



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION JR NO. 185 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

AND

KIAMBU LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

HON. D A OKUNDI (PRINCIPAL MAGISTRATE,

KIAMBU LAW COURTS.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

THEDROUS CHEGE KINUTHIA.....1ST INTERESTED PARTY

THINDIGUA CO. LIMITED.....2ND INTERESTED PARTY

EX PARTE: WAMBUI CHEGE MACHARIA

RULING

Introduction

1. By an Amended Chamber Summons dated 22nd June, 2015, the applicant herein **Wambui Chege Macharia**, seeks leave to apply for an order of certiorari to remove into this Court and quash the proceedings and award of the Kiambu Land Dispute Tribunal in case No. LND/16/20/22/2009. The applicant and seeks that she be allowed to file both the application for leave and the substantive motion out f the statutory period.

2. According to the applicant, he is the allottee of ballot no. 365 issued to her by the 2nd interested party herein for land parcel no. LR 76/748 (hereinafter referred to as “the Suit Land”), while her co-allottee is **Teresia Wanjiku**. However the 1st interested party herein filed a claim before the Kiambu Land Dispute

Tribunal (hereinafter referred to as “the Tribunal”) claiming ownership of the suit land and seeking that the applicant be declared a trespasser and be evicted.

3. On 7th January, 2010, the Tribunal ruled that the said land was duly registered to the 1st interested party and that the applicant’s co-allottee and that the applicant were trespassers and were ordered to vacate the same. That decision/award was subsequently adopted as a judgement of the Court by the 2nd Respondent (hereinafter referred to as “the Court”) on 4th March, 2010.

4. It was the applicant’s case that the decision of the Tribunal failed to take into consideration that that she had impliedly acquired ownership of the suit land by virtue of sections 27 and 28 of the repealed ***Registered Land Act***, Cap 300 and that the Tribunal went beyond its mandate by adjudicating on matters concerning acquisition of land and ownership hence this application.

5. It was submitted that although it would appear that these proceedings are caught up by limitation, in actual fact this is not the position since the Tribunal had no jurisdiction to adjudicate over disputes relating to ownership of registered land and title hence its decision as merged with the judgement of the Court was a nullity ab initio. T the applicant in the premises the 6 months limitation does not apply. To the applicant, this dispute could only be determined by a filing a suit since issues such as adverse possession ought to have been canvassed.

6. It was submitted that there can be no limitation in respect of an action that is null and void since justice would implore the High Court to exercise its supervisory role over inferior tribunals to strike out nullities. In support of this contention the applicant relied on **Republic vs. Kajiado Land Disputes Tribunal Misc. Appl. No. 689 of 2001, Lukenya Ranching and Farming Co-operative Limited vs. Machakos Land Disputes Tribunal & 2 Others Misc. Appl. No. 162 of 2007 and Republic vs. Ndaragwa Division Land Dispute Tribunal Judicial Review No. 18 of 2013.**

7. It was submitted that the delay in bringing the application for review could be attributed to the fact that the ex parte applicant is 80 years old and illiterate and only became aware of the said proceedings on being served with an order to vacate the property

Respondents’ Case

8. In opposition to the application, the Respondents raised the following preliminary objections:

1. **That the ex parte application herein is fatally defective and offends the provisions of the Law Reform Act sections 9(2) and (3) Cap 26 Laws of Kenya.**

2. **That the ex parte application is frivolous and vexatious thus an abuse of the Court process.**

9. It was submitted on behalf of the Respondents that there was inordinate delay by the applicant in pursuing her rights for a period of 6 years yet no sufficient reasons were advanced to explain the same. It was submitted that since the instant application offends against section 9(2) and (3) of Cap 26, this Court lacks jurisdiction hence cannot grant the prayers sought. The Respondents relied on the Supreme Court decision in **Re: The Matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011.**

Determinations

10. I have considered the foregoing.

11. In my view, the Respondent is raising the issue of limitation. That limitation goes to the jurisdiction is a position adopted in **Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998** where it was held by the Court of Appeal that a preliminary objection based on limitation can be taken for the first time on appeal because it goes to jurisdiction.

12. Section 9(3) 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.

13. Judicial review proceedings ought 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.**

14. In **Republic vs. The Minister For Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** it was held that legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.

15. 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.” [Emphasis mine].

16. It is therefore clear that applications for judicial review must be commenced within 6 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.

17. 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...”

18. 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 ignore 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.”

19. 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”.

20. 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 limitations 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.

21. 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.

22. 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.**

23. 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”.

24. 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”.

25. In this case, there is no explanation at all in the verifying/supporting affidavit as to why the applicant did not move the Court within the prescribed time. A rather belated attempt was made in the submissions by way of speculation to surmise that the day may have been caused by the applicant’s age. With due respect such speculation will not do. The exercise of discretion must be based on factual issues and not on speculation. In legal proceedings, evidence ought not to be introduced by way of submissions. As was held by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:**

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

26. The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

27. Similarly in in Ngang’a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

28. It follows that there is no basis upon which the applicant’s failure to institute these proceedings within the prescribed time can be excused. As was held By a three judge bench comprising **Bosire, Mboghli-Msagha & Oduk, JJ** in Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993, the requirement for leave is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. This is meant:

“firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

See **Waki, J** (as he then was), in Republic vs. County Council of Kwale & Another ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996

29. Before I pen off, I must comment on the joinder of the Magistrate in her personal capacity in these proceedings. Whereas Order 53 rule 3(2) of the **Civil Procedure Rules** states that where the application relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the

notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings, in my view the correct party is the Court itself and not the particular presiding officer since judicial review proceedings being public law remedies are ordinarily issued against public bodies as opposed to private ones unless the latter carry out public functions.

30. It follows that the preliminary objection raised herein succeeds with the result that the application for leave as well as these proceedings are incompetent.

Order

31. In the result, these proceedings are misconceived and are struck out with no order as to costs as the issue of jurisdiction has not been determined.

32. It is so ordered.

Dated at Nairobi this 24th day of October, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Chege representing the 1st interested party

CA Mwangi