



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

MISCELLANOUS APPLICATION E001 OF 2022

JAMES KIOKO MAUTA.....APPLICANT

-VERSUS-

CABINET SECRETAY,

MINISTRY OF LANDS AND PHYSICAL PLANNING1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

-AND-

WANZAU NZUMBI.....1ST INTERESTED PARTY

WANZAU NZUMBI.....1ST INTERESTED PARTY

LABAN KISILU NZUMBI.....2ND INTERESTED PARTY

MWALIMU MULI.....3RD INTERESTED PARTY

LAMUEL KISINGU MBWIKA.....4TH INTERESTED PARTY

RULING

1. The application before court is an ex parte Chamber Summons dated 10th January 2022. The same is brought under Order 53 Rules 1 and 2 of the Civil Procedure Rules and Sections 8 and 9 Law Reform Act CAP 26 Laws of Kenya and seeks the Courts leave to apply for the following orders;

a) AN ORDER OF CERTIORARI to remove into this Honorable Court and quash the decision by the 1st Respondent in allowing Appeal to the Minister Case Number 146 of 2020 against Land Parcel Number 1831 at Ngwani Adjudication Section, Mutomo Sub County and directing the said parcel to be transferred to LAMUEL KISING’U MBWIKA on 3rd November 2020.

b) AN ORDER OF PROHIBITION against the 1st Respondent, their agents or anybody acting under them, restraining them from implementing their decision of 3rd November, 2020 and transferring Land Parcel Number 1831 Ngwani Adjudication Section, Mutomo Sub County to LAMUEL KISINGU MBWIKA

c) AN ORDER OF MANDAMUS directing the 1st Respondent, their agents or anybody acting under them to transfer the Parcel of Land Number 1831 Ngwani Adjudication Section, Mutomo Sub County, Kitui County to JAMES KIOKO MAUTA.

d) Any such other or further orders or direction as the Honorable Court may deem just and equitable to grant in the circumstances, for the end of justice to be met.

The said application is based on the grounds that;

I. The Applicant bought the whole Parcel of Land Number 1831 Ngwani Adjudication Section, Mutomo Sub County, Kitui County

from the 1st Interested party in the year 2015 after the area had been declared an Adjudication Section and the portion was demarcated to and recorded in the register in the name of WANZAU NZUMBI.

II. The suit land had been under occupation and use by the 1st Interested Party since 1945 and it was part of a previously larger block that comprised of two other Parcels being Numbers 1829 & 1832 Ngwani Adjudication Section (hereinafter referred to as “adjacent parcels”), which the 1st Interested Party had sold one to the 3rd Interested Party and the other she gifted the 2nd Interested Party (her step son) respectively.

III. During Adjudication processes the three parcels were demarcated to and registered in the name of the 1st Interested Party, however the 4th Interested Party laid claim on all the three Parcels of land and the Adjudication Committee and the Board who heard the parties awarded all the three parcels to the 1st Interested Party.

IV. At the objection level, the adjacent parcels were awarded to the 4th Interested Party while the suit land was awarded to the 1st Interested Party.

V. The 4th Interested Party appealed to the 1st Respondent as against the suit land being awarded to the 1st Interested Party which Appeal was allowed and directions issued for transfer of the Parcel to the 4th Interested Party in a process that was illegal, irrational and procedurally improper.

VI. The 2nd and 3rd Respondents did not participate in the Appeal, however in the Committee and the Board they were represented by the 1st Interested Party.

VII. The Applicant participated in the Appeal and was also present during the Committee and Board Sitzings, but he was never accorded an opportunity to be heard in the case, despite him being in occupation and use of the suit land from year 2015.

VIII. The Applicant felt aggrieved by the way his concerns were casually dismissed at the Appeal to Minister hearing, having acquired the suit land for valuable consideration without any knowledge of defect in the title to the said land.

IX. The finding that since, there were no Appeal on Parcels Numbers 1829 & 1832 which were part of the same Block with 1831 previously, was an indication that the 1st Interested Party was satisfied with the decisions in the adjacent parcels and hence it followed that Parcel Number 1831 should belong to the 4th Interested Party, was itself an irrational, improper and oppressive conclusion which is against the rules of natural justice.

X. The Applicant has developed the suit land, planted trees and cultivated crops therein, which he now fears will be destroyed and he stands to suffer irreparably if prayers sought are not granted.

2. The application herein was filed on 10th January 2022 under certificate of urgency and was presented to the court on 17th January 2022. The court directed that the application be served and heard inter partes on 31st January 2022. The reason for directing that the application be served even though the same is ex parte was for the reason that the application is said to be brought under Section 9 (1) (b) Law Reform Act Section 9 (3) provides that;

“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, prescribed under any written law...”

and Order 53 Rule 3 of the Civil Procedure Rules

“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.”

