



**Nchabari v Kiryanyama & 6 others; Republic (Applicant); Cabinet Secretary,
Ministry of Land and Physical Planning (Respondent); Mutegi & 2 others
(Interested Parties) (Environment and Land Miscellaneous Application
E004 of 2023) [2023] KEELC 21955 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21955 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2023**

LG KIMANI, J

NOVEMBER 28, 2023

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

IN THE MATTER OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

**IN THE MATTER OF THE CABINET SECRETARY,
MINISTRY OF LAND AND PHYSICAL PLANNING**

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT, CAP 40, LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF CERTIOARI BY TITUS MUTEGI MAKIRA AGAINST
THE MINISTERS DECISION IN MINISTERS APPEAL CASE NO. 390/2022**

BETWEEN

STEPHEN MUTEGI PHILIP NCHABARI APPELLANT

AND

MUSIOKI KIRYANYAMA 1ST RESPONDENT

PATRICK MURITHI 2ND RESPONDENT

MUTUGI KIRYANYAMA 3RD RESPONDENT

BENJAMIN MAKIRA KIRYANYAMA 4TH RESPONDENT



KIYOGI KARIUNGI 5TH RESPONDENT
MUTEMI MUTUGI 6TH RESPONDENT
PIUS KINYUA MATI 7TH RESPONDENT

AND

REPUBLIC APPLICANT

AND

**THE CABINET SECRETARY, MINISTRY OF LAND AND PHYSICAL
PLANNING RESPONDENT**

AND

STEPHEN MUTEGI INTERESTED PARTY

PHILIP NCHABARI INTERESTED PARTY

THE HON ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The Ex parte applicant filed Amended Chamber Summons dated 7th day of August 2023 and amended on 21st September 2023 seeking the following orders:
 1. Spent
 2. Leave be granted for the Applicant to apply for an order of certiorari out of time against the decision of the Respondent, the Cabinet Secretary Ministry of Land and Physical Planning allowing the appeal in Minister's case No.390/2022 in favour of the Interested party purporting to have the names for the titles be registered in the name of the interested party.
 3. The leave so granted do operate as a stay of the decision of the Respondent of the Respondent made on 28/09/2022.
 4. Costs of and incidental to the application be provided for.
 5. Such further and other reliefs that the Honourable Court may deem expedient to grant.
2. The Application was supported by the affidavit of the Applicant filed in court on 7th August 2023 and the supplementary affidavit sworn on 3rd November 2023. The Applicant states that the decision of the Minister was made in breach of the rules of natural justice, it was biased, illegal, arbitrary and unreasonable and that it put into account irrelevant considerations and failed to take into account all relevant considerations. The ex-parte applicant further claimed that the decision was reached without disclosure of the specific particulars of the evidence of both facts and law.
3. The ex-parte applicant states that he went through the entire adjudication process on account of the suit land and at the time of the Minister's appeal, he was served with an undated summons for the hearing of the Minister's Appeal No. 390/2022 but was not served with any information, materials or evidence that was to be relied on the appeal to prepare his case. After attending the hearing on 26th July 2022, the decision was rendered in favour of the Interested party on 28th September 2022 without his knowledge.



The Respondent's and 2nd Interested Party's grounds of opposition

4. State Counsel representing the Attorney General filed grounds of opposition dated 9th October 2023 opposing the instant application on the following grounds:
 - 1) The period between when a decision was made by the Deputy County Commissioner on the 28th of September 2022 to the time the Applicant filed for leave to institute judicial review proceedings is more than 6 months.
 - 2) The Applicant has failed to demonstrate that he has a good reason for failing to file the judicial review application for orders of certiorari within the time allowed by statute or sufficiently account for the delay.
 - 3) There is an inordinate delay in making this application for an extension of time, against the provisions of Order 53(2) of the *Civil Procedure Rules*, 2010.
 - 4) The applicant has made a prayer for an extension of time to apply for an order of certiorari but cited no law nor authority to support this prayer.

The Ex-parte Applicants' supplementary affidavit

5. In a supplementary affidavit the ex parte applicant deposed that he was not informed when the decision of the Minister's appeal would be delivered despite visiting the Deputy County Commissioner's offices severally and was issued with title deeds to the suit lands in July 2023 before he was given the decision.
6. In July 2023 he went to find out about the Minister's decision but to his shock he was told that the decision was delivered on 28th September 2022 despite him asking about it in July 2023 and this necessitated the delay.
7. The ex-parte applicant states that he immediately took steps to visit the land offices in Nairobi to obtain the certified copy of the decision of the Minister which was issued to him on 17/7/2023 and proceeded to file this application out of the statutory timelines. He stated that the delay was not so inordinate and pleaded with the Court to allow his application for leave to file for the judicial review order of certiorari as the said decision would have adverse effects on his proprietary rights and that of his family.

The hearing of the application

8. The hearing of the application proceeded on the 9th of November 2023 and Counsel for the ex-parte applicant relied on Articles 159(2), 22(3), 23(4), 40, 47(2) and 48 of the *Constitution of Kenya* and Section 9(3) of the *Law Reform Act*.
9. Counsel submitted that the delay is 4 months after the expiry of the 6-month limitation period and has been explained and stated that the court has the jurisdiction to extend the time within which to file for the orders. He relied on the decision of the Hon. Emukule in *Apex Finance International Ltd & another v Kenya Anti-Corruption Commission* (2012) eKLR. Counsel submitted that the decision relates to illegality and thus is a nullity as was held in the above authority.
10. The ex-parte applicant further prays for a stay of the said decision, stating that it is yet to be implemented and that his client has a title deed to the suit land.
11. In opposition thereof, state counsel for the respondent and 2nd interested party submitted that the ex-parte applicant has not provided any reason for the failure to make the application in good time. She



submitted that since the decision was delivered on 28th September 2022, the delay for a year is contrary to Section 9 of the [Law Reform Act](#) and Order 53 of the [Civil Procedure Rules](#).

