



**Republic v Cabinet Secretary-State Department for Lands & Physical Planning
& 2 others; Otieno & 3 others (Exparte Applicants); Ojwang & 4 others
(Interested Parties) (Environment and Land Judicial Review Miscellaneous
Application E006 of 2024) [2025] KEELC 3575 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E006 OF 2024**

FO NYAGAKA, J

APRIL 23, 2025

BETWEEN

REPUBLIC APPLICANT

AND

**THE CABINET SECRETARY-STATE DEPARTMENT FOR LANDS &
PHYSICAL PLANNING 1ST RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER SUBA SUB-
COUNTY 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

SAMWEL L. OTIENO EXPARTE APPLICANT

TIMSON O. OTIENO EXPARTE APPLICANT

ERASTUS O. OTIENO EXPARTE APPLICANT

MISHAEL ONYANGO OTIENO EXPARTE APPLICANT

AND

WYCLIFFE O. OJWANG INTERESTED PARTY

HEADMONDS JAMES KOBIL INTERESTED PARTY

CHARLES ADAMO OJWANG INTERESTED PARTY

JOSEPH OKOTH OJWANG INTERESTED PARTY

MICHAEL OTIENO OJWANG INTERESTED PARTY



RULING

Brief Facts

1. The Respondents filed a preliminary objection dated 13th November, 2024 which is on the following grounds;
 - a. That the instant application is fatally defective for expressly offending the provisions of Order 53 of the Civil Procedure Rules.
 - b. That the instant application expressly offends the provisions of Section 9(3) of the [Law Reform Act](#), Cap 26 of the Laws of Kenya.
2. The preliminary objection was canvassed by way of written submissions.

Respondents submissions

3. Counsel for the Respondents filed submissions dated 13th November, 2024. The first issue Counsel submitted on was on whether leave ought to have been sought and granted before the Ex parte Applicants could file the substantive motion for judicial review. Counsel relied on the cases of Republic v Chief Magistrate Milimani Commercial Courts & 2 others Ex Parte Fredrick Bett [2022] KEHC 27029 (KLR), Republic v County Council of Kwale & another; Kondo & 57 others (Exparte) [1998] KEHC 2 (KLR) and submitted that the Ex parte Applicants herein neither sought for leave nor were they granted leave before they filed the substantive motion. The present proceedings were commenced in total flagrance of the law.
4. The second issue counsel submitted on was on whether the instant application was time barred. Counsel relied on Section 9(3) of the [Law Reform Act](#) and Order 53 Rule 2 of the Civil Procedure Rules, the case of Wilson Osolo v John Ojiambo Ochola & another [1996] eKLR as was cited in Republic vs Salim & 2 Others; Gami (Ex parte Applicant) [2024] KEELC 5440 (KLR) and submitted that orders of certiorari can only be sought within a period of six months of the decision and where such a period had lapsed, the Court lacks the jurisdiction to enlarge the time. Counsel concluded his submissions by urging the Court to allow the Respondents Preliminary Objection and dismiss the application dated 30th May, 2024.

The Ex parte Applicants submissions.

5. Counsel for the ex parte applicants filed submissions dated 30th January, 2025. Counsel submitted that the matter was commenced vide an ex parte Chamber Summons Application dated 30th April, 2024 that was filed on 3rd May, 2024. Counsel relied on Section 9(3) of the [Law Reform Act](#) and submitted that leave to commence judicial review proceedings was sought and granted. Upon obtaining the said leave, the ex parte Applicants filed the substantive motion on 13th June, 2024. Counsel relied on the case of Peninah Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2015] eKLR, Order 50 Rule 2 of the Civil Procedure Rules and submitted that the ex parte Applicants were supposed to file the substantive motion within 21 days. Since leave was granted on 7th May, 2024, the substantive motion ought to have been filed within twenty-one days. Counsel submitted that in computation of time, Sundays and public holidays are excluded and therefore the substantive motion was filed within time.



