



Republic v Cabinet Secretary, Ministry of Land & Physical Planning & 3 others; Mugo (Exparte Applicant); Kamumo & another (Interested Parties) (Judicial Review Miscellaneous Application E008 of 2023) [2023] KEELC 19067 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19067 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E008 OF 2023

CK YANO, J

JULY 26, 2023

IN THE MATTER OF AN APPLICATION BY LAWRENCE MUCHIRI MUGO FOR LEAVE TO INSTITUTE JUDICIAL REVIEW ORDES FOR CERTIORARI AND PROHIBITION OUT OF TIME

AND

IN THE MATTER KAMWIMBI SECITON A ADJUDICAITON SECTION UNDER CAP 234 PARCEL 537

AND

IN THE MATTER OF THE DECISION OF THE MINISTER FOR APPEAL NO. 417 OF 2011

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

BETWEEN

REPUBLIC APPLICANT

AND

THE CABINET SECRETARY, MINISTRY OF LAND & PHYSICAL PLANNING 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT OFFICER 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

AND

LAWRENCE MUCHIRI MUGO EXPARTE APPLICANT



AND

EPHANTUS NJUKI KAMUMO INTERESTED PARTY

EPHANTUS NJUKI NJERU INTERESTED PARTY

RULING

1. I have before me an application brought under the provisions of Order 53 Rules 1(1), (2) and (4), rule 2 and Rule 3 of the Civil Procedure Rules, and Section 8(2) and 9 of the *Law Reform Act*, Cap 26, Laws of Kenya and all other enabling provisions of the law. The application is seeking for orders that;
 - a. Spent
 - b. That leave be granted to commence judicial review proceedings out of time
 - c. That leave be granted to the ex-parte applicants to apply for an order of certiorari to quash the decision made by and or awarded by the 1st respondent in respect of land Parcel 537 Kamwimbi A Adjudication Section in the Minister Appeal 417 of 2011 dated 19th January, 2022 and certified on 25th January, 2023.
 - d. That leave be granted to the exparte applicants to apply for an order of prohibition prohibiting the interested parties as well as the 2nd and 3rd respondents from implementing the decision of the 1st respondent judgment and or award on the decision dated 19th January, 2022 and certified on 25th January, 2023 in regard to land Parcel 537 Kamwimbi A Adjudication Section in the minister appeal 417 of 2011.
 - e. That pending the hearing and determination of this application together with the substantive notice of motion, the exparte applicant's properties and structures situate on parcels of land Kamwimbi A Adjudication Section not be destroyed by the interested parties.
 - f. Costs of this application be in the cause.
2. The application is premised on the grounds set out hereunder and the affidavit of Lawrence Muchiri Mugo;
 - a. That the ex-parte applicant was a defendant in appeals filed to the minister dated 10th June 2022.
 - b. That despite the ex-parte applicant being summoned for hearing, the matter had already been decided by the minister way before it had been heard.
 - c. That dissatisfied with the decision by the minister the ex-parte applicant requested for the proceedings at Ardhi House but was informed that the proceedings had not been forwarded by the DCC.
 - d. That the ex-parte applicant followed up with the DCC but upon return to Ardhi House on diverse dates he was informed that the proceedings had not been forwarded for typing.
 - e. That the ex-parte applicant resulted to visiting the County Commissioner who intervened to have the proceedings forwarded for typing.
 - f. That by the time the ex-parte applicant got the proceedings and funds to secure an advocate, the statutory period provided for judicial review matters had lapsed.



