



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E L C. MISC. APPL. NO. 3B OF 2021

**IN THE MATTER OF AN APPLICATION BY DAVID TANUL, KISANG YANO, DAVID KIPKORE KIBENDO
AND NELSON CHELIMO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI**

AND

IN THE MATTER OF THE DECISION BY THE MINISTER IN ADJUDICATION

IN MAINA SECTION OVER PLOTS NUMBER 951, 955, 1839 AND 374

AND

IN THE MATTER OF SECTIONS 21, 22, 23, 24, 25, 26, 27 AND 28 OF THE LAND ADJUDICATION ACT, CAP 284

AND

IN THE MATTER OF SECTIONS 29 AND 31 OF THE LAND ADJUDICATION ACT, CAP 284

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

DAVID TANUL.....1ST APPLICANT

KISANG YANO.....2ND APPLICANT

DAVID KIPKORE KIBENDO.....3RD APPLICANT

NELSON CHELIMO.....4TH APPLICANT

AND

DEPUTY COUNTY COMMISSIONER, (MARAKWET EAST).....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

LAND ADJUDICATION AND SETTLEMENT OFFICER, MARAKWET EAST.....3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....4TH RESPONDENT

CHIEF LAND REGISTRAR.....5TH RESPONDENT

AND

PETER CHERUIYOT.....INTERESTED PARTY

RULING

{NOTICE OF PRELIMINARY OBJECTION DATED THE 24TH SEPTEMBER, 2021}

1. The Interested Party filed the notice of preliminary objection dated the 24th September, 2021 raising the ground that the “court lacks jurisdiction to hear and determine this Judicial Review application for the reason that the same is statute (*sic*) barred and or time-barred under Sections 8 and 9 of the Law Reform Act, Cap 26, Laws of Kenya.”

2. The court gave directions on filing and exchanging written submissions on the 29th September, 2021, 24th November, 2021 and 15th February, 2022. The learned counsel for the Interested Party filed their written submissions dated the 29th October, 2021, and on the 15th February, 2022 when this matter was last in court, the learned counsel for the Applicants was granted last opportunity to file their written submissions to the preliminary objection by the 18th February, 2022, but none had been filed by the time of preparing this ruling.

3. The record shows that the Applicants filed the Chamber Summons application under certificate of urgency dated the 8th April, 2021 seeking to be “*granted leave to institute judicial review proceedings against the Respondent ..*” The orders to be sought after leave is granted are indicated to be *inter alia*:

i. “An order of certiorari to remove to this Honourable Court for the purposes of being quashed, the 1st Respondent's entire decision delivered on 28th November 2018 on appeal from the decision of the 3rd Respondent dated 31st October 2016 the award of PLOTS NUMBER 951, 955, 1839 and 374 Maina Adjudication Section.

ii. An Order of Mandamus directed at 1st, 3rd, 4th and 5th Respondents requiring it to immediately enter the names of the Applicants upon the adjudication register and title documents be prepared in favour of the Applicants.

iii. That the decision by the 1st Respondent in favour of the Interested Party dated 28th November 2018 in respect of PLOTS NUMBER 951, 955, 1839 and 374 be stayed pending the hearing and determination of this Application.

iv. That the decision by the 1st Respondent in favour of the Interested Party dated 28th November 2018 in respect of PLOTS NUMBER 951, 955, 1839 and 374 be stayed pending the hearing and determination of this suit.”

That filed with the said application is the Statutory Statement and Verifying Affidavit of even date among others. The Applicants' application is primarily founded on the ground that the Interested Party's appeal to the Minister was lodged after the 60 days' period stipulated in section 29(1) of the Land Adjudication Act, chapter 284 of the Laws of Kenya.

4. The Interested Party opposed the aforementioned application for leave to apply for judicial review orders through the replying affidavit by PETER CHERUIYOT KISANG sworn on the 24th September, 2021, in which he among others pointed out that the Adjudication Officer's decision in the ensuing dispute was delivered on 31st October, 2016; that the Interested Party being aggrieved by the aforementioned decision lodged an appeal to the minister on 20th December, 2016 when he made the requisite payment and was issued with a receipt number 7721363 on the same date, and that the verdict in the said appeal was delivered on the 28th November, 2018, in his favour.

5. The Interested Party then filed the Notice of Preliminary Objection, subject matter of this ruling, contending that the Applicants application offends the provisions of sections 8 and 9 of the Law Reform Act, Chapter 26, Laws of Kenya, and should be dismissed with costs.

