



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**JUDICIAL REVIEW MISC. APPLICATION NO. 49 OF 2018**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR**

**ORDER OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: THE LETTERS DATED 13<sup>TH</sup> JULY 2016**

**AND**

**IN THE MATTER OF: THE COMPANY ACT CAP 486 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE BOARD OF DIRECTORS OF RUKURIRI TEA FACTORY COMPANY LIMITED**

**BETWEEN**

**NYAGA MUBIRI & 3 OTHERS**

**AND**

**RUKURIRI TEA FACTORY COMPANY LIMITED**

**BETWEEN**

**JOSEPH R. KITHINJI.....1<sup>ST</sup> APPLICANT**

**ANN GACIUKI.....2<sup>ND</sup> APPLICANT**

**WILFRED MUCHIRA KINYUA.....3<sup>RD</sup> APPLICANT**

**NYAGA MUBIRI.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**RUKURIRI TEA FACTORY COMPANY LIMITED.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. The applicants filed the application dated 17<sup>th</sup> September 2018 in which they seek the following orders;

*a) That this Honourable Court be pleased to grant the applicant leave to bring certiorari proceedings to move into court and to quash the order and/or decision(s) and/or proceedings taken by the Respondent as more particularly exhibited in its decision of*

letters dated 13<sup>th</sup> July 2016 where the respondent purported to bar the applicants from delivering their green tea leaves to the respondent buying centre through a decision taken retrogressively and without affording the applicants an opportunity to be heard.

b) That this Honourable Court be pleased to grant the applicant leave to bring prohibition proceedings directed against the respondents and ordering it, to refrain, stop and cease from barring the applicants from delivering their green tea leaves to the respondent buying centre.

c) That this Honourable Court be pleased to grant the Applicant leave to bring mandamus compelling the respondent to reverse in their entirety the purported decisions contained in the letter dated 13<sup>th</sup> July 2016 and restore status quo ante in favour of the applicants to deliver their green tea leaves to the respondent buying centre.

d) That the grant of leave in the prayers herein above do operate as a stay of the decisions, or proceedings, and/or orders of the respondents, and principally the decision taken on 13<sup>th</sup> July 2016 by the Respondent pending hearing and determination of these proceedings.

e) That the costs of this application be provided for and/or be in the cause.

2. On the 28<sup>th</sup> September 2018 the respondent entered appearance and filed a notice of preliminary objection based on the grounds that the claim of the applicants is time-barred and should not be entertained.

### **B. Applicant's case**

3. In reply to the respondents notice of preliminary objection, the applicants through the applicant deposed that having been aggrieved by the respondent's decision moved the Principal Magistrate's Court in Runyenjes but their suit was dismissed as the court lacked jurisdiction.

4. The applicants further deposed that they subsequently instructed their advocate to seek remedy in the High Court as directed by the principal magistrate's court but their advocate delayed and they sought to move this court in their personal capacity.

5. The applicants deposed that the preliminary objection by the respondent amounted to a technicality and urged this court to grant them audience as Article 159 (d) of the Constitution provided that justice shall be administered without undue regard to technicalities.

### **C. Respondent's Case**

6. It was submitted on behalf of the respondent that that this court lacked jurisdiction to entertain the applicants case for being time-barred. The provisions of **Section 8 and 9 of the Law Reform Act** as well as **Order 52, Rule 2 of the Civil Procedure Rules** were cited which restrict an application for judicial review to 6 months from the date of the decision sought to be quashed. It was submitted that the decision in the instant case was made in 2016.

7. The respondent submitted that they relied on the cases of **Civil Appeal No. 27 of 1989** by the Court of Appeal sitting in Kisumu and that of **Meru ELC Case No. 67 of 2009** which provided that the 6 months' period is statutory and cannot be extended.

8. The respondent further submitted that the justification by the applicants that the delay was due to their advocate was irrelevant.

### **D. The Determination**

9. From the court record it is evident from the judgement of the lower court that the applicants instituted their claim at Runyenjes court sometime in 2016. The judgement was delivered on the 16<sup>th</sup> August 2018. The current judicial review application was filed in this court on the 17<sup>th</sup> September 2018.

10. I have considered the issues raised by the respondent, the response by the applicant as well as the law and their respective submissions.

11. **Section 9 (3) of the Law reform Act [22]** provides as follows: -

*"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."*

12. The above provision is replicated in **Order 53 Rule 2 of the Civil Procedure Rules, 2010** in the following words: -

*"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."*

13. The respondent relied on the case of **Republic Vs Director of Land Adjudication and Settlement & 2 Others [2017] eKLR** where the court held in a case where judicial review proceedings were brought eighteen (18) months late.

*I therefore hold and find that the application for leave to file judicial review was brought out of time.... It is hereby dismissed.....*

14. In the case of **Ako Vs Special District Commissioner Kisumu & Another** it was held: -

*It is plain that under Section 9(3) of the law Reform Act Cap. 26, leave shall not be granted unless the application for leave is made inside six (6) months after the judgment. The prohibition is statutory and is therefore not challengeable under the procedural provisions of the Civil Procedure Rules.....*

15. I am in agreement with the respondents that the applicants claim is statutorily time-barred and should not be entertained. The reasons given by the applicant for the delay cannot alter the provisions of the law. This is not a matter where the court can exercise its discretion.

16. I find the preliminary objection merited and I uphold it thereby dismissing the proceedings accordingly with costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Ithiga for Respondents**

**Applicant in person**