ORIEDO OWUOR ..... 4<sup>TH</sup> RESPONDENT**



## RULING

### Introduction

1. Vide the Chamber Summons application dated 7<sup>th</sup> March, 2023, stated to be brought pursuant to the provisions of Order 53 Rules 1, 2 & 4 of the Civil Procedure Rules 2010 and section 11 of the *Fair Administrative Action Act*, 2015, the Ex parte Applicant sought for orders that;
  - a. leave be granted to the Applicant to apply for an order of certiorari to bring into this court and quash the decision of the 1<sup>st</sup> Respondent to alienate the Applicant's suit parcel of land to members of Koguta Community of Kisumu County.
  - b. leave be granted to the Applicant to apply for an order of certiorari directed to the 2<sup>nd</sup> Respondent to stop any planning, survey and/or resettlement of the Koguta Community members in the suit parcel of land.
  - c. leave be granted to the Applicant to apply for orders of prohibition prohibiting the 2<sup>nd</sup> Respondent from purporting to plan, survey and/or resettle the Koguta Community members in the suit parcel of land.
  - d. the granted leave herein do operate as a stay of the decision of the 1<sup>st</sup> Respondent as well as the Ruling of the learned Ombwayo J. pending the hearing and determination of this Judicial Review application.
2. The grounds upon which the application was brought as shown on the face of the application are that;
  - a. The applicant is the rightful owner of the suit parcels of land
  - b. That the suit parcels of land lie close to the border of Kericho and Kisumu Counties but within the boundary of the Applicant herein.
  - c. That the suit parcels were leased to Muhoroni Sugar Company Limited for a period of ninety-Nine (99) years commencing in 1912 and determining in 2012.
  - d. That the lease period has since lapsed and the said parcels of land ought to have reverted to the Applicant.
  - e. That there have been some boundary disputes from the communities across the border and within the territory of Kisumu County.
  - f. That the Applicant petitioned the Senate Justice and Legal Affairs and Human Rights Committee through the clerk of the Senate on 5<sup>th</sup> November, 2021 seeking to know the status of ownership of the suit parcels.
  - g. That the applicant submitted a detailed report accompanying the said petition detailing the place where the suit parcels are situated.
  - h. That the applicant registered a dispute with the Inter-Governmental Relations Technical Committee on 10<sup>th</sup> July, 2020 relating to determination of the boundaries between Kericho and Kisumu Counties.



- i. That elders of Soin within Kericho County held a meeting on 26<sup>th</sup> July, 2019 and concluded that the members of the Koguta Community hold no proprietary rights over the suit parcels of land at all.
  - j. that Muhoroni Sugar Company Limited confirmed that the suit parcels of land fall in both Kericho and Kisumu counties with only 450 acres situate in Kisumu County.
  - k. that the 4<sup>th</sup> Respondent made a complaint to the 1<sup>st</sup> Respondent over historical land injustices seeking to compel the 2<sup>nd</sup> Respondent to plan, survey and resettle the member of Koguta Community of Kisumu county on the suit parcels of land.
  - l. that the Applicant was never involved in the proceedings at the 1<sup>st</sup> Respondent despite being the lawful owner of the suit parcels.
  - m. The 1<sup>st</sup> Respondent proceeded to make its decision communicated vide Gazette Notice of 1<sup>st</sup> March, 2019 Vol.CXXI – NO.27 giving the suit parcels of land to the Koguta Community of Kisumu County.
  - n. On the basis of the 1<sup>st</sup> Respondent’s decision the 4<sup>th</sup> Respondent moved the Environment and Land Court at Kisumu by way of Judicial Review Application seeking for an order of Mandamus compelling the 2<sup>nd</sup> Respondent to plan, survey and settle the members of Koguta Community of Kisumu in the said parcels of land.
  - o. That the learned Ombwayo (J) granted the orders of Mandamus as prayed by the 4<sup>th</sup> Respondent having been an Ex parte Applicant in the proceedings before the Environment and Land Court Kisumu.
  - p. the Applicant was never involved in the proceedings at the Environment and Land Court, Kisumu.
  - q. The Applicant was not accorded the cardinal right of fair hearing both at the 1<sup>st</sup> Respondent and before the Environment & Land Court Kisumu despite having the proprietary right over the suit parcels of land.
  - r. That the Applicant glares at an imminent risk of having its right to propriety being threatened contrary to Article 40 of *the Constitution*.
  - s. That the process and decision of the 1<sup>st</sup> Respondent are prejudicial unfair, unprocedural and illegal and to that extent are nullity.
  - t. That no party will suffer any prejudice should the orders sought be granted.
  - u. That it is just and equitable that the relief sought are granted.
3. The application was filed with the requisite Statutory Statement dated 7<sup>th</sup> March 2023, the Supporting Affidavit sworn by DR. WESLEY BOR, the County Secretary to the Applicant on 7<sup>th</sup> March, 2023 and the annexures thereto.
4. When the Chamber Summons was first placed before the Judge for orders and or directions, directions were given pursuant to the provisions of the proviso to order 53 Rule 1(4) Civil Procedure Rules, 2010 that the application for leave be served upon the Respondents and be heard inter partes.



