REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

JUDICIAL REVIEW MISC. APPL NO. 231 OF 2018

IN THE MATTER OF THE RIGHT TO A FAIR HEARING

AND IN THE MATTER OF THE LAND ADJUDICATION ACT

CHAPTER 284 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY OF LANDS....RESPONDENT

AND

ELIJAH MUEMA KITAVI.....1ST INTERESTED PARTY

KASENGA MWANIA.....2ND INTERESTED PARTY

EX PARTE: RAPHAEL KAKENE MULOKI

AND PETER MAINGI KAVITA

JUDGEMENT

1. The prayers the subject of this judgment are contained in the Notice of Motion dated 1st July, 2018 in which the *ex parte* applicants, **Raphael Kakene Muloki** and **Peter Maingi Kavita,** seek the following orders:

(a) An Order of Certiorari do issue to remove to the High Court and quash the decision of the Respondent to disregard the judgment in the Minister's Appeal Number 112 of 1994 and proceed with implementation of the Judgment in Minister's Appeal number 110 and 111 of 1994.

(b) An Order of Prohibition do issue directed at the Respondent or any party acting on the Respondent's instructions against any further implementation of the Judgment in Appeal Numbers 110 and 111 of 1994.

(c) An Order setting aside Judgment in Minister's Appeal numbers 110,111 and 112 of 1994 and remitting the said three Appeals to the Respondent for consolidation and re-trial de novo and Judgment do issue.

(d) The Exparte Applicants' costs of this case shall be met by the Respondents.

Applicant's Case

2. The application was supported by a statutory statement and a verifying affidavit sworn by **Raphael Kakene Muloki** on 25th June, 2018.

3. According to the applicants, they are uncle and nephew respectively while the two interested parties are cousins. The 1st applicant, on the other hand is a step brother of the interested parties' father.

4. According to the applicants. In 1948, during the process of land consolidation and demarcation, part of the land belonging to **Katulu Kasenga** was divided into five equal parts for his five wives and were given different numbers with the interested parties' mother getting land number 568 and the 1st applicant's mother getting land number 573. However, on the land parcel number 568, there lived a man called **Kioko Ngau** who laid claim thereon and later land number 573 vide a claim made before the Kangundo Magistrate's Court against the 1st interested party who defended the same on behalf as regarding land number 573.

5. It was averred that the dispute before the Kangundo Court was resolved by administering Kamba oath, Kithitu, in which it is believed that the person falsely claiming interests would die after taking of the oath. According to the applicants, **Kioko Ngau** and his family members died soon after and consequently, the 1st interested party was declared as the successful party. Having been successful, the 1st interested party laid claim to the portion number 573 which was being claimed by the said **Kioko** as belonging to his siblings including the 2nd interested party. According to the applicants' the claim by the 1st interested party over land number 573 was unfair since they too raised funds towards the said litigation.

6. It was averred that in 1973 the applicants who were claiming ownership of the entire land number 573 as demarcated and consolidated, continued harvesting sisal on the portion claimed by the 1st interested party and were as a result sued by the interested parties in Machakos District Magistrate's Court in Civil Suit Number 978 of 1973 for trespass to land and unlawful harvesting of sisal. After hearing the evidence, the court declined to award damages finding that the sisal harvested by the applicants was not on the interested parties' land but on the land falsely claimed by them. Thereafter the interested parties filed a complaint or dispute before Nguluni Adjudication Committee being, Land Committee Dispute Number NGU 80/82, where one of the Committee members was **Mwania Katulu**, the father of the interested party.

7. It was disclosed that the decision of the said committee was that the disputed portion of land number 573 belonged to the interested parties based on the decision of the Kangundo Magistrate's Court between the interested parties and **Kioko Ngau**. Accordingly, the Committee decided that the said portion, renumbered as 1943 was the interested parties'.

8. Dissatisfied with the said decision, the applicants filed an objection with the District Land Adjudication Officer whose decision was that land number 1943 be shared equally by the applicant s and the interested parties. By the time of the delivery of the said decision, land number 1943 had already been subdivided into three numbers being 1943, 2420 and 2407.

9. According to the applicants since the interested parties had already disposed of land number 2420 to a school, that portion was to be taken as part of the potion adjudicated to the interested parties. Accordingly, the applicants' half was renumbered as land number 2407.

10. However, being dissatisfied with this decision, the applicants appealed to the Minister for Lands seeking reversal of the said decision vide Minister's Appeal Case Numbers 110 and 111 of 1994. The interested parties similarly lodged their appeal vide Appeal Case No. 112 of 1994. Since the procedure followed in the adjudication cases is for each land number to be given a distinct suit, in respect of appeal numbers 110 and 11 of 1994, the appellants were the applicants. In those appeals they were challenging the decision of the Land Adjudication Officer to give the land comprised in 1943, being 2420 and 1943 to the interested parties. On the other hand, the interested parties in their appeal challenged the decision to give the applicants half of land number 573.

