



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 382 OF 2014

REPUBLIC.....APPLICANT

VERSUS

LAND DISPUTES TRIBUNAL, KARURI.....1ST RESPONDENT

SENIOR PRINCIPAL MAGISTRATE'S

COURT KIAMBU.....2ND RESPONDENT

RACHEL WANJIKU WAIGIINTERESTED PARTY

RULING

1. Through the Chamber Summons application dated 3rd October, 2014 the Applicant, Karuchi Waigi prays for orders as follows:

“1. THAT the Applicant be given leave to apply for judicial review for an order of certiorari to remove into the High Court and quash and set aside the orders made by the Land Disputes Tribunal, Karuri and the Senior Principal Magistrate’s Court Kiambu on 4th day of May 2000 and 15th day of August 2001 in Tribunal Case No. LND/116/20/24/99 and Civil Case No. 25 of 2000 respectively.

2. THAT an order of prohibition prohibiting the senior Principal Magistrate’s Court from issuing any further orders in Civil Case No. 25 of 2000.

3. THAT an order of mandamus do issue compelling the respondents to terminate forthwith Kiambu Senior Principal Magistrate Civil Case No. 25 of 2000.

4. THAT the grant of leave to apply for orders of certiorari and prohibition do operate as a stay of all proceeding in the Kiambu Senior Principal Magistrate’s court relating to this matter pending the hearing and final determination of the application for certiorari, prohibition and mandamus.

5. THAT the costs of this application be provided for.”

2. The application is supported by a statutory statement and a verifying affidavit sworn by the Applicant which were filed together with the application.

3. The judicial review orders are proposed to be sought against the Land Disputes Tribunal, Karuri as the 1st Respondent and Senior Principal Magistrate's Court, Kiambu as the 2nd Respondent.
4. According to the Applicant, the Interested Party, Rachel Wanjiku Waigi, instituted proceedings against him before Karuri Land Disputes Tribunal in Case No. LND/116/20/24/99 claiming half interest in his L.R. No. Kiambaa/Karuri/T589. After hearing the matter, the 1st Respondent awarded half a portion of his land to the Interested Party.
5. The award by the 1st Respondent was later read and adopted as the judgement of the court by the 2nd Respondent in Kiambu Senior Principal Magistrate's Court Civil Case No. 25 of 2000. His parcel of land was later sub-divided into two and one portion registered in the name of the Interested Party as Kiambaa/Karuri/T976. He was subsequently evicted by the Interested Party.
6. It is the Applicant's case that the 1st Respondent lacked jurisdiction to hear a case involving the determination of title to land. Further, that the adoption of the decision of the 1st Respondent by the 2nd Respondent was therefore null and void.
7. The respondents, although said to have been served with the application, did not respond to the same.
8. The Interested Party opposed the application through her replying affidavit sworn on 25th November, 2014. The Interested Party's position is that the case the Applicant seeks to terminate, to wit **Kiambu SPMCC Land Case No. 25 of 2000 (PMCC No. 307 of 2004)**, was concluded many years ago and the judgement fully executed when the Applicant was evicted from the suit property by a court bailiff on 15th September, 2009.
9. The Interested Party accused the Applicant of failing to disclose that he had filed **Nairobi High Court Judicial Review Misc. Application No. 110 of 2010**, over the same matter and it was dismissed on 21st March, 2012.
10. The Interested Party also exhibited a ruling issued in **Nairobi High Court Misc. Case No. 750 of 2009 Karuchi Waigi v Racheal Wanjiku Waigi** on 9th February, 2010, dismissing the Applicant's application for leave to file appeal out of time against the decision of the 2nd Respondent.
11. For record purposes it is noted that the Interested Party passed on as the matter was pending. This being an application for leave and considering that the same could proceed *ex parte*, I did not find it necessary to await the substitution of the deceased Interested Party. It is only after leave has been granted that the question of substitution can be considered in earnest.
12. The only question to be addressed through this ruling is whether the Applicant has met the threshold for the grant of leave to apply for judicial review orders.
13. Once an applicant establishes an arguable case, the court should grant leave. In **Aga Khan Education Service Kenya v Republic ex-parte Seif [2004] eKLR** the Court of Appeal stated:

“We think both Mr. Inamdar and Mr. Kigano are generally agreed on the principles of law applicable in these matters. They are agreed that in order to enable a judge to grant leave under Order 53, there must be prima facie evidence of an arguable case and for that proposition both counsel rely on this Court's decision in: IN THE MATTER OF AN APPLICATION BY SAMUEL MUCHIRI WANJUGUNA & 6 OTHERS and IN THE MATTER OF THE MINISTER FOR AGRICULTURE AND THE TEA ACT, Civil Appeal No. 144 of 2000 in which the Court approved and applied the principles to be found in the English case of R v SECRETARY OF STATE, ex p. HERBAGE [1978] 1 ALL ER 324 where it was stated thus:

“It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave – see Halsbury’s Laws of England, 4th Edition Vol 1 (1) paragraph 167 at page 1276.”

