



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW 4 OF 2019

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OUT OF TIME BY PETER MWIKA M'IMAINGI FOR THE ORDER OF CERTIORARI**

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO'S 1570 AND 5730 KARAMA ADJUDICATION SECTION

AND

IN THE MATTER OF TIGANIA EAST OBJECTION NO. 2442 OF 2016

PETER MWIKA M'OMAINGI.....1ST EXPARTE APPLICANT

ANICIETA NKUNU.....2ND EXPARTE APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

SILAS MUGAMBI.....1ST INTERESTED PARTY

JOSEPH NTOMBURA.....2ND INTERESTED PARTY

RULING

1. Before the court is a preliminary objection dated 28.1.2020 brought by the respondent on the basis that the exparte applicants offended the provision of **Sections 8 and 9 of the Law Reform Act Cap 26** while applying for leave to institute the proceedings.
2. The respondent relied on holding in ***Republic –vs- Public Procurement Administrative Review Board & Another exparte Teachers Service Commission [2015] eKLR, Republic –vs- Mwangi Nguyai & 3 Others exparte Haru Nguyai [2013] eKLR.***
3. The 2nd interested party in his submissions dated 7.2.2022 submitted the impugned decision was made on 22.11.2016 whereas the application seeking leave was made on 5.3.2019 contrary to **Order 53 Rule 2 of the Civil Procedure Rules** hence it was outside the statutory six months. This court therefore lacks jurisdiction to entertain the entire proceedings. He relied on ***Republic –vs- Council of Legal Education & another exparte Subina Kasamia & Another [2018] eKLR.***
4. Through written submissions dated 22.9.2020, the exparte applicant opposed the preliminary objection asserting that in his chamber summons dated 5.3.2019, he sought for leave to file out of time an application for an order of certiorari to remove the decision of Karama adjudication, Tigania East District land adjudication officers award of 22.11.2016 to this court to be quashed among other prayers.

5. That by a ruling dated 18.9.2019, the court granted the orders sought after which he filed the notice of motion within the stipulated 21 days. He relied on Republic –vs- Kenya Revenue Authority Exparte Stanley Mombo Amuti [2018] eKLR urging the court to find as held that, the court had powers to extend time in line with the King’s Bench in Rookey’s Case.
6. Further, solace was sought in Republic –vs- Speaker of National City Council Assembly Exparte Evans Kidero [2017] eKLR on the proposition that **Order 50 Rule 6** was applicable to judicial review, the inherent powers of the court to extend time and Article 48 on the right of access to justice and lastly Equity Bank Ltd –vs- Westlink MBO Ltd [2016] eKLR on the proposition that courts of law existed to administer justice by balancing the competing rights or interests of different parties but within the confines of law to ensure that the ends of justice are met and the inherent powers of the court was the authority.
7. After the chamber summons dated 5.3.2019 was filed, the court directed for its service and gave a hearing interpartes for 24.4.2019 and 6.5.2019 respectively.
8. The record indicates that the respondent raised the issue now filed as a preliminary objection. The court delivered its ruling on 18.9.2019 based on the pleadings before it which included a replying affidavit sworn on 23.4.2019 by Joseph Ntombura for the respondent.
9. In Longinus Oroni Murunga –vs- David Masika Mafumbo [2017] eKLR the Court of Appeal was faced with a situation where leave to commence judicial review was lodged outside the timelines for a prayer of certiorari and a preliminary objection filed thereafter on both the six months rule and the non-filing of the notice of motion within 21 days. The court proceeded to strike out the notice of motion.
10. The court held though **Article 159 (2) (2)** abhorred undue regard to technicalities of procedure and advocates for the overriding objective for just, expeditious, proportionate and affordable resolution of disputes, such did not apply to timelines limited by law for instituting court proceedings.
11. As a parting shot, the court stated that since the application was filed out of time and the time had not been extended by the court the decision to strike out the application was correct.
12. In the instant case, the leave was granted after an interpartes hearing. The respondent and interested parties were heard on merits. Therefore, the preliminary objection in my view is res judicata in line with **Section 7 of the Civil Procedure Act. See Centre for Peace and Democracy (CEPAD) Board of Directors –vs- Non-Governmental Organizations Co-Ordination Board [2014] eKLR.**
13. In Biren Amritlal Shah & another –vs- Republic & 3 others [2013] eKLR, the Court of Appeal held that there was no provision for review by a superior court of its own decision in judicial review once rendered, in line with Section 8 (5) of the Law Reform Act Cap 26.
14. In Republic –vs- Maseno University Staff Disciplinary Committee & Another [2009] eKLR, the Court of Appeal held that a decision of a council was not an order of court, a judgment or a decree or proceedings and that if that decision was found to be a nullity, then an order of certiorari should lie even if challenged after the six months and that a nullity could be subject of the six months period because it did not exist and so it could be challenged outside the six months.
15. In view of the foregoing, it is obvious the current matter is distinguishable since the application for leave had sought for not only leave but also an extension of time to lodge the application for leave out of time. The court in my view considered the circumstances and the opposition by the interested parties and the respondents but nevertheless granted leave.
16. The court pronounced itself on the issues before it and granted leave to commence the proceedings. The notice of motion was thereafter filed and served upon the respondents and the interested party. There was no appeal against the said ruling.
17. Similarly, other than the preliminary objection, the respondent has put no response to the notice of motion. In my view, once the chamber summons was heard interpartes and determined, the issue of leave became spent.
18. The court is not faced with an application for review but a preliminary objection disguised as an appeal. The court cannot sit on appeal of its own orders. If the respondent and the interested parties were aggrieved or prejudiced by the grant for leave to lodge judicial review proceedings, there were two causes of action. One was to appeal against the order granting leave and secondly file a response to the notice of motion and still argue out the issue during the hearing of the substantive motion.
19. This court cannot therefore relitigate the issues again and or sit on its own judgment. The preliminary objection is therefore dismissed with costs.
20. Parties to file their responses and written submissions within 60 days from the date hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23RD DAY OF MARCH, 2022

In presence of:

Exparte applicant - present

Kieti for 1st and 2nd respondents

Karimi for 1st interested party

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE