Republic v Attorney General & 3 others; Koros & 2 others (Exparte Applicants) (Miscellaneous Application E001 of 2022) [2023] KEELC 19136 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19136 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

MISCELLANEOUS APPLICATION E001 OF 2022

JM ONYANGO, J

JULY 25, 2023

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE AN APPLICATION FOR JUDICIAL REVIEW FOR PREROGATIVE ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT 2011

AND

IN THE MATTER OF LAND REFERENCE NO. 225/3

AND

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

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 LAWS OF KENYA (NOW REPEALED)

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL AT KAPSERET, ELDORET LAND ARBITRATION CASE NO. 64 OF 2001

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT ELDORET AWARD NO. 99 OF 2002

BETWEEN

REPUBLIC ..... APPLICANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

KAPSERET LAND DISPUTES TRIBUNAL ..... 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT AT ELDORET ..... 3RD RESPONDENT

PAUL KIPYEGO JIWIT ..... 4TH RESPONDENT

AND

DANIEL KOROS ..... EXPARTE APPLICANT

WILLIAM KOROS ..... EXPARTE APPLICANT

ALICE KOROS ..... EXPARTE APPLICANT

RULING

1. By a notice of motion dated December 16, 2021, the applicants filed an application pursuant to order 53 rule 1 of the *Civil Procedure Rules* seeking the following orders:

    a. That leave be granted to the applicants to apply for an order of certiorari to bring into the High Court and quash the award and proceedings of the Land Disputes Tribunal at Kapseret, Eldoret Arbitration Case No 64 of 2001 and registered as Eldoret Chief Magistrate's Court award MCC No 99 of 2002.

    b. That leave be granted to the applicants to apply for an order of prohibition to restrain the Chief Magistrate at Eldoret from proceeding with Eldoret MCC/99/2002 pursuant to the ruling dated June 18, 2021.

    c. That the leave so granted shall operate as a stay of proceedings and decision of the Chief Magistrate at Eldoret adopting the award as an order of the court *vide* MCCC /99/2002 and any other action founded on the said decision or otherwise until final determination of the judicial review proceedings.

    d. That the costs of this application be provided for.

2. The application is based on the grounds that the grounds set out on the face of the notice of motion and the supporting affidavit of Daniel Koros , the 1st ex-parte applicant sworn on December 16, 2021. In the said affidavit, the applicant depones that he is one of the administrators of the estate of his late father Chemoiyo Koros - deceased who died on October 12, 2001. He depones that the proceedings before the land disputes tribunal were brought against the deceased one year after his demise and hence he could not have been a competent party in the purported proceedings. The award was of the tribunal was subsequently filed in Eldoret Chief Magistrate's Court *vide* MCC No 99 of 2002. The Chief Magistrate has since delivered a ruling allowing the substitution of the administrators.

3. It is his contention that the proceedings before the Land Disputes Tribunal were a nullity having been brought against a deceased person. Further, that the tribunal had no jurisdiction to determine the issue of ownership of land and that the award of the tribunal is therefore a nullity. The proceedings before the Chief Magistrate in MCC No 99 of 2002 are also a nullity.

4. In response to the application the 1st and 3rd respondents filed grounds of opposition dated March 22, 2022 citing the following reasons:-

i. That the judicial review application was filed outside the 6 –months period provided under the *Law Reform Act* and order 53 of the *Civil Procedure Rules*.

ii. The applicants are guilty of laches.

iii. The judicial review application is incurably defective and bad in law.

iv. The judicial review application is an afterthought and an abuse of the court process.

5. The 4th respondent filed a notice of preliminary objection on the ground that the application offends the provisions of section 9(3) of the *Law Reform Act* cap 26 of the Laws of Kenya.

6. The court directed that the preliminary objection be subsumed in the application and the same be canvassed by way of written submissions. The ex-parte applicants and 4th respondent duly filed their submissions.

Applicants' Submissions

7. In his submissions set out the provisions of section 9(3) of the *Law Reform Act* as follows:

> " In case of an application for an order of certiorari to remove any judgment, order , decree conviction or other proceeding for the purpose of its being quashed, leave shall not be granted unless the application is made not later than six months after the date of the judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for 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."

8. It was counsel's submission that there was no valid decision to be adopted as a judgment of the court in the first instance since the proceedings before the Land Disputes Tribunal were brought against a deceased person hence they were null and void *ab initio*. He relied on the case of *Japheth Nzila Muangi v Hamisi Juma Malee* (2022)eKLR where the court relied on the case of *Viktar Maina Ngunjirir & 4 others v Attorney General & 6 others* (2018) eKLR where the court held as follows:

> " If he (defendant) dies before the suit is brought against him in the name in which he carries on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted it is also a nullity. Similarly, an order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as the defendant and allowing suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person".

9. He contended that the preliminary objection did not raise a pure point of law as the date when the impugned award was rendered by the tribunal and the date of its adoption by the court needed to be ascertained.

10. He referred to the case of *Republic v Kenya Ports Authority Board of Directors & 2 others Public Service Commission (ex-parte), Genesis for Human Rights Commission* (applicant) judicial review application

No 001 of 2022 (2022) KEELRC1362 where the court cited the case of *Oraro v Mbaja* (2005) 1KLR 14 where the court held that;

> " Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle, a preliminary objection which the court should allow to proceed."

11. It was his submission that the 2nd respondent condemned the applicants unheard as they were not parties to the proceedings by the Land Disputes Tribunal.