3. The above two sections of the law prohibit the court from granting leave to a party to apply for an order of certiorari unless the application for leave is made not later than six months after the date of the proceeding.

4. In the present case the judgement subject matter of the proceedings herein was delivered on 3rd November 2020 while the present application was filed on 10th January 2022 a period beyond the required six months. The applicant served the application on the Respondents and the interested parties but none of them appeared.

5. The applicant through his counsel submitted that the Applicant became aware of the decision subject matter of the proceedings herein on 7th December 2021. Counsel relied on the case of **R.VS District Commissioner Keiyo & 2 Others ex-parte Robert Kisingiroi Lotyang (2018) e KLR** for the submission that there is no time limit for applying for certiorari to quash null proceedings because nullities can be quashed any time. Efforts by the court to obtain the authority have not yielded fruit.

6. When dealing with a similar issue, the Court of Appeal in the case of **Joseph Malakwen Lelei & another v Rift Valley Land Disputes**

Appeals Committee & 2 others observed that: -

“Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity. See Macfoy v. United Africa Co. Ltd 1961 3 All ER 1169; Re Continental Credit Finance Ltd [2003] 2 EA 399; Owners of Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited (1989) KLR 1.” (Emphasis added)

We agree with the opinion of a 3-Judge bench of the High Court in **Republic Vs. Judicial Commission of Inquiry into The Goldenberg Affair & 3 Others Ex Parte Malulu & 3 Others** (supra) that “nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle to the nature of nullities”.

7. The applicant seeks to quash the decision of the 1st Respondent on the ground that the same is illegal, irrational and procedurally improper. That he was also not given an opportunity to be heard. In my view the applicant has not shown that the decision subject matter of the proceedings herein was a nullity. There is no claim that the Minister lacked jurisdiction to hear and determine the appeal before him and on the face of the proceedings that issue of whether or not the decision is a nullity is not apparent.

8. Judicial review as a relief is provided for in among others; Article 23 (3) of the Constitution of Kenya 2010, section 8 of the Law Reform Act Chapter 26 Laws of Kenya, section 13(7) of the Environment and Land Court Act 2011, section 7 of the Fair Administrative Action Act 2015 and the Common law. In my view, no leave is required to seek judicial review as a relief under Article 23(3) of the Constitution where proceedings are instituted to enforce the Bill of Rights under Article 22 of the Constitution or where proceedings have been brought under section 7 of the Fair Administrative Action Act, 2015 for the review of an administrative action. Such leave is also not required under the Environment and Land Court Act 2011 before such relief is sought.

9. Leave is however still required where an applicant for judicial review moves the court under the Law Reform Act Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules. Following the promulgation of the Constitution of Kenya, 2010 and Fair Administrative Action Act, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under the Constitution of Kenya 2010 and/or the Fair Administrative Action Act, 2015 in which case they will not need leave of the court. Applicants can also choose to go for the same relief under the Law Reform Act Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the court. I find that having elected to seek leave to apply for judicial Review under the Law Reform Act and Order 53 of the Civil Procedure Rules, the applicant is bound by the six-month condition given for the grant of leave to apply for an order of certiorari under Section 9 (3) of the Law Reform Act and Order 53 (3) of the Civil Procedure Rules.

10. **In the Joseph Malakwen Lelei & another** case (supra) the court went further and observed that the strict application of the six-month rule would be unimpeachable when considering a decision properly made within the jurisdiction of a tribunal. The court stated as follows;

Did the learned Judge so wrongly exercise his discretion as to warrant our interference" We are afraid so. It is clear from the brief ruling that the learned Judge took a strict approach to the 6-month limitation period and concluded that the application before him was incompetent. Ordinarily, such a conclusion would be unimpeachable but, in the matter before the learned Judge, what was being challenged was not a decision properly made within jurisdiction against which time could run. Rather it was a nullity which amounted to nothingness. It was therefore incapable of commencing a reckoning of time and was definitely incapable of triggering a statutory bar, being in every respect barren and of no effect. Had he given full consideration to the nature of the order being challenged before him he would likely have arrived at a different decision.

11. I further find that the leave sought to apply for orders of Prohibition and Mandamus are dependent on the grant of leave to apply for an order of certiorari and the said prayers cannot stand on their own.

For the foregoing reasons I find that the application dated 10th January 2022 is incompetent having been filed outside of the six-month period provided under Section 9 (3) of the Law Reform Act and Order 53 (3) of the Civil Procedure Rules and the same is hereby dismissed.

DELIVERED, DATED AND SIGNED AT KITUI THIS 28TH DAY OF FEBRUARY, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

C. Nzioka.....Court Assistant

Kilonzi Advocate.....for the Appellant/Applicant

Mbaluka Advocate.for the Respondent