11. According to the applicants the Minister's Appeals Nos. 110 and 111 of 1994 were heard by the District Commissioner Machakos and judgement delivered in 2006 by which it was decided that the entire original land, 1943 be given to the interested parties hence extinguishing any rights of the applicants over their deceased grandfather's inheritance in land number 1943 and a share of the land due to the house of the 2nd wife of the original owner of land, namely **Katulu Kasenga**.

12. It was averred that the interested parties' appeal being Appeal Number 112 of 1994 was heard by the District Commissioner, Matungulu, who by his decision of 8th May, 2018, upheld the decision of the District Land Adjudication Officer meaning that each party was entitled to half of the original land number 1943.

13. According to the applicants, therefore, there are two concurrent conflicting decisions. However, while the Minister has refused to implement the judgement in Appeal No. 112 of 1994, he has similar declined to suspend the decision in Appeals Nos. 110 and 111 of 1994 despite various trips made by the applicants seeking to have the later decision reversed. Instead, the Minister has since 2009 authorised the implementation of the judgement in Appeal Nos. 110 and 111 of 1994 through letters dated 20th July, 2009 and 11th February, 2016 addressed to the District Surveyor Machakos and District Land Registrar, Machakos respectively.

14. The applicants averred that they were unaware of the two letters till they were supplied with the judgement in Appeal Case Number 112 of 1994, which was heard in 2017, and sought implementation of the same. According to the applicants, upon carrying out a search, they have discovered that Land Number 1943 is currently registered in the name of **Kitavi Katulu** and **Mwania Katulu**; Land Number 2420 is currently registered in the name of Masaku County Council and reserved for Kwangii Secondary School; and the registration of land number 2407 in the names of **Ngui Muloki**, **Musembi Muloki** and **Kavita Muloki** was cancelled awaiting full implementation of the aforesaid letters.

15. The applicants lamented that the Minister decided to implement a judgement whose parcels of land involved were pending judgement in another appeal and should have waited for the decision in appeal no. 112 of 1994 before implementing the decisions in appeals 110 and 111 of 1994 or better still consolidated all the appeals and caused them to be heard together.

16. It was further disclosed that the Minister's letter dated 20th July, 2009 that required that a new map be drawn has now been fully implemented showing land parcel number 1943 at it was prior to the subdivision in readiness for processing a new title document in the interested parties' names while land number 2407 was completely removed from the map on 8th June, 2018. It was therefore the applicants' apprehension that the interested parties would dispose of the new parcel to defeat justice.

Interested Partys' Case

17. On their part the interested parties herein filed a replying affidavit sworn by **Elijah Muema Kitavi**, the 1st interested Party herein and an uncle to the 2nd Applicant, on 20th July, 2018.

18. According to the interested parties, the Applicants have failed to disclose that the matter was litigated on and finalized vide Machakos High Court Civil Appeal Number 30 of 2007 which abated on 17th March 2015. It was therefore averred that the Applicants are time barred to apply for an order of certiorari pursuant to the provisions of Order 53 Rule 2 of the ***Civil Procedure Rules*** as they ought to have sought leave of the court to apply for an order of certiorari at least 6 months from the decision they seek to quash.

19. It was averred that the Applicants have been in an out court, tribunals and adjudication forums with regards to the same subject matter and are now mischievously coming before this court seeking judicial review orders to stall, frustrate or otherwise deny the Respondent their right to property as enshrined in Article 40 of the Constitution.

20. It was the interested parties' case that these proceeding are an academic exercise as the issues the Applicants bring forth are issues that have already been tried and determined. According to them, the contradicting decisions the Applicant speaks of are the decision of the Minister and the decision of the District Commissioner Matungulu. However, according to the interested parties, the District Commissioner Matungulu had no jurisdiction to entertain a matter that was before the High Court vide Machakos High Court Civil Appeal Number 30 of 2007 which abated. The said mater, it was disclosed, was filed by the 2nd Applicant herein against the father of the 2nd interested party and a brother to the 1st interested party.

21. It was therefore averred that in light of the purposeful omission by the Applicants to disclose vital facts about the litigation history of the subject matter, the Applicants have come to a court of equity with tainted hands and therefore they should not be granted the reliefs sought for this reason. The interested parties asserted that in the interest of justice litigation must come to an end and the Applicants must concede they have no other recourse after failing to succeed in previous litigation. In their view, should the court grant the orders sought it will be tantamount to subversion of legal principles of law and the provisions of the ***Civil Procedure Rules***, The Constitution and even the Kamba Customary Law.