6. Counsel relied on the case of *Ngotho & another v County Director of Land Adjudication and Settlement Makueni County; Minister of Housing & Lands Through the Deputy County Commissioner Kilungu SubCounty (Interested Party)* (Environment and Land Judicial Review Case E008 of 2022) [2023] KEELC 21681 (KLR) (15 November 2023) (Ruling) and urges the Court to find that the substantive motion was filed within the requisite time period.

Interested Parties Submissions.

7. Counsel for the Interested Parties filed submissions dated 26th February, 2024.
8. The first issue Counsel submitted on was on whether the Substantive Notice of Motion application dated 30th May 2024 was competent in light of the provisions of Order 53 Rules 3(1) and 4(1) of the Civil Procedure Rules. Counsel submitted that from the CTS it was clear that the Ex parte Applicants filed the Chamber Summons application on 3rd May, 2024 and leave to commence judicial review proceedings was possibly granted on 6th May, 2024.
9. Counsel relied on Order 53 Rule 3(1) of the Civil Procedure Rules and submitted that once leave has been granted, the substantive motion ought to be filed within twenty one days. In the present matter, leave was granted on 6th May, 2024 but the substantive motion was filed on 13th June, 2024 which was outside of the permitted time period. Counsel also submitted that the *Law Reform Act* does not provide for enlargement of time within which a party should file the substantive motion. Therefore, any substantive motion filed out of time is incompetent and defective.
10. Counsel relied on Order 53 Rule 4(1) of the Civil Procedure Rules, the case of *Wilson Osolo v John Ojiambo Ochola & Another* [1996] eKLR and submitted that the Interested Parties were not served with the statements accompanying the application for leave as required by law. Counsel also relied on the cases of *Republic v Principal Magistrate's Court Kerugoya & 2 others Ex-Parte Nancy Wathiba Kimoo* [2015] eKLR, *Christine Kerubo Bosire & 15 others v Ministry of Education & another* [2019] eKLR and reiterated that the Notice of Motion application dated 30th May, 2024 was incompetent as it was filed in violation of Order 53 Rule 3(1) and Order 53 Rule 4(1) of the Civil Procedure Rules.
11. On whether the Notice of Motion application dated 30th May, 2024 ought to be struck out, counsel relied on the case of *State v Cabinet Secretary, State Department for Lands and Physical Planning & 2 others; Rowa (Exparte Applicant); Ngorome & 4 others (Interested Parties)* [2025] KEELC 55 (KLR) and urges the Court to strike out the said application with costs.

Analysis and Determination

12. A preliminary objection was defined in the case of *Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”



13. In the case of *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] eKLR the Court stated as follows;

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

14. A preliminary objection raises a pure point of law. The Court in determining a preliminary objection only considers the pleadings and compares them with the law in order to determine the merits of the objection.

15. In the present matter, the first ground on the Respondents preliminary objection is that the Applicant’s application is defective as it offends the provisions of Order 53 of the Civil Procedure Rules. The Respondents submitted that the ex parte Applicants did not seek for leave to commence judicial review proceedings before they filed the substantive motion.

16. In response, the ex parte Applicants submitted that they filed an ex parte Chamber summons application dated 3rd May, 2024 seeking leave which leave was granted on 6th May, 2024. They thereafter filed the substantive motion on 13th June, 2024.

17. The interested parties submitted that from the CTS there is a possibility that leave to commence judicial review proceedings was granted on 6th May, 2024.

18. Order 53 of the Civil Procedure Rules provides as follows;

“(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —

(a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and

(b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.