6. The following are the issues for the court's determinations;

1) *Whether the ground on the preliminary objection raises a pure point of law that is capable of being determined without calling for evidence.*

2) *Whether the Applicants' application for leave dated the 8th April 2021 is statute time barred.*

3) *Who pays the costs.*

7. The court has carefully considered the ground on the preliminary objection, learned counsel's submissions, superior courts decisions cited thereon, and come to the following determinations;

a. That the Supreme Court in the case of HASSAN ALI JOHO & ANOTHER V SULEIMAN SAID SHAHBAL & 2 OTHERS cited the leading decision on preliminary objections, that is the case of MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD. (1969) EA 696, where the court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

That from the foregoing, I find that the Interested Party’s preliminary objection herein invokes the provisions of section 8 and 9 of the Law Reforms Act, and that ground therefore constitute a pure point of law, that raises a jurisdictional question that is capable of being determined without calling for evidence from the parties. The preliminary objection if upheld is also capable of disposing of the Applicants’ application for leave to file the judicial review application.

b. That the crux of the Interested Party’s preliminary objection is captured in the provisions of Section 9(3) of the Law Reform Act, which provides as follows:

“(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 Order 53 Rule 2 of the Civil Procedure Rules contains a similar provision which provides as follows:

“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 from the parties’ pleadings, the decision that the Applicants seek for leave to apply to quash by an order of Certiorari was delivered on 28th November, 2018. That the Applicants’ application for leave to file a judicial review application was filed on the 8th April, 2021, which was obviously over two (2) years and four (4) months after the decision in contention as issued.

c. That in the case of AKK V CHILDRENS’ COURT, MILIMANI; SMM (INTERESTED PARTY) [2019] eKLR the court upheld a preliminary objection raised on the basis of section 9(3) of the Law Reforms Act and Order 53 Rule 2 of the Civil Procedure Rules, and held as follows:

“The instant application is therefore time barred in relation to any orders of certiorari to quash the orders made on 31st January 2018 as the application was made after six months from the date of the said orders, and this Court therefore has no jurisdiction to grant any leave to bring judicial review proceedings to quash the said order.”

And in the case of JOSEPH R. KITHINJI & 3 OTHERS V RUKURIRI TEA FACTORY COMPANY LIMITED [2018] eKLR the court held as follows:

“I am in agreement with the respondents that the applicants claim I (sic) statutorily time-barred and should not be entertained. The reasons given by the applicant for the delay cannot alter the provisions of the law. This is not a matter where the court can exercise its discretion.”

d. That in view of the provisions of the Statute, Rules and case law set out above, the court is persuaded by the observation made by the court in the case of *Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006*, cited with approval in the case of TEACHERS SERVICE COMMISSION V EX-PARTE PATRICK M NJUGUNA [2013] eKLR where it was held that;

“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 million 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..... 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.”

e. That the Applicant’s application for leave dated and filed on the 8th April, 2021 was filed long after the time prescribed by the Statute and the Rules, and is therefore time barred.

f. The Applicants had also indicated that they would be seeking for an order of Mandamus, but I am of the considered view that the order of Mandamus is pegged on the success for leave to apply for an order of Certiorari, and that order being granted. That as the application for leave to apply for the order of Certiorari has not issued, the application for an order of Mandamus would be without basis and hence unsustainable under the circumstances.

g. That as the court recently opined in the ***Eldoret ELC JR NO. 10 OF 2020, Republic v The Cabinet Secretary, Lands, Housing and Urban Development & Others, Exparte Gideon Kandagor & Another, [unreported]***, had the Exparte Applicants herein moved the court under *Articles 22, 23(3) (f) 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 by the issues of limitation of time, and the need to seek for leave to apply for the prerogative orders first, that is being raised by the Interested Party now in objection to their application. The foregoing provisions of the Constitution and statutes do not require leave to be sought before applying 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.

8. That in conclusion, I find that the Interested Party’s preliminary objection dated 24thSeptember, 2021 has merit, and is hereby upheld, and the Judicial Review application dated the 8th April, 2021 is struck out with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 27TH DAY OF APRIL, 2022

S.M.KIBUNJA

JUDGE

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

EXPARTE APPLICANTS:.....

RESPONDENTS:ABSENT

INTERESTED PARTY:

COUNSEL: ...Ms.Ghati for Tigoi for 1st to 5th Respondents

COURT ASSISTANT: ONIALA

S.M.Kibunja,J.

ELC ELDORET