## Responses to the Chamber Summons

5. The 1<sup>st</sup> Respondent opposed the application via the Preliminary Objection dated 15<sup>th</sup> May, 2023 to the effect that the application was time-barred by dint of Section 9(2) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules 2010 hence the court has no jurisdiction to entertain the same.
6. The Attorney General opposed the application vide the Grounds of Opposition dated 13<sup>th</sup> April, 2023 on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (the Ministry of Land and Physical Planning and the Hon Attorney General). It was the case of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that the Judicial Review application is time barred as it is being made six years after the decision sought to be quashed. That the Applicant being aggrieved by the published decision of the National Land Commission never appealed the decision within the stipulated 28 days in court. That the question to the ownership of the land was already determined by both the National Land Commission and the Environment and Land Court hence the matter in question is res judicata. That the issues being raised are of historical injustices hence the appropriate avenue for seeking redress was the National Land Commission for admission and subsequent investigation as the law has placed the mandate on the Commission to address the issues of historical land injustices. That this makes the suit premature as the Applicant has rushed to court without exhausting all the available mechanism. That the court may not have the proper machinery to conduct the investigations. That the Applicant has not shown nexus between their ancestry and the suit parcels of land. That the application has no merit, is bad in law and an abuse of the court process.
7. The 4<sup>th</sup> Respondent's case as contained in the Replying Affidavit sworn by the 4<sup>th</sup> Respondent on 3<sup>rd</sup> May, 2023 was that he was the representative of Koguta Clan members. That in the year 1900 or thereabouts Koguta Community migrated from the greater Nyakach and settled on land parcel Number L.R.3977 measuring approximately 2,339 acres and L.R.3878 of 1960 acres or thereabouts located in South West of Muhoroni town within Muhoroni sub-county Kisumu County.  
  
That later the Koguta clan was unlawfully evicted from the land. That the Koguta Community filed a complaint on 9<sup>th</sup> September, 2013 to the National Land Commission seeking remedy for historical land injustices. That the National Land Commission made a final determination in favour of Koguta Community with a recommendation that the Privatization Commission and Ministry of Lands and Physical Planning assist in planning, surveying and resettlement on land parcel Numbers 3977 and 3978. That the decision of the National Land Commission was published vide Gazette Notice of 1<sup>st</sup> March, 2019 VOL. CXXI-NO.27.
8. That because of delay by the 2<sup>nd</sup> Respondent to implement the decision of the 1<sup>st</sup> Respondent, the Koguta Community moved to the Environment Land Court Kisumu vide JUDICIAL REVIEW APPLICATION NO.1 OF 2020 wherein the court issued orders of Mandamus compelling the 2<sup>nd</sup> Respondent to plan, survey and resettle the Koguta Community on L.R. No.3977 and 3978.  
  
That the subject parcels of land lie within the jurisdiction of Kisumu County. That the Applicant has no locus standi or sufficient interest to bring the application against the Respondents. That the call for this court to interfere with the orders issued by Hon. Justice Ombwayo is bad in law as it offends the provision of Section 8(3) & (5) of the Law Reforms Act. That the application is frivolous, an abuse of the court process and lacks merit.

