



**Republic v Chairman Land Dispute Tribunal-Siaya & 2 others; Okello (Interested Party); Obinge (Personal representative of the Estate of Obinge Nyamwanda (Deceased) (Exparte) (Judicial Review E001 of 2022) [2023] KEELC 21051 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21051 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
JUDICIAL REVIEW E001 OF 2022  
AY KOROSS, J  
OCTOBER 26, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CHAIRMAN LAND DISPUTE TRIBUNAL-SIAYA ..... 1<sup>ST</sup> RESPONDENT**

**PROVINCIAL LAND APPEAL COMMITTEE- NYANZA ..... 2<sup>ND</sup> RESPONDENT**

**PRINCIPAL MAGISTRATE COURT- SIAYA ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**LEONIDA APAT OKELLO ..... INTERESTED PARTY**

**AND**

**MARGARET ALOO OBINGE (PERSONAL REPRESENTATIVE OF THE  
ESTATE OF OBINGE NYAMWANDA (DECEASED) ..... EXPARTE**

**RULING**

**Introduction**

1. This ruling is in respect of the notice of preliminary objection dated 17/03/2021 raised by the ex parte applicant in which she raised the following point of law: -
  - a. The interested party's notice of motion offends Section 9(2) and (3) of the *Law Reform Act* and Order 53 Rules 1 and 2 of the Civil Procedure Rules which requires that leave to file an application for judicial review must be filed within 6 months from the date of judgment or decision.



2. It is significant I delve into the background of the matter in dispute. The ex parte applicant's husband Obinge Nyamwanda ('deceased') filed a claim before Siaya Land Disputes Tribunal ('tribunal') against the interested party.
3. The subject of the dispute was land parcel no. 615/Migwena/South Sakwa ('suit property'). After hearing the parties, the tribunal in its decision rendered on 28/3/2000 awarded the interested party a portion of the suit property. In the presence of both parties, this decision was adopted as a judgment of the court in Siaya PM Misc. Case No. 58 of 2000 on 03/08/2000.
4. Dissatisfied, the deceased preferred an appeal to Nyanza Land Dispute Appeals Committee ('committee'). Parties were heard and an award was made on 7/10/2010 in which the tribunal's award was upheld. This decision was adopted by the subordinate court on 10/05/2011.
5. On 7/7/2011, the ex parte applicant sought leave to institute judicial review proceedings to quash the tribunal and committee's decisions. Leave was granted on even date and a substantive notice of motion was filed on 27/7/2011. It was not prosecuted and was subsequently dismissed on 19/07/2016. The dismissal order was set aside on 18/03/2022.
6. It appears the matter was transferred from Kisumu High Court to Kisumu ELC before its eventual transfer to this court. Before the notice of motion could be disposed of, the interested party filed the notice of preliminary objection that is the subject for determination.
7. The court directed the preliminary objection to be canvassed by way of written submissions. Accordingly, both parties complied by filing their respective submissions.
8. From the record, the Office of the Attorney General has never been made a party to these proceedings and this may explain the absence of the respondents from these proceedings.

#### **Interested Party's Submissions**

9. Her counsel, Mr. Ochanyo filed his written submissions dated 19/05/2023. Counsel identified a single for resolution; whether the application for leave to institute judicial review proceedings was time barred and whether time could be extended.
10. Counsel submitted Section 9(2) and (3) of the *Law Reform Act* and Order 53 Rule (2) of the *Civil Procedure Rules* categorically stipulated judicial review proceedings of certiorari could not be commenced outside the stipulated window period of 6 months from when the decision sought to be quashed was rendered. In the circumstances of this case, it was 6 months from when the tribunal and committee made their respective awards. Counsel relied on the decision of *Republic vs Director of Land Adjudication and Settlement & 2 Others* (2017) eKLR.

