



**Kiungua v Deputy County Commissioner Mbooni East & 2 others;
Kimilu (Interested Party) (Judicial Review Application 1 of 2023)
[2023] KEELC 20030 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20030 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

JUDICIAL REVIEW APPLICATION 1 OF 2023

TW MURIGI, J

SEPTEMBER 20, 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT
CAP 26 LAWS OF KENYA**

AND

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT
NO. 4 OF 2015**

AND

**IN THE MATTER OF A DECISION OF AN APPEAL TO THE MINISTER
CASE NO 55 OF 2001 DELIVERED BY THE DEPUTY COUNTY
COMMISSIONER MBOONI EAST ON 9TH NOVEMBER 2018 OVER
LAND PARCEL NO. 685 NDULUKU ADJUDICATION SECTION**

BETWEEN

DAVID MUKEKU KIUNGUA APPLICANT

AND

DEPUTY COUNTY COMMISSIONER MBOONI EAST 1ST RESPONDENT



DIRECTOR OF LAND ADJUDICATION & SETTLEMENT . 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

AND

ISAAC MUTHAMA KIMILU INTERESTED PARTY

JUDGMENT

1. By a Chamber Summons dated January 12, 2023, brought under the provisions of Order 53 Rule 1 and 2 of the *Civil Procedure Rules* 2010, Sections 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya and all other enabling provisions of the law, the Applicant seeks the following orders:-
 1. Spent.
 2. That this Honourable Court be pleased to grant leave to the Applicant to file an application for Judicial Review Order of Certiorari outside the statutory period of six (6) months.
 3. That leave be granted to the Applicant to apply for Judicial Review Order of Certiorari to remove to this court and quash the decision of the 1st Respondent delivered on November 9, 2018 over land parcel No 685 Nduluku Adjudication Section.
 4. That leave be granted to the Applicant to apply for Judicial Review Order of Prohibition directing the 2nd Respondent from implementing and/or effecting the decision of the 1st Respondent delivered on November 9, 2018 over land parcel No 685 Nduluku Adjudication Section.
 5. That the leave so granted do operate as a stay of the decision of the 1st Respondent delivered on November 9, 2018 over land parcel 685 Nduluku Adjudication Section and the implementation of the same by the 2nd Respondent.
 6. Costs of the application be provided for.
2. The application is based on the grounds set out in the Statutory Statement together with the verifying affidavit of David Mukeku Kiungua sworn on even date.

The Applicant's Case

3. The Applicant averred that the dispute in the present suit revolves around the ownership of land parcel No 685 Nduluku Adjudication Section was initially heard and determined in his favour by the Nduluku Adjudication Committee.
4. He averred that the Interested Party appealed against the decision of the Committee before the Arbitration Board which in its decision, sub divided parcel No 529 into parcel 529 which he was to retain and parcel No 685 which was to be recorded in the names of David Kimilu Nzivo.
5. That being aggrieved by the decision of the Arbitration Board, he appealed to the Land Adjudication Officer who in his decision, set aside the decision made by the Arbitration Board and awarded him the entire land parcel No 529.
6. That being dissatisfied with the decision of the Land Adjudication Officer, the Interested Party filed an Appeal to the Minister being Appeal No 55 of 2001. That after hearing both parties, the Minister



rendered his decision on November 9, 2018. He averred that he did not receive any communication from the Minister regarding the decision despite inquiring on the same.

7. The Applicant went on to state that he became aware of the decision sometime in December 2022 when he visited the land registry and was given a copy of the same. He averred that the failure to institute judicial review proceedings on time was not of his own making since he was not aware of the decision.
8. He contended that the decision by the Minister offends the principles of natural since he was not given an opportunity to call witnesses nor to cross examine the Interested Party. For those reasons, he urged the court to grant the orders sought.

The Respondents' Case

9. The application was opposed by the Respondents through the grounds of opposition dated March 29, 2023 setting out the following grounds:-
 1. That Section 9(3) of the Law Reform Act is couched in mandatory terms and the said Statute has no provisions for extension of time.
 2. That the application discloses no cause of action against the 2nd and 3rd Respondents hence they should be struck out as parties to the suit.
 3. That the application as drawn and taken out is bad in law, incompetent and otherwise an abuse of the process of this Honourable Court.
10. The Respondents urged the Court to dismiss the application with costs.

The Interested Party's Case

11. The Interested Party filed a replying affidavit sworn on March 10, 2023 in opposition to the application. He averred that he is the beneficial owner of Land Parcel No 685 Nduluku Adjudication Section.
12. He further averred that he substituted his late father in the Appeal to Minister Case No 55 of 2001. He averred that the Applicant was granted an opportunity to call and cross examine witnesses during the hearing of the appeal. He further averred that upon conclusion of the hearing of the Appeal, both parties were informed that the decision would be delivered via notice and that the typed judgment would be available in the Deputy County Commissioner's office. He asserted that the decision was made on November 9, 2018 via Notice.
13. He went on to state that after the Applicant failed to appeal against the decision made by the Minister, he took possession of the suit property and fenced it off. He averred that in the month of April 2022, he started the process of registering the suit property in his late father's name. He urged the court to dismiss the application as there has been inordinate delay in presenting the same.
14. The application was canvassed by way of written submissions.