- g. That it is unfortunate that the statutory time to file judicial review matters has already lapsed.
 - h. That the suit has high chances to succeed once allowed.
 - i. That there has been no inordinate delay in bringing this application.
3. In his supporting affidavit, the ex-parte applicant avers that he has been doing the appeal on behalf of his father, Njagi Muchunje (now deceased). That the interested parties herein filed appeal No. 417 of 2011 against the applicant in regard to parcel No. 537 and a copy of the appeal has been annexed. That on 25th May 2022, the ex-parte applicant was summoned for a hearing on 9th June 2022 through a letter by the DCC through the Chief. A copy of the letter dated 25th May 2022 is also annexed. The applicant states that the DCC further summoned him through the area chief vide a phone call to deliver a ruling which the applicant attended.
 4. The ex-parte applicant states that to his surprise, when he went to the office of the DCC together with the 1st interested party, the DCC read a ruling of appeal 194 of 2017 where he awarded the applicant parcel No. 537 which is subject of this application. That he however deliberately refused to read the ruling in appeal No. 417 of 2011 which the 2nd interested party had filed against the applicant and upon inquiry, the applicant was told that the same was not ready. That the DCC further instructed the applicant to purchase proceedings for the matter at Ardhi House which the applicant did but upon inquiry, he was informed that the proceedings had not been forwarded. That he went back to the DCC to get a forwarding letter but the DCC vehemently denied him access to the documents which he terms as against the law.
 5. That the DCC further summoned the applicant and the 2nd interested party in regard to the same parcel of land on 16th August 2022 in appeal No. 229 of 2018. A copy of the letter is annexed. That aggrieved by the said summons the applicant wrote a complaint letter dated 26th August 2022 to the 1st respondent against the DCC and the 1st respondent then wrote a letter to the DCC Meru South over the two appeals. Copies of the letters are annexed. That all along since they were heard, the DCC on behalf of the minister, failed to deliver and disclose the ruling in appeal 417 of 2011.
 6. That again the 1st respondent wrote a letter in regard to appeal 417 of 2011 which is the subject of this application asking the County Commissioner to personally follow up the said ruling and that it was when the County Commissioner intervened that the applicant was informed in January that the ruling had been forwarded to Ardhi House and that he could access the same. The applicant avers that he was able to have the proceedings certified on 25th January, 2023 where he realized the parcel 537 was awarded to both interested parties.
 7. The applicant avers that the reason for the delay in filing judicial review proceedings was not intentional since he was neither aware of the ruling nor did he have the typed and certified proceedings. That the delay was occasioned by the DCC on behalf of the Minister since he failed to deliver and disclose the contents of the ruling in appeal 417 of 2011 in regard to parcel 537 despite several complaints. The applicant avers that he is desirous and keen on prosecuting this matter in full and that it is in the interest of justice that the application be allowed.
 8. The 1st, 2nd, 3rd and 4th respondents filed a notice of preliminary objection dated the 17th April 2023 on the following grounds-;
 - i. That the application is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore it is unsustainable in the obtaining circumstances.



- ii. That the application offends the provisions of Order 53 Rule 2 of the Civil Procedure Rules 2010, provides that, 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 no later than six months after the date of the proceedings.
 - iii. That the application offends the provisions of Section 9 (3) of the Law Reform Act, Cap 26 Laws of Kenya which provides for a mandatory statutory time limitation of six months in respect to application for prerogative orders.
 - iv. That the application is otherwise frivolous, vexatious and an abuse of the court process.
9. The 1st interested party filed his replying affidavit dated 24th April 2023 wherein he stated that the application by the ex-parte applicant herein for leave to file Judicial Review proceedings is in contravention to the rules of procedure. That he has been informed by his learned counsel on record that the said application for leave has been filed out of the prescribed time limit of six months as it has been enshrined under Section 9 (2) of the Law Reform Act Cap 26.
 10. The 1st interested party averred that the said Act does not provide for extension of time for filing an application for leave to file Judicial Review proceedings.
 11. The 1st interested party stated that the decision by the minister was delivered on the 14th of August 2022 in the presence of himself and the ex-parte applicant and that the application herein was filed on the 28th of March 2023 which clearly shows that six months had lapsed since the delivery of the judgment by the minister.
 12. The 1st interested party further stated that it is evident with the letters that have been produced by the ex-parte applicant that instead of addressing his issues before the court as he is at the moment since the 4th August 2022 when the judgment was delivered he opted to engage in meaningless battles within several government offices with unsubstantiated claims of bribery. That the ex-parte applicant allowed his time to lapse therefore causing inordinate delay in filing this suit.
 13. The 1st interested party averred that there are not any provisions under any statute in Kenya that provide for the rules of procedure to apply for extension of the six months as provided for under the statute quoted by the ex-parte applicant in his application. That neither the court nor any other court in Kenya has the requisite jurisdiction to extend time for filing an application seeking for leave to file judicial review proceedings.
 14. The 1st interested party stated that the instant application has not been instituted in such a manner as is prescribed by the law and it is time barred, contra-statute and a nullity and that the application should be dismissed and urged the court to dismiss the application for the interest of justice.
 15. The application was canvassed by way of written submissions. The ex-parte applicant filed his on the 16th of May 2023 while the 1st interested party and the respondents filed theirs on 26th May 2023.

Ex-parte Applicant's Submissions

16. The applicant submitted that with the enactment of the 2010 constitution, courts have held that time for filing judicial review proceedings can be extended and relied on the case of Republic v Public Procurement administrative Review Board ex-parte Syner-Chemie, Republic v Ministry of lands, housing and urban Development & 4 others Jeremiah Otieno Okenye (interested party) Ex-parte Osoro Kennedy Omwoyo [2019] eKLR AND Nicholas Kiptoo Arap Korir Salat v Independent



Electro and Boundaries Commission & 7 others [2014] eKLR. The ex-parte applicant submitted that he has explained the reasons for the delay and that the intended judicial review has high chances of success.

The Interested Party Submission

17. The interested party submitted that in the application, the ex-parte applicant has invoked Order 53 Rules 1 (1) (2) and (4) Rule 2 and Rule 3 of the *Civil Procedure Act* and Sections 8(2) and 9 of the Law Reforms Act Cap 26 Laws of Kenya and submitted that a plain reading of the above two sections of law, those provisions require the court to confirm whether or not a period of six (6) months has lapsed since the judgment, order, decree, conviction being quashed was made.
18. The interested party relied on the case of Wilson Osolo Vs John Ojiambo Ochola & another 1995 eKLR and Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama [2014] eKLR and submitted that both the Civil Procedure Rules under Order 53 and the Law Reforms Act did not provide for the extension of time and therefore the courts do not have jurisdiction to extend time on their own.
19. The interested party urged the court to dismiss the ex-parte applicant's application dated the 28th of March 2023 with costs to the interested party.