## Submissions

9. The application was argued by way of written submissions.



10. It was submitted on behalf of the Applicant vide the written submission dated 4<sup>th</sup> March, 2023 filed on its behalf by SMS Advocates LLP that the application for leave has attained the requisite threshold for grant of leave to file substantive Judicial Review proceedings. That the Applicant is concerned with the manner in which the 1<sup>st</sup> Respondent arrived at the decision sought to be quashed. That the Applicant was not invited to participate in the proceedings before the 1<sup>st</sup> Respondent. That the decision arrived at by the 1<sup>st</sup> Respondent did not comply with the principles of natural justice. That the Applicant was condemned unheard.
11. Relying on the case of Republic –vs- Council of Kwale, Counsel submitted that a cursory perusal of the application reveals that there is a case for further investigation at a full inter partes hearing of a substantive application for Judicial Review. Counsel further relied on the case of County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 Others (2022) eKLR where the High Court held that in an application for leave, the court ought not to delve deeply into the arguments of parties but make a cursory perusal of the evidence before court and make a decision as to whether an Applicant’s case is sufficiently meritorious to justify leave. Counsel submitted that the application was brought timeously.
12. On whether the leave if granted should operate as stay of the decision of the 1<sup>st</sup> Respondent as well as the Ruling of the Environment & Land Court, Counsel submitted that the leave once granted should operate as stay for the sake of preserving the substratum of the proceedings in the application. Counsel relied on the provisions of Order 53 Rule 1(4) of the Civil Procedure Rules 2010, the case of Kenya National Chamber of Commerce of Makueni & County Council of Makueni –vs- County Council of Makueni (2003)eKLR and Republic –vs- Sandra Ouma & 5 Others Ex Parte Levis Okello [2021] eKLR to support the submissions.

On costs, Counsel submitted, relying on Section 27 of the *Civil Procedure Act* and the case of Peter Muriuki Ngure –vs- Equity Bank(K) Ltd [2018] eKLR that the Respondents should bear the costs of the application.

13. The 1<sup>st</sup> Respondent submitted vide the written submissions dated 23<sup>rd</sup> May, 2023 that in both Section 9(3) of the Law Reforms Act and Order 53(2) Civil Procedure Rules, a limitation period of six months is set for bringing an application for leave to apply for an order of certiorari from the date of the proceedings being challenged. Counsel relied on the case of Association of Air Operation –vs- Kenya Airports Authority & Another (2018) eKLR, Nakuru Holdings Limited –vs- Commissioner of VAT, Civil Appeal No.NA1 200 OF 2003, (2011)eKLR and Milka Nyambura Wanderi & Another –vs- Principal Magistrate’s court Muranga & 4 Others [2014]eKLR to submit that since the decision sought to be quashed was made in the year 2019, the present application seeking leave to apply for certiorari dated 7<sup>th</sup> March, 2023, filed about 4 years later is clearly out of time.
14. Relying on Section 7 of the *Civil Procedure Act*, the case of William Koross –vs- Hezekiah Kiptoo Komen & 4 Others [2015]eKLR and Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others [2017] eKLR Counsel submitted that the application is res judicata.

That the Applicant has admitted that the decision of the 1<sup>st</sup> Respondent was published in the Kenya gazette. That the 4<sup>th</sup> Respondent moved the Environment & Land Court vide JUDICIAL REVIEW NO.1 OF 2020 and obtained an order of Mandamus to compel the 2<sup>nd</sup> Respondent to plan, survey and settle the members of Koguta Community of Kisumu vide the judgement dated 30<sup>th</sup> April, 2021. That the Applicant therefore cannot bring a Judicial Review application seeking to challenge the judgement. That the court lacks jurisdiction to entertain the matter.



15. Written submissions dated 15<sup>th</sup> May, 2023 were filed on behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents by the Attorney General. Counsel submitted that the Court does not have jurisdiction to handle the matter as it concerned historical land injustices as defined by Section 15 of the [National Land Commission Act](#). That the Applicant is inviting the court to usurp the mandate of the National Land Commission under Article 67(2) of [the Constitution](#) and Section 5(1)(e) of the [National Land Commission Act](#).