12. Submitting on the application for leave, he reiterated that the proceedings and award by the Land Disputes Tribunal were null and void ab initio having been brought against a deceased person. In its verdict the tribunal held that:

> " the estate of the late Mr Koros should be held responsible and accountable for the amount contributed by members of Talanty Farm Company"

13. He submitted that the 2nd respondent breached the applicants rights under article 47 and 48 of *Constitution* and sections 4(1) (2) and (3) of the *Fair Administrative Actions Act* as well as article 50 of the *Constitution*

Respondents Submissions

14. Learned counsel for the 4th respondent submitted that the application is for leave to apply for an order of *certiorari* to bring into the High Court and quash an award made in arbitration No 64 of 2001 and a court award made in CMCC No 99 of 2002. He contended that the award was dated November 19, 2002 and therefore the application should have been made by May 19, 2003 or earlier while the application for leave to quash the magistrate's decision in CMCC should have been made within 6 months in the same year or the following year.

15. Having considered the application, supporting affidavit, notice of preliminary objection and rival submissions, the following issues fall for determination.

    i. Whether the preliminary objection should be sustained

    ii. Whether the application for leave to apply for judicial review should be granted.

16. With regard to the preliminary objection, the court in the case of *Mukisa Biscuit Company Ltd v West End Distributors Limited* (1969) EA 696 held as follows:

> So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....
>
> A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase the costs and occasions confusion of the issues. This improper practice should stop.

17. In the instant case, the respondents have raised the ground that the application for leave to apply for judicial review was filed more than 6 months after the award of the land disputes tribunal and the order adopting the said award as a judgment of the court contrary to section 9(3) of the *Law Reform Act*. However, whereas the date of the award of the tribunal has been stated, nowhere in the pleadings is the date of the order adopting the award as the judgment of the court in CMCC No 99 of 2002 stated. The court would therefore have to ascertain when the award of the Land Disputes Tribunal was adopted as a judgment of the court.

In *Oraro v Mbaja* (supra) it was held that;

> "any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle, a preliminary objection which the court should allow to proceed."

18. From the foregoing it is clear that the preliminary objection raised by the respondents is not a pure point of law and accordingly I decline to sustain the objection.

19. Turning to the application, it is clear that the same is anchored on the provisions of the *Law Reform Act* and order 53 rule 1 of the *Civil Procedure Rules* which require that the application for leave to apply for judicial Review be filed within six months. In *Republic v Council of Legal Education & another Exparte Subina Kasamia & another* [2018] eKLR the court held as follows;

> "Section 9 (3) of the *Law Reform Act* is couched in mandatory terms "shall" and imports a form of command or mandate and that Parliament prescribed a period of six months within which application of *certiorari* may be brought and a court has no discretion to extend time."

20. Further in the case of *Ako v Special District Commissioner Kisumu & another* [1989]eKLR where the Court of Appeal held that;

> "It is plain that under sub-section (3) of section 9 of the *Law Reform Act* Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits for enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of subsection (3) of section 9 of the *Law Reform Act*.

21. Similarly, in *Osolo v John Ochola & another* (1995) eKLR the Court of Appeal held as follows:

> "It can readily be seen that order 53 rule 2 (as it 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 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". (Emphasis added).

22. In the case of *National Social Security Limited v Sokomanja Limited* (2021 eKLR) the court observed as follows:

> "Judicial review as a relief is provided for in among others; article 23 (3) of the *Constitution* of Kenya 2010, section 8 of the *Law Reform Act* chapter 26 Laws of Kenya, section 13(7) of the *Environment and Land Court Act* 2011, section 7 of the *Fair Administrative Action Act* 2015 and the Common law. In my view, no leave is required to seek judicial review as a relief under article 23(3) of the *Constitution* where proceedings are instituted to enforce the bill of rights under article 22 of the *Constitution* or where proceedings have been brought under section 7 of the *Fair Administrative Action Act*, 2015 for the review of an administrative action. Such leave is also not required under the *Environment and Land Court Act* 2011 before such relief is sought.
>
> Leave is however still required in my view where an applicant for judicial review moves the court under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules. Following the promulgation of the *Constitution* of Kenya, 2010 and *Fair Administrative Action Act*, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under the *Constitution* of Kenya 2010 and/or the *Fair Administrative Action Act*, 2015 in which case they will not need leave of the court or go for the same relief under the *Law Reform Act* chapter 26 laws of kenya and order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the court.

23. What can be gleaned from the above decisions is that indeed the scope of judicial review is no longer confined to the legal framework under the *Law Reform Act* and order 53 of the *Civil Procedure Act* but is now also entrenched in the *Constitution* and the *Fair Administrative Act*. However, as correctly held in the in the *NSSF case* (supra) if one opts to apply for judicial review under the *Law Reform Act* and order 53 of the *Civil Procedure Rules*, one must apply for leave within six months of the decision as the court has no discretion to enlarge time within which to file the application for leave to apply for judicial review.

24. In the present case, the decision of the Land Disputes Tribunal which the applicant seeks to quash was made way back in November 2002 and adopted by the court as judgment of the court soon thereafter. The application for leave which was made twenty years later is therefore hopelessly out of time and cannot be granted.

25. The upshot is that the application is dismissed.

26. I make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF JULY 2023.

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J.M ONYANGO

JUDGE

In the presence of;

Ms. Mwangi for the Ex-parte Applicnt

Ms. Chepkwony for Mr. Nyamweya for the 4th Respondent

Court Assistant: A. Oniala