Respondents' Submissions

20. In their submissions, the respondents also cited Order 53 Rule 2 of the Civil Procedure Rules and Section 9 of the *Law Reform Act* and relied on the case of Rosaline Tubei & 8 others v Patrick K, Chemiyot & 3 others [2014] EKLr, Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another [2018] Eklr and Wilson Osolo Vs John Ojiambo Ochola & another and submitted that Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules are couched in mandatory terms and urged the court to uphold the preliminary objection raised and dismiss the ex-parte applicant's chamber summons dated 19th December, 2017 with no order as to costs.

Analysis and Determination

21. The issue for determination is whether the ex-parte applicant's application is competent or not and whether the applicant is entitled to the orders sought.
22. Judicial review jurisdiction is a special Jurisdiction which is neither Civil nor Criminal and it is governed by Section 8 and 9 of the *Law Reform Act* which is the substantive law while Order 53 of the Civil Procedure Rules set out the procedural law. By those provisions the court is mandated to issue orders of mandamus, certiorari or prohibition in appropriate judicial review proceedings.
23. The *Land Adjudication Act* provides on how disputes are to be resolved including an appeal to the minister. It is apparent that the ex-parte applicant did pursue that right of appeal. He has also invoked the provisions of the *Law Reform Act* and the Civil Procedure Rules, which entitle a party, to apply for prerogative orders including orders of certiorari. I have no doubt in my mind that the ex-parte applicant is entirely within his rights to pursue that avenue.
24. However, applications for prerogative orders have a limitation period. The *Law Reform Act* Cap 26 Laws of Kenya, provides as follows at Section 9 (3):-

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of



that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law: and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

25. The above provision is echoed in the Civil Procedure Rules, 2010, which in Order 53 rule 2 provides as follows:-

“Order 53 Rule 2 – 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 six months after the date of the proceedings or such shorter period as may be prescribed by any Act: and where the proceedings is subject to appeal and the time is limited by 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.”

26. It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of the decision. The decision of the 1st respondent that is sought to be quashed is dated 19th January, 2022. This application was filed on 28th March 2023. The application is therefore out of time. There is nevertheless a prayer within this application for time to be extended, so that the ex-parte applicant can proceed to apply for the order of certiorari out of time.

27. The Court of Appeal case in *Wilson Osolo v John Ojiambo Ochola & another* [1996] eKLR expressed itself thus;

“It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from Section 9(3) of the *Law Reform Act*. Whilst the time limited for doing something under the civil procedure rules can be extended by an application under order 49 of the civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case the *Law Reform Act*.” There is no provision for extension of time to apply for such leave in the *Limitation of Actions Act* (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.”

28. I am also guided by the case of *Republic v Chairman Amagoro Land Dispute Tribunal & another Ex-parte Paul Mafwabi Wanyama* [2014] eKLR wherein D. Maraga JA (as he then was) held that:-

“The judicial review proceedings before the learned judge, which have given rise to this appeal were therefore special in nature and the learned judge erred in importing provisions of the *civil Procedure Act* and rules to proceedings governed by the said provisions of the *Law Reform Act* and Order 53 Civil Procedure Rules. We agree with learned counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do.”

29. I am aware that by dint of the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the rules. Following this provision, it may be arguable that time may be enlarged to make an application for Judicial Review outside the 6 months limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provisions set out in Section 9(3) of the *Law Reform Act* (above), and it is trite law that rules made under statute,



cannot override a statutory provision. The Law Reform Act, itself has no provision for extension of time. I have seen no law, which can entitle me to enlarge time for the filing of an application for certiorari outside the 6 month limitation period.

30. I have been unable to see what law one can base an application to extend time for the commencement of judicial review proceedings. I do not even think that the often quoted cure for all, Article 159 (2) (d) of the Constitution, which requires courts to administer Justice without undue regard to procedural technicalities, can be of assistance, since I don't think that provisions of limitation of time, can fall within the domain of technical rules of procedure. In my view, they are part of substantive and not procedural law, and cannot fall within the ambit of Article 159(2)(d) of the Constitution.
31. I do not see how this application can succeed. I decline to extend time for commencement of judicial review and further decline to grant the orders sought. This application is hereby dismissed but I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF JULY 2023

IN THE PRESENCE OF:

Court Assistant – Martha

Ms. Musyimi for Ex-parte Applicant

Ms. Kijaru h/b for Ms. Nyaga for 1st Interested Party

Ms. Kendi for Respondents

N/A for 2nd Interested Party

C.K YANO

JUDGE

