



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**JUDICIAL REVIEW NO.10 OF 2020**

**IN THE MATTER OF AN APPLICATION OF GIDEON KANDAGOR & PHILEMON KANDAGOR FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI AND PROHIBITION**

**-AND-**

**IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 284) LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF LAND PARCEL BARINGO/KAPCHOMUSWO 'A'/208 IN KAPCHOMUSWO ADJUDICATION  
SECTION (BARINGO CENTRAL SUB-COUNTY)**

**-AND-**

**IN THE MATTER OF THE DECISION OF THE DEPUTY COUNTY COMMISSIONER BARINGO SUB COUNTY**

**BETWEEN**

**GIDEON KANDAGOR & PHILEMON KANDAGOR (suing as the administrators of the estate of**

**Hosea Kimeres Kandagor).....APPLICANTS**

**VERSUS**

**THE DEPUTY COUNTY COMMISSIONER BARINGO CENTRAL..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, LANDS**

**HOUSING AND URBAN DEVELOPMENT .....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF LANDS**

**ADJUDICATION SETTLEMENT.....3<sup>RD</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT**

**THE COUNTY LAND ADJUDICATION**

**AND SETTLEMENT OFFICER BARINGO.....5<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....6<sup>TH</sup> RESPONDENT**

**-AND-**

**CHARLES KIGEN..... INTERESTED PARTY**

## RULING

1. This ruling was prompted by the Interested Party's preliminary objections raised through the notice dated the 6<sup>th</sup> December, 2021, raising four (4) grounds that:

a) the Judicial Review Application dated 5<sup>th</sup> October 2020 was incurably defective and bad in law;

b) it is statutory time barred as it was filed outside the six (6) months period contrary to section 9(2) of the Law Reform Act Cap 26 and Order 53 rule 2 of the Civil Procedure Rules;

c) that the Applicant did not seek leave to institute judicial review application outside the six (6) months period as it challenged decisions delivered by the District Commissioner Baringo on 6<sup>th</sup> March, 2012, which was more than eight (8) years ago; and

d) the application is scandalous, frivolous, vexatious, wholly misguided and without merit.

2. The court gave directions on filing and exchanging submissions on the preliminary objection on the 7<sup>th</sup> December, 2021. That during the subsequent mention of 8<sup>th</sup> February, 2022 the learned counsel for the Respondents indicated that they will not participate in the preliminary objection. The learned counsel for the Interested Party and the Applicant filed their submissions dated the 17<sup>th</sup> December, 2021 and 7<sup>th</sup> February, 2022 respectively.

3. It is the submissions of the Interested Party that the decision sought to be reviewed was that of the District Commissioner of Baringo delivered on 6<sup>th</sup> March, 2012, which was made more than eight years ago. That though leave to apply for judicial review orders was granted on the 22<sup>nd</sup> September, 2020, the court should find that section 9(2) and (3) of the Law Reform Act, and Order 53 Rule 2 of the Civil Procedure Rules barred the grant of leave to file Judicial Review decisions if the application was made 6 months after the date of the decision subject of the application was delivered. That as more than eight years have lapsed since the decision was made, the judicial review application should be dismissed. The learned counsel cited several superior courts decisions including Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Limited (1969) EA 696, Republic v District Tigania East and West, Deputy County Commissioner & Another Ex parte Stephen Kathuthu Michuki Kiunga (Interested Party) (2021)eKLR, Joram Kaberia v District Land Adjudication and Settlement Officer & 2 Others (2018) eKLR, Rosaline Tubei v Patrick K. Cheruiyot & 3 Others (2014) eKLR, and Republic v District Commissioner, Narok North District & 4 Others Ex parte Jane Naserian Enelokula (2016) eKLR, in support of their submissions.

4. That the Applicants submitted that they sought for, and obtained leave to apply for the judicial review application in Eldoret ELC Misc Application No. 22 of 2020, and filed this substantive application on the 1<sup>st</sup> October, 2020. They conceded that Order 53 Rule 1 & 2 of the Civil Procedure Rules and section 9 of the Law Reform Act chapter 26 of Laws of Kenya provide a time frame of six (6) months within which to seek for leave to apply for the judicial review orders. They submitted that Zacheus Kimeres had acted for the estate of the late Hosea Kimeres in the Minister's appeal without authority or a grant. That due to that fraud and in accordance with section 26 of the *Limitation of Actions Act chapter 22 of Laws of Kenya*, time did not start to run until middle of April 2020 when they got to know of the minister's decision and that the preliminary objection should be dismissed with costs. The learned counsel for the Interested Party cited the following superior court decisions in support of their submissions; Alba Petroleum Limited v Total Marketing Kenya Limited (2019) eKLR, Republic V Kenya Revenue Authority Ex parte Stanley Mombo Amuti (2018) eKLR, Republic v Speaker of the Senate & Another Ex parte Afrison Export Ltd & Another (2018) eKLR, and Republic v Mwangi Nguyai & 3 Others Ex parte Harun Nguyai (1913) eKLR.