12. It was also submitted that the ex-parte Applicant was present for the hearing as required by Article 47 of the [Constitution](#) and it would be unfair to grant the orders sought since the applicant had time to put in the application within the statutory period.

Analysis and Determination

13. The Applicant seeks to leave to file for a judicial review order of certiorari out of the 6-month limitation period. Section 9 of the [Law Reform Act](#) has a similar provision to Order 53(1) of the [Civil Procedure Rules](#) (2010) which provides for leave of court in the filing of an application for judicial review and states that:

“Applications for mandamus, prohibition and certiorari to be made only with leave.

- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
- (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

14. Nyamweya J. in the case of [Republic v Registrar of Companies & another Ex parte Prakla East Africa Limited; Prakla Bobrtecknic GMBH \(Interested Party\)](#) [2021] eKLR broke down the reasons an application for leave and stay pending the substantive Judicial Review Application.

“I have considered the arguments made by the parties herein, and the applicable law for leave to commence judicial review proceedings, namely Order 53 Rule 1 of the [Civil Procedure Rules](#). The main reason for the leave as explained by Waki J. (as he then was), in [Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others](#), Mombasa HCMCA No. 384 of 1996, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

15. In the case of [Uwe Meixner & another v Attorney General](#) [2005] eKLR cited by State Counsel for the 1 and 2nd Respondents, the Court of Appeal held that:

“The leave of the court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion.”

16. The court has noted that the applicant herein was not a party to the appeal to the minister case number 390 of 2022. The parties to the said appeal are named in the application herein and the applicant herein states that he is suing on behalf of the Respondents in the said Appeal to the Minister where the parties were [Stephen Mutegi Philip Nchabari v Musyoki Kiryanyama, Patrick Muriithi, Muturi Kiryanyama, Benjamin Makira Kiryanyama, Kiyogi Kariungi, Mutemi Mutugi and Pius Kinyua Mati](#). In the attached proceedings before the Minister, it is stated that the Applicant herein appeared on behalf of the Respondents before the Minister.

17. Among the documents attached to the application herein though the same are not mentioned in the affidavit in support of the application is an undated Power of Attorney said to be donated by the



above-named persons to Titus Mutegi Makira, the Applicant herein and the same states that he is so appointed

“to be our Power of Attorney and act on our behalf to pursue and proceed with our appeal to the Minister till it’s finality”

18. The court notes that the said power of Attorney is not registered as required by the law and the same is also limited to representing the said persons in their appeal to the Minister. The same does not mention representation in this case. Section 4 of the [Registration of Documents Act](#) sets out documents that are required to be registered and states;

“All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over the immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:”

19. In the case of [Francis Mwangi Mugo v David Kamau Gachago](#) [2017] eKLR the court found that registration of a Power of Attorney was a prerequisite to filing a suit on behalf of the donor since it vests the donee with the capacity to file the suit and failure to register was fatal to the suit. The court stated as follows;

“In our case, I think the more fatal omission is not necessarily payment of the stamp duty, important as it is, but the failure to register the power of attorney before filing suit, for to me, it is that act of registration which then vests the donee with the capacity to deal with the immovable property claimed by the donor. The power of attorney in this instance, is not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, falls under the purview of capacity, for one cannot act for another without having the legal capacity to do so. I hold the view, that before a donee of a power of attorney can act, on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to have the capacity to act.”

I do not think capacity is a technicality curable under Article 159 of the [Constitution](#). It is either you have it or you do not. You do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo, in my view did not have capacity because he had not registered the power of attorney. I therefore have no option but to strike out the suit with costs which shall be paid by the said Francis Mwangi Mugo.”

20. The above position was upheld where the issue of non-registration of the Power of Attorney was not raised by the opposing party in the case of [Kenneth Omollo Simbiri & another v Daniel Ongor](#) [2020] eKLR where the court held;

“In the present case, the Respondent did not raise the issue of the legality of the power of attorney or the standing of the Appellant’s Attorney in their statement of defence or during the hearing. The court is under an obligation to evaluate the case in its totality and if there is any anomaly or illegality with the process which is mandatory in nature then the court cannot sanitize such anomaly or illegality even though it was not raised as an issue for determination. The court also has an obligation to frame issues from the pleadings or summarize the issues put forth by the parties.”

21. Capacity or locus standi goes to the root of the case and cannot be termed as a technicality that can be salvaged by Article 159 of the [Constitution](#) and the court finds that the Applicant in this case does not



have the capacity to sue on behalf of the persons who were parties to the Appeal to the Minister case 390 of 2022 where the parties were *Stephen Mutegi Philip Nchabari v Musyoki Kiryanyama, Patrick Muriithi, Muturi Kiryanyama, Benjamin Makira Kiryanyama, Kiyogi Kariungi, Mutemi Mutugi and Pius Kinyua Mat.*

22. The upshot of the above is that the Amended Chamber Summons dated 7th day of August 2023 and amended on 21st September 2023 is found to be incompetent and the same is hereby struck out with costs to the Respondent and the 2nd Interested Party.

DELIVERED, DATED AND SIGNED AT KITUI THIS 28TH DAY OF NOVEMBER 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

The ruling read in open court and virtually in the presence of-

J. Musyoki - Court Assistant

M/s Mwangi holding brief for Ngira for Respondent

Maingi for Applicant