That the Applicant should have utilized the mechanism provided by in the [National Land Commission Act](#) and the National Land Commission (Investigation of Historical Land Injustices) Regulations 2017 to address its claims. Counsel relied on the case of *Ladidi Ole Tauta & Others –vs- the Hon. Attorney General & 2 Others* [2015] eKLR to support the submissions.

16. Counsel submitted further that the application is time barred under the provisions of Order 53 Rule 2 of the Civil Procedure Rules. That the provisions are clear that upon lapse of 6 months from the date of the decision, the court will be disabled from granting leave to apply for an order of certiorari to quash the decision.
17. It was submitted on behalf of the 4<sup>th</sup> Respondent vide the submissions dated 17<sup>th</sup> May 2023 filed by Odumbe & Odumbe Advocates that the relevance of obtaining leave in a Judicial Review application is to do away with applications which are frivolous, hopeless and abuse of the court process. Counsel relied on the case of *Republic –vs- County Council of Kwale & Another Ex parte Kondo & 57 Others HC MISC Application No.384 of 1996, Meixer & another –vs- A-G* [2005] KLR 189 and *Republic –vs- Kenya Revenue Authority, Commission for Investigation and Enforcement Department Ex parte Centrica Investments* (2019)eKLR to support the submissions.
18. That an order for Mandamus having been issued by Hon. Justice Ombwayo in *Kisumu ELC JR NO.1 OF 2020* in favour of the 4<sup>th</sup> Respondent for *Koguta Community Members*, the court is now functus officio and cannot interfere with the same as such interference offends the clear provisions of Section 8(3) and (5) of the Law Reforms Act.

That the conditions of granting leave have not been demonstrated.

### **Issues for Determination**

19. From the Chamber Summons, the responses thereto and the submissions filed, the following emerge as the issues for determination herein:
- a. Whether or not the application is time barred.
  - b. Whether or not the application satisfied the conditions for grant of leave to bring judicial review proceedings.
  - c. What orders to make on costs.

### **Analysis and Determination**

20. The relief of Judicial Review is provided for in [the Constitution](#) of Kenya 2010, article 23, the Environment and [Land Act](#) section 13(7), the [Fair Administrative Action Act](#), 2015 section 7, the [Law Reform Act](#) section 8 and 9 and Order 53 of the Civil Procedure Rules. The Chamber Summons was brought pursuant to the provisions of Order 53 Rules 1, 2 and 4 of the Civil Procedure Rules and section 11 of the Fair Administrative Actions Act 2015. While Order 53 provides for the procedure of applying for the relief, section 11 of the [Fair Administrative action Act](#) provides for the orders that the court may grant in proceedings for judicial review.



21. While proceedings for judicial review brought under *the Constitution*, the *Fair Administrative Action Act* and the *Environment and Land Court Act* do not require leave of the court, applications brought under Order 53 and the *Law Reform Act* require leave. See *National Social Security Limited vs Sokomanja Limited* [2021]eKLR

Order 53 Rule 1 (1) Civil Procedure Rules provides:

“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.”

Order 53(2) which is a verbatim reproduction of Section 9 of the Law Reforms Act provides:-

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than 6 months after the date of the proceedings or such shorter period as may be described by any Act; and where the proceeding is subject to appeal and a time is limited by the law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