#### **Ex Parte Applicant's Submissions**

11. Her counsel, Mr. Oyuko, filed his written submissions dated 26/05/2023 in which he adopted the interested party's issue. Counsel submitted the decision of the committee was adopted as a judgment of the court on 10/05/2011 and therefore time started to run from this date and it therefore followed the application for leave was filed timeously.
12. Counsel also identified two other issues for determination; whether the preliminary motion was merited and what about costs. Counsel contended the preliminary objection was not merited and costs should be awarded to the ex parte applicant.



## Analysis and Determination

13. Having considered the pleadings, preliminary objection, rival submissions, provisions of law and the authorities cited by the interested party, the following issues which shall be handled simultaneously arise for determination: -
- I. Whether the preliminary objection raises pure points of law.
  - II. Whether the judicial review proceedings were time barred.

### I. Whether the Preliminary Objection Raises Pure Points of Law.

14. The case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (1969) EA 696 has long settled the principle of preliminary objections. A preliminary objection must be on a point of law and it is premised on the assumption that all the facts pleaded by the other side are correct. At page 700 paragraphs D-F, Law JA had this to say:-

“...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

15. In the preliminary objection, the interested party contended this court lacked jurisdiction to hear and determine a statutory barred case. No doubt, this is a pure point of law which may determine the matter without necessarily considering the merits of the substantive notice of motion. I find the preliminary objection raises a pure point of law.

### II. Whether The Judicial Review Proceedings Were Time Barred.

16. Section 9(2) and (3) of the *Law Reform Act* stipulates thus: -

- “(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.
- (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 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.”



17. These provisions of law are replicated within the provisions of Order 53 Rule (2) of the [Civil Procedure Rules](#) which provides as follows: -

“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.”

18. The Court of Appeal in [Wilson Osolo v John Ojiambo Ochola & Another](#) 1995 eKLR held :-

“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 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 of the Laws of Kenya which gives some limited right for extension of time to the suits after expiry of a limitation period. But this Act also has no relevance here.”

19. A similar position was taken in [Republic vs. Director of Land Adjudication and Settlement \(Supra\)](#) which stated: -

“Section 9 of the *Law Reform Act*, Cap 26 is very explicit in the time frame within which an order for certiorari may be applied and has similar provisions as the Civil Procedure Rules aforesaid. Section 9(3) of the *Law Reform Act* read together with Order 53 Rule 2 are couched in mandatory terms; Leave shall not be granted unless an application for leave is made not later than 6 months after the date of the decision.”

20. From the arguments of both counsels, it is apparent the mandatory statutory period of 6 months was not in dispute. What was in dispute was when time started to run. Mr. Ochanyo argued time started to run from when the decision was awarded by the tribunal and committee while Mr. Oyuko was adamant time commenced from when the committee’s decision was adopted as a judgment of the court.

21. The stance taken by these counsels is not novel and their respective positions have been the subject for determination by courts of concurrent jurisdiction. Two schools of thought emerged; one of the view that time started to run from when the award was made by the tribunal while the other of the opinion time commenced from the date when the award was adopted as a judgment of the court. Since these decisions were made by courts of concurrent jurisdiction, they are not binding on this court.

22. The decision of [Republic v Kajiado Central Land Dispute Tribunal & 8 others Ex-Parte Daniel Nkatete Nasha](#) [2017] eKLR held that time for purposes of judicial review proceedings commenced from the date when the award was made when it held: -

“It is trite that the decision that is to be quashed by this court is that of the Tribunal and not the magistrate. I say so because the Magistrate, pursuant to the provision of Section 7(1) of the Land Disputes Tribunals Act, was only supposed to enter judgment “in accordance with the decision of the Tribunal” ...In the circumstances, I agree with the Interested Parties’



advocate's Preliminary Objection and submissions that the suit is fatally defective for having been filed after the lapse of six months from the date of the decision of the Tribunal."