So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth.”

14. Leave is not, however, granted as a matter of course. An applicant needs to convince the court that there are sufficient grounds for granting the orders which are proposed to be sought once leave has been granted.

15. The Applicant herein seeks leave to apply for an order of certiorari in regard to a judgement that was executed in 2009. Five years have since lapsed. In accordance with Order 53 Rule 2 of the Civil Procedure Rules, 2010, an application for leave to apply for order of certiorari must be sought within six months from the date of the decision being challenged.

16. Order 53 Rule 2 of the Civil Procedure Rules, 2010 is in the same terms with Section 9(3) of the Law Reform Act. In the case of **Ako v Special District Commissioner Kisumu & another 163[1989] KLR** the Court of Appeal expressed its opinion on Section 9(3) of the Law Reform Act in the following words:

“It is plain that under sub-section (3) of Section 9 of Law Reform Act Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of Section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of sub-section (3) of section 9 of the Law Reform Act.”

17. It is clear therefore that an application for leave to apply for an order of certiorari must be made within six months from the date of the decision being challenged.

18. In fact, in the already cited case of **ex-parte Seif**, the Court of Appeal opined that leave should not be granted **“where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there are, therefore, no prospects at all of success.”**

19. It is therefore clear that the Applicant cannot be granted leave to commence judicial review proceedings with a view to quashing a decision that was made many years ago.

20. What about the application for leave to commence judicial review proceedings and apply for an order of prohibition? In **Paragraph 123 (Page 273) of the 4th Edition (2001 Reissue Volume 1(1) of Halsbury’s Laws of England**, the learned authors discuss the nature of certiorari and prohibition.

21. In regard to an order of prohibition they state that:

“A prohibiting order is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority or body which is susceptible to judicial review which forbids that court or tribunal or authority or body to act in excess of its jurisdiction or contrary to law.... Whereas quashing orders are concerned with decisions in the past, prohibiting orders are concerned with those in the future.”

22. In the case of **Kenya National Examinations Council v Republic, ex-parte Geoffrey Gathenji Njoroge & 9 others, Civil Appeal No. 266 of 1996** the Court of Appeal expressed its opinion on the use of a prohibition order as follows:

“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128..... The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition”

23. An order of prohibition therefore looks into the future. Its aim is to stop a wrong from being committed or the continuation of such a wrong.

24. In the case before me, the Applicant seeks leave to apply for an order of prohibition to prohibit the 2nd Respondent from proceeding with **Kiambu SPMCC No. 25 of 2000**. The evidence placed before the Court is that the matter was long concluded and the judgment executed. Nothing therefore remains to be prohibited. An order of prohibition cannot therefore issue in such circumstances and it would be a futile exercise to grant leave to the Applicant to apply for an order which the court is not in a position to issue.

25. The Interested Party’s affidavit also shows that the Applicant has not been forthright with the Court. The Applicant failed to disclose that he had filed **Nairobi High Court JR No. 110 of 2010, Republic v Kiambu senior Principal Magistrates Court & another** which was dismissed by Warsame, J (as he then was) on 21st March, 2012. The Applicant also failed to disclose that his attempt to apply for leave to file an appeal out of time against the decision of the 2nd Respondent was rejected by Waweru, J on 9th February, 2012 in **Nairobi High Court Misc. Case No. 750 of 2009, Karuchi Waigi v Racheal Wanjiku Waigi**.

26. A perusal of the papers filed in court by the Interested Party shows that the Applicant only filed **JR No.110 of 2010** after his request for leave to appeal out of time was rejected in **Misc. Case No. 750 of 2009**. Instead of seeking a review or appealing against the decision to dismiss his case for want of prosecution in **JR No.100 of 2010**, he has instead filed a fresh matter. There is an identifiable pattern of abuse of the court process by the Applicant. Failure to disclose previous litigation is also a good ground for denying an applicant leave to commence judicial review proceedings.

27. In view of what I have stated above, I decline to grant leave to the Applicant to apply for judicial review orders as prayed in the chamber summons application dated 3rd October, 2014. The application is therefore dismissed.

28. There will be no orders as to costs.

Dated, signed and delivered at Nairobi this 23rd day of Oct., 2015

W. KORIR,

JUDGE OF THE HIGH COURT