22. It has been submitted by the Respondents that the application for leave herein is time barred in view of the above quoted provisions of the law and the provisions of Section 9 of the Law Reforms Act.
23. The Applicant’s response to this was a submission that immediately the Applicant discovered the 1<sup>st</sup> Respondent’s decision sought to be quashed herein, it filed the present application. However, perusal of the application shows that the 1<sup>st</sup> Respondent’s decision was communicated to the public vide Gazette Notice of 1<sup>st</sup> March, 2019 VOL. CXXI – NO.27. Although there is no express indication in the application as to when the Applicant got to learn of the existence the of decision, the Applicant stated in the Supporting Affidavit that as at 10<sup>th</sup> July, 2019, the elders of Soim within Kericho County discussed the matter on 26<sup>th</sup> July, 2019 and concluded that Koguta Community hold no proprietary rights over the suit lands. It is clear from annexure DWB1 (Letter dated 5<sup>th</sup> November, 2021, addressed to the clerk of the Senate) that as at that date 5<sup>th</sup> November, 2021, the applicant was aware not only of the decision of the 1<sup>st</sup> Respondent but also of the Judgement of the Environment and Land Court, Kisumu in Judicial Review No.1 of 2020.
24. It is common ground that the 1<sup>st</sup> Respondent made a decision touching on the suit lands which decision was contained in the Gazette dated 1. 3. 2019I. It is not disputed that the law under which the Chamber Summons was brought gives a time limit within which an application for leave to bring Judicial Review proceedings for certiorari should be brought. It is not disputed that the Chamber Summons was filed long after the expiry of the provided period. Perusal of the record shows that no extension of the time has been sought or obtained. I find that the application was filed out of time in respect of prayers 2 and 3 of the application which prayers seek for leave to apply for an order of certiorari.

#### **Whether the application satisfies the conditions for grant of the leave sought.**

25. The purpose of the application for leave to bring substantive Judicial Review proceedings is to eliminate at an early stage any application for Judicial Review which are frivolous, vexation or hopeless and to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. (see case of *Republic –vs- County Council of Kwale & Another Ex parte Kondo & 57 Others*) relied on by the Respondent.



In Republic –vs- Kenya Revenue Authority Commission, Ex parte Key Corp Rent Advisory Limited (2019) eKLR it was held that at the leave stage, an applicant must show;

- (i) Sufficient interest in the matter otherwise known as locus standi.
- (ii) He/she is affected in some way by the decision being challenged.
- (iii) He/she has an arguable case and that the case has a reasonable chance of success.
- (iv) The application must be concerned with a public law matter that is the action must be based on some rule of public law.
- (v) The decision complained of must have been taken by public body that is a body established by statute or otherwise exercising a public function.”

25. The grievance of the Applicant is firstly that it was dissatisfied with the decision of the National Land Commission under the National Land Commission Act which awarded the suit parcels of land to the Koguta Community represented by the 4<sup>th</sup> Respondent. That it was never notified of the proceedings before the 1<sup>st</sup> Respondent and hence was condemned unheard and that it has demonstrated a case for further investigation.

26. The National Land Commission Act provides for a mechanism for challenging such decisions namely an appeal to the court. Under Rule 19 of the National Land Commission (Investigation of Historical Land Injustices) Regulations 2017 provides: -

“A person who is aggrieved by the decision of the Commission may within twenty-eight days of the publication of the decision appeal to the court.”

There is no evidence that the Applicant made any efforts to file the appeal in accordance with this provision.

27. Secondly, the Applicant was aggrieved by the decision of the Environment & Land Court in Judicial Review No.1 of 2020. The question is whether filing of Judicial Review proceedings is the remedy provided by law to address these grievances.

As concerns the decision of the Environment & Land Court, the Applicant had recourse to appeal against it. Under Order 43 Rule 1(1)(aa) Civil Procedure Rules, an appeal lies as of right from a decision made under Order 53 (Judicial Review Order). The Applicant also had recourse to seek review of judgement under O.45 Rule (1) Civil Procedure Rules.

28. It is trite law that where the law has provided a mechanism for seeking redress a party should pursue that mechanism.

In the Speaker of the National Assembly (1992)KLR 21 the court held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

This position was affirmed by the Court of Appeal in Geoffrey Muthinja Kabiru & Others –vs- Samuel Munga Henry & 1776 Others (2015) eKLR.

29. I find that there is no basis for granting the leave sought. The application was filed out of time and the applicant had not exhausted the mechanisms availed by law for redress. For these reasons I find that the application is not merited. The application is dismissed. Each party to bear own costs.

30 Orders accordingly.



**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 27<sup>TH</sup> DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen- Court Assistant.

Korir for the Applicants.

No appearance for the Respondent.