The Applicant's Submissions

15. The Applicant's submissions were filed on February 24, 2023. On his behalf, Counsel submitted that the main issue for determination is whether the Applicant should be granted leave to apply for judicial review orders of Certiorari out of time. Counsel argued that the delay in filing the judicial review application herein was occasioned by the fact that the 1st Respondent delivered his decision in Appeal Case No 55 of 2001 on November 9, 2018 but failed to communicate the same to the Applicant.



16. Counsel contended that the Applicant is entitled to fair administrative action as per Article 47 of the Constitution. Counsel argued that the constitutional provisions on the right of access to justice and for the enforcement of the Bill of Rights under Articles 48 and 22 respectively, empower this Court to extend time for filing of judicial review proceedings outside of the six months' statutory limitation provided under Order 53 of the *Civil Procedure Rules* and Section 9 of the Law Reform Act.
17. Counsel further argued that the decision was unprocedural, erroneous, biased and unreasonable as the Applicant was not granted an opportunity to call his witnesses nor to cross-examine the Interested Party herein.
18. Summing up his submissions, Counsel contended that the Applicant had demonstrated merit in the application and urged the Court to allow it as prayed. To buttress his submissions, Counsel placed reliance of the following authorities: -
 1. Republic Vs Speaker of the Senate & Another Ex Parte Afrison Export Import Limited & Another [2018] eKLR;
 2. Republic Vs Public Procurement Administrative Board Ex-Parte Syner-Chemie Limited & 3 Others [2016] eKLR;
 3. Republic Vs Mwangi Nguyai & 3 Others Ex Parte Haru Nguyai [2013] eKLR.

The Respondents Submissions

19. The Respondents' submissions were filed on March 20, 2023. Learned State Counsel submitted that the only issue for determination is whether the order for enlargement of time to institute judicial review proceedings ought to be granted.
20. It was argued that the provisions of Order 53 Rule 2 of the *Civil Procedure Rules* are couched in mandatory terms and that an application for leave to apply for an order of Certiorari must be made within six months of the impugned decision hence the orders for extension of time cannot issue.
21. The Learned State Counsel argued that the prayer for extension of time for leave to apply for an order of certiorari is untenable and hence the application ought to be dismissed with costs. To buttress its submissions, the Learned State Counsel relied on the following authorities: -
 - i. Wilson Osolo Vs John Ojiambo Ochola & Another [1996] eKLR;
 - ii. Rosaline Tubei & 8 Others Vs Patrick K. Cheruiyot & 3 Others [2014] eKLR;
 - iii. Republic Vs Kenya Revenue Authority Ex-parte Stanley Mombo Amuti [2018] eKLR.

The Interested Party's Submissions

22. The Interested Party filed his submissions on March 31, 2023. On his behalf, Counsel submitted that there was inordinate delay in filing the present application. Counsel argued that the Interested Party has not explained the delay of more than four years. In addition, Counsel contended that the legal provisions upon which the Applicant was basing his application for leave to file for judicial review orders outside the six months' statutory period are not available to him. Counsel urged the Court to dismiss the application.



Analysis and Determination

23. Having considered the application, the affidavits and the rival submissions, the main issue for determination is whether the Court has power to extend time to file judicial review proceedings.

24. The law governing an application for judicial review is set out in Section 9(3) of the [Law Reform Act](#) which provides that:-

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 judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding 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 said Section is replicated in Order 53 Rule 2 of the [Civil Procedure Rules](#) which provides that:-

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a 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. The provisions are quite clear that upon the lapse of six months from the date of any judgment, order, decree, conviction or other proceeding, the Court cannot grant leave to apply for an order of Certiorari aimed at quashing the relevant judgment, order, decree, conviction or other proceeding.

27. In the case of [Wilson Osolo Vs John Ojiambo Ochola & Another](#) [1995] eKLR the Court of Appeal held that;

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 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. A similar view was held in the case of [Ako Vs 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](#) leave shall not be granted unless application for leave is made inside six months after the date of the judgment.”

29. It is clear from the above cases that the provisions of Section 9 (3) of the [Law Reform Act](#) and Order 53 Rule 2 of the [Civil Procedure Rules](#), 2010 are couched in mandatory terms and must be complied with.



30. In the instant application, it is clear that the decision that the Applicant is seeking to be quashed is dated November 9, 2018. The application for leave having been filed on January 16, 2023 was brought to court out of time and is thereby time barred.
31. It therefore follows that the court has no power to extend time to file judicial review proceedings.
32. In the end, the Chamber summons dated January 12, 2023 is devoid of merit and the same is dismissed with costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF SEPTEMBER, 2023.

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

Muthiani for the Applicant