22. The interested parties averred that the court has a wide discretion whether to grant relief and if so what form of relief is to be granted taking into account the conduct of the party applying, undue delay, unmeritorious conduct and other factors that disentitle the applicant from the relief sought. In this case, they contended, the conduct of the Applicants and all other factors that the court may rely on greatly disadvantage the Applicant and disentitle him the reliefs sought as is clear from the litigation history of the subject matter and the chronology of events leading to the application before court.

Respondents' Case

23. Similarly, the application was opposed vide a replying affidavit sworn by **Eustace Njagi Kithumbu**, a Senior Assistant Director of Land Adjudication and Settlement, Ministry of Lands and Physical Planning.

24. In his affidavit he set out the history of the dispute and cast aspersions on the decision of the Matungulu Deputy County Commissioner in Appeal No. 112 of 1994 whose authenticity he doubted. In his view, the circumstances of this case and the events leading to the decision in Appeals Nos. 110 and 111 of 1994 made it impossible for the decision in 112 of 1994 to be implemented.

Determinations

25. The facts in this case are not seriously in dispute. The main point of contention based on the agreed facts is that there appears to be two conflicting decisions. Both decisions affect the original land number 1943.

26. The first decision was made in the Minister's Appeals Nos. 110 and 111 of 1994 by the District Commissioner Machakos in which judgement delivered in 2006 by which the entire original land, 1943, was given to the interested parties hence the ex parte applicants' interests therein were extinguished. In respect of the 2nd decision, which arose from Minister's Appeal No. 112 of 1994 by the District Commissioner, Matungulu, made on 8th May, 2018, the decision of the District Land Adjudication Officer that Land Parcel No. 1943 be divided between the applicants and the interested parties equally was upheld.

27. In this case however, the ex parte applicants contend that the Minister has refused to implement the judgement in Appeal No. 112 of 1994, he has similar declined to suspend the decision in Appeals Nos. 110 and 111 of 1994. In fact, the Minister, in 2009 authorised the implementation of the judgement in Appeal Nos. 110 and 111 of 1994 through letters dated 20th July, 2009 and 11th February, 2016 addressed to the District Surveyor Machakos and District Land Registrar, Machakos respectively. Upon carrying out a search, they discovered that Land Number 1943 is currently registered in the name of **Kitavi Katulu** and **Mwania Katulu**; Land Number 2420 is

currently registered in the name of Masaku County Council and reserved for Kwangii Secondary School; and the registration of land number 2407 in the names of **Ngui Muloki**, **Musembi Muloki** and **Kavita Muloki** was cancelled awaiting full implementation of the aforesaid letters. In addition, the Minister has directed that a new map be drawn and that the said directive has been fully implemented showing land parcel number 1943 at it was prior to the subdivision in readiness for processing a new title document in the interested parties' names while land number 2407 was completely removed from the map on 8th June, 2018.

28. From the foregoing it is clear that the Minister is simply implementing the decisions arising from the said appeals. However, what the applicants expected the Minister to do was to refrain from such implementation. It is doubtful whether the Minister can revisit a decision already made on appeal at his behest. As to whether the implementation of a decision as opposed to the decision itself can be the subject of judicial review proceedings, in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001,** it was held that:

> **"Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law."**

29. In this case while the applicants contend that they were unaware of the Minister's letters implementing the decisions in question, they have not contended that they were similarly unaware of the decisions in Minister's Appeals Nos. 110 and 111 of 1994 by the District Commissioner Machakos which were delivered in 2006. Section 9(3) of the ***Law Reform Act*** Cap 26, Laws of Kenya provides:

> ***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 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.***

30. In this case the decisions on appeal were clearly proceedings contemplated under the aforesaid provision hence the period for seeking to quash the said decisions are clearly prescribed as six months which lapsed in 2006. The fact that another decision was made in 2018 did not revive the limitation period.

31. I must however disabuse the notion that an application made within the six months is by that mere fact valid or warranted. It must always be remembered that judicial review remedies are discretionary in nature and one of the factors which would militate against the grant thereof is delay in seeking relief. As was held by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** and **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: "***Speed and promptness are the hallmarks of judicial review.***"** This was emphasised in **Republic vs. Minister For Finance & Another Ex Parte Nyong'o & 2 Others, [2007] eKLR** where **Nyamu, J** (as he was then) stated;

> **"Refocusing on the issue of delay in seeking earlier intervention by the applicants the court must point out again as it has done before, that speed is the hallmark of judicial review…indeed decisions with financial implications must be challenged promptly failing which orders should not issue even where otherwise deserved."**

See also **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**

32. In my view, judicial review acknowledges the need for speedy certainty as to the legitimacy of the target activities. The court's responsibility is that of handling matters before it with speed, efficiency and economy so as to achieve the overall objective of judicial review. See **O'reilly vs. Mackman and Others [1982] 3 All ER 1124.**

33. Judicial review proceedings ought, therefore as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve millions and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.**

34. The issue of delay can therefore be a factor in determining whether or not to grant judicial review, even if merited. This was the position adopted by **Majanja, J** in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** where the learned Judge pronounced himself as hereunder:

> ***"The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review***

become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and Fulham (Respondents) and Other Exparte Burkett & Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,

"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision…But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."