5. The court has carefully considered the grounds on the preliminary objection, the parties' learned counsel written submissions, superior courts decisions cited and come to the following findings;

a. A preliminary objection is supposed to raise a pure point of law that does not require interpretation of facts or production of evidence. That for a preliminary objection to succeed, the breach of law should be self-evident upon being pointed out. That though the Interested Party at ground 1 (b) of his notice has stated that the Applicants had not sought for leave to apply for leave to seek for judicial orders outside the six months stipulated in the law, that has not been countered by the Applicants, who have only alleged fraud on the part of Zacheus Kimeres and sought refuge under section 26 of the Limitation of Actions Act. The margin notes on that section reads "*Extension of limitation period in case of fraud or mistake*". That Applicants have not submitted that they had sought for leave before moving the court in Eldoret ELC Misc. Application No. 22 of 2020 for leave to apply for the prerogative orders sought herein.

b. That in any case, various superior courts decisions have taken the position that the provisions of Order 53 of the Civil Procedure Rules and section 9 of the Law Reform Act do not provide for extension of time ones the six months' period from the date of the impugned decision has lapsed. That section 9 of the Law Reform Act provides for among others the power to make rules "requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order"... and at sub-section (2) and (3), provides that "Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe **that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.** (3) 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." (emphasis added). That it is clear that section 9(1) required that any rules enacted to govern civil procedure cover the grant of leave to seek orders of prohibition, mandamus or certiorari. Section 9(2)

requires that these rules bar applications made outside the six (6) months from the date the decision or process under review was decided or undertaken. Section 9(3) also provides as much as regards a six-month time limit within which applications for leave to apply for the orders can be brought.

c. That it is unarguable that the rules contemplated by section 9 of the Law Reform Act are in Order 53 of the Civil Procedure Rules 2010 which governs applications for orders of judicial review of mandamus, certiorari and prohibition. Specifically, Order 53 Rule 2 provides that:

“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.” (emphasis added).

That the application before the court is about the decision of Baringo Deputy County Commissioner of 6<sup>th</sup> March 2012, which was made over eight years before the application for leave was filed. The application clearly flies in the face of Section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules. There is therefore no doubt that on the ground that the application for leave to apply for judicial review orders, and the instant subsequent application were both filed outside the six months prescribed by the law, the Interested Party’s preliminary objection has merit.

d. That the application filed after the leave was granted is the one headed as follows;

“EX-PARTE

CHAMBER SUMMONS

“Under Order 53 Rules 1 and 2 of the Civil Procedure Rules 2010 & section 8 and 9 of the Law Reform Act”.

That the application that is required to be commenced through chamber summons is the one for leave. That after leave is granted the substantive application for the judicial review writs is under Rule 3 of the said Order required to be by notice of motion. The Rule provides as follows;

“3 (1) when leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion.....”(Emphasis added).

That though the form through which the application herein was brought has not been challenged by the parties and may not be in issue in view of Article 159(2)(b) of the Constitution, the court has found it necessary to restate the position of the Rule as above.

e. That had the Exparte Applicants moved the court under Articles 22, 23(3) and 47 of the Constitution, section 7 of the Fair Administrative Actions Act, 2015, and section 13(7) of the Environment and Land Court Act 2011, they probably would not have been caught up with the issues of limitation, and the need to seek for leave first being raised by the Interested Party now in objection to their application. That the foregoing provision of the Constitution and the Statutes do not require leave to be sought before application for judicial review orders. They also do not limit parties to move the court within only six months from the date of the impugned decision.

f. That from the foregoing the court finds merit in the Interested Party’s preliminary objection, and the application for judicial review orders herein is hereby struck out with costs.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 16TH DAY OF MARCH 2022.**

**IN THE VIRTUAL PRESENCE OF;**

**EX - PARTE APPLICANTS .....**

**RESPONDENTS ..... *Absent***

**INTERESTED PARTY .....**

**COUNSEL ...*Mr. Kipnyekwei for Exparte Appicant* .....**

**...*mr. Kiptoo for Interested Party* .....**

COURT ASSISTANT: ONIALA

**S.M.KIBUNJA, J.**

**ELC ELDORET**