23. A similar position was taken in *Republic v Machakos Land Disputes Tribunal & Another Ex parte Geoffrey Mwanzia Muathe* [2012] eKLR where the court stated as follows: -

"To my mind the application is bound to fail or succeed on the single issue, whether these proceedings were commenced on time. The law is clear that judicial review proceedings seeking orders of certiorari must be commenced within 6 months of the making of the decision sought to be quashed. In the circumstances of this case, whereas the 1<sup>st</sup> respondent's award sought to be quashed was made on 17<sup>th</sup> June, 2005 as evidenced by the applicant's own prayer 1 in the Notice of Motion, these proceedings were commenced on 9<sup>th</sup> May, 2006 almost 11 months later. It is therefore apparent that the proceedings were brought outside the mandatory 6 months period provided for under Order 53 of the Civil Procedure rules. On that premises and order of certiorari cannot issue." (Sic)

See also *Republic v Chairman Machakos District Land Disputes Tribunal & another Ex parte Nancy Kamene Maingi & another* [2017] eKLR.

24. A contrary position has been taken in several decisions. In the case of *Joab Shiundu Macheso v Ndivisi Land Disputes Tribunal & another* [2013] eKLR the court stated and found: -

"Therefore it is my finding that time begins to run from the date of adoption as that is when the award is read out to the parties. If it were to be looked at differently, as some schools of thought have held that time runs from the date of award, then it is mandatory that the tribunal notifies all parties of its decisions and time then runs from the period when the parties are deemed notified of the award."

25. In *An application of Herbert Mwadhi Mulewa for leave to apply for orders of certiorari and prohibition (sic) and the Kaloleni Resident Magistrate Court, Land Award no.33 of 2003 btn Kitsao Mangi Yaa, Shida Mangi Yaa and Herbert Mwadhi Mulwa and the Land Dispute* [2004] eKLR the court stated:-

"Section 7 of the Land Disputes Tribunal Act provides as follows:-

It is clear from this section that the proceedings before the Tribunal are concluded when its decision has been made a judgment of the court. Before that is done, no decree can issue and the Tribunal decision is not enforceable. The six months' period provided for the making of applications for Certiorari in the case of the Land Disputes Tribunal proceedings in my view therefore starts to run from the date of entry of judgment by the court. This application is therefore not time barred and is properly before court."

See also *Republic v Chairman, Gatundu South Land Disputes Tribunal & 3 others Ex parte Lazaro Nduati Gitau* and *Republic v Mwea Land Dispute Tribunal & 2 others* [2008] eKLR.

26. As earlier stated in this ruling, the proceedings and decisions sought to be quashed are those of the tribunal and committee which were respectively rendered on 28/03/2000 and 7/10/2010 and time started to run from the date of these decisions; the former in respect of the tribunal's decision and the latter on the committee's decision.



27. The ex parte applicant did not seek to quash the adoption of the awards by the subordinate court. This court is alive that under Section 7 (2) of the repealed Land Disputes Tribunals Act, the magistrate was mandatorily required to adopt the award. This provision provided as follows: -
- “The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.”
28. As for the decision of the committee, time could only start running from when the award of the committee was rendered. This was so because under Section 8 (8) and (9) of the repealed *Land Disputes Tribunal Act* which was couched in mandatory terms, the decision of the committee was final and an appeal could lie to the ELC only on points of law.
29. I agree with Mr. Ochanyo that the limitation period of 6 months commenced from the day the tribunal and committee rendered their respective decisions and not from the time the court adopted the awards.
30. I find the motion was statutory barred and my hands are tied. I sympathize with the ex parte applicant because she appears to have a good case and she is at liberty to pursue other legal avenues to approach this court and ventilate her case.
31. In the end, I find the preliminary objection is merited and hold the view that the notice of motion dated 26/07/2011 is incompetent, devoid of merit and bad in law. It is hereby struck out. Considering the circumstances of this case, there shall be no orders as to costs.

**DELIVERED AND DATED AT SIAYA THIS 26<sup>TH</sup> DAY OF OCTOBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