35. In **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**, it was held:

"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s. 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads "unless the High Court considers that there is good reason for extending the period within which the application shall be made" is ultra vires section 9(2) of the Act. *Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose*…As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred."

36. It is therefore clear that applications for judicial review must be commenced within 6 months from the date when the ground for the application arose. The law does not state that the application be made from the date when the applicant became aware of the decision or when the decision was issued to the parties.

37. The applicant has, based on **Republic vs. Kajiado Land Disputes Tribunal Misc. Appl. No. 689 of 2001**, *inter alia*, contended that where the decision sought to be challenged in a nullity, limitation period is inapplicable. However, in that case, what was contended was that the application before the Court was tainted with procedural irregularities in that the decision sought to be quashed was not filed and that no order of certiorari was sought against the Court that adopted the award. Before me however, is not a procedural issue but a jurisdictional issue. Where Parliament has provided for a period within which judicial review proceedings may be commenced, this Court cannot by craft or innovation go round such a legislative edict. As was held in **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**:

"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules...The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists...Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose…"

38. In this case it is clear the decision being challenged was made outside the 6 months' limitation period and the applicant must have appreciated this otherwise she would not be seeking for extension of time. In my view the failure to apply within the time prescribed by the law cannot be ignored pursuant to the provisions of Article 159 of the Constitution. In my view Article 159(2)(d) of the Constitution cannot be a panacea for all ills. It cannot be relied upon to revive a claim which is expressly extinguished by statute since the provision does not give rise to a cause of action. In my view it is not meant to destroy the law but to fulfil it. It is meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issue of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law. Dealing with the said Article of the Constitution, the Supreme Court in Petition No. 5 of 2013**, Raila Odinga versus Independent Electoral and Boundaries Commission & Others [2013] eKLR** expressed itself as follows:

"…...Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our

insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality."

39. An issue that goes to jurisdiction cannot, in my view, be termed a mere technicality. To the contrary the issue goes to the root of the matter since without jurisdiction the Court has no option but to down its tools. As was held in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA** expressed himself as follows:

> **"Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

40. Whereas there is no express provision for extension of time, this Court is however of the view that it is high time the provisions of Section 9 of the ***Law Reform Act*** were amended to provide for extension of time in cases where a strict adherence to the limitation manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period. Whether the Court would be entitled to "read in" a provision for extension of time in line with the new Constitutional dispensation, is outside the scope of this decision since the matter before me is not an application for that purpose.

41. The Court is however, of the opinion that in order to uphold the values of the Constitution, the Court would be perfectly entitled where an Act of Parliament exhibits certain deficiencies which make it insufficient to properly realise the Constitutional aspirations to "read in" the omitted words so as to bring the Legislation in line with the Constitutional aspirations. This in my view is the understanding of Article of 20(3)(a) of the Constitution which provide that in applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom.

42. This remedy was invoked by the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others vs. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17.**

43. In **Roodal vs. State of Trinidad and Tobago [2004] UKPC 78,** the majority in the Privy Council cited with approval the South African case of **State vs. Manamela [2000] (3) SA 1** in which it was held:

> **"Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential."**

44. Even where the Court has jurisdiction to extend time, it is upon the applicant to place before the Court material on the basis of which the Court can exercise its discretion in his favour. In other words, it is upon the applicant to supply the Court with the peg with which the Court can pitch its tent. As was held in **John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163**:

> **"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work… must fall on their shoulders...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent".**

45. It was further contended that the Applicants failed to disclose that the matter was litigated on and finalized vide Machakos High Court Civil Appeal Number 30 of 2007 which abated on 17th March 2015. Whereas abatement of proceedings that have not been heard and determined on merits does not amount to res judicata with respect to subsequent proceedings, such an action may well be deemed as an abuse of the process of the court which may disentitle an applicant to the remedy of judicial review.

46. Having considered the proceedings, herein, it is my view that the same are incompetent. In the premises, the Motion fails and is dismissed but considering the relationship between the applicants and the interested parties and the fact that the Respondent failed to comply with the court's directions to furnish soft copies, there will be no order as to costs.

47. It is so ordered.

Read, signed and delivered in open Court at Machakos this 26th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nzilani for Mr Turunga for the Interested Party

CA Geoffrey