(3) The judge may, where leave denotes stay, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the



proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

19. A perusal of the Court record shows that on 3rd May, 2025 the ex parte Applicants filed an ex parte Chamber Summons application dated 30th April, 2024 where they sought the following prayers;
 - a. That the instant application be certified extremely urgent and dealt with on priority basis and ex parte.
 - b. That interim orders of prohibition do issue preventing/prohibiting the Interested Parties from taking possession and/or dispossessing the ex-parte Applicants from land parcel Numbers Kaksingri West B/1335 and 1336 pending the hearing and determination of this Judicial Review application.
 - c. That interim orders of prohibition do issue temporarily suspending/staying execution of the orders of the Respondents made in the ruling delivered between the parties on or about the 3rd day of November, 2023 and directing that status quo ante be maintained until such a time as the main judicial review application is heard and determined on merits.
 - d. That the ex parte applicants herein be granted leave to apply for orders of certiorari and prohibition against the 1st and 2nd Respondents, bringing and quashing the proceedings, ruling and the orders contained in the ruling delivered by the 1st Respondent on or about the 3rd day of November, 2023 between the ex parte Applicants and the Interested Parties.
 - e. That costs of the application be provided for.
20. A further perusal of the Court record shows that on 6th May, 2024 the Court issued the following directions;

“I have seen the application dated 30th April 2024. I grant leave to filed judicial review proceedings in terms of prayer (4) of the application...I direct that the main motion be filed and served within the next 21 days. Upon service there is given 14 days to reply...”
21. It is therefore evident from the Court record that the ex parte Applicants filed a Chamber Summons application seeking for leave to commence judicial review proceedings which leave was granted on 6th May, 2024.
22. The second ground on the Respondents preliminary objection is that the Notice of Motion application offends the provisions of Section 9(3) of the *Law Reform Act*. The Respondents submitted that leave to commence judicial review proceedings cannot be granted unless the application for leave is made not later than six months after the date of the decision. The Respondents also submitted that the decision the ex parte Applicants are seeking orders of certiorari against was delivered on 3rd November, 2023 and since the substantive motion was filed on 13th June, 2024 it is time barred and ought to be dismissed.
23. The ex parte Applicants and the interested parties did not submit on this ground.



24. Section 9(3) of the *Law Reform Act* 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.”

25. The Court of Appeal in *Ako v Special District Commissioner Kisumu & another* [1989] eKLR held as follows;

“It is plain that under sub-section (3) of section 9 of the *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 for 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 subsection (3) of section 9 of the *Law Reform Act*.

The decision of this court in *Girado Othieno Mahaja v Khafulu Khatwalo & another CA No 19 of 1987* which was cited by Mr Okech, learned counsel for the appellant, is in conformity with our view of correct interpretation of the material section. The decision does not therefore advance the appellant’s case.

The views of Hancox JA in which he leaned towards a liberal construction were not essential to the decision, were not expressly shared by the majority and were based on the rules of the Supreme Court of England which do not automatically apply to this jurisdiction.”

26. From the above cited judicial decision, it is evident that Section 9(3) of the *Law Reform Act* provides that leave cannot be granted to commence judicial review proceedings six months after the making of a judgement or order which order parties seek to be quashed. In the present matter, leave to commence judicial review proceedings was already granted on 6th May, 2024 and therefore this ground of the preliminary objection lacks merit.

27. This Court noted that essentially, the gist of the Respondent’s preliminary objection was that firstly, the ex parte Applicants did not seek for leave before they commenced the judicial review proceedings and secondly such leave cannot be granted since six months had lapsed after the decision they seek to challenge was issued.

28. It is my view that since leave was already granted to the Ex parte Applicants to commence the judicial review proceedings. The only question that remains to be answered by the Ex parte Applicant is whether he utilized the Leave in accordance with the conditions attached to it. If they did not, then at the lapse of any of the conditions without compliance the leave ceased hence there could have been none



- to found the filing of the substantive Motion. In my view, if I understood the Respondents well, this was the reason why they contended that the instant application was filed without leave of the Court.
29. Leave for the filing of the Judicial Review was granted that in the Chamber Summons on 6th May, 2024. The Judge directed that the substantive Motion was to be filed within twenty-one (21) days. It means that the Judicial Review Application was supposed to have been filed by 27th May 2024.
30. The facts herein are clear that the Ex parte Applicant filed the substantive Motion on 13th June 2024. This was about seventeen days after the lapse of the leave. There is no evidence that the Ex parte Applicant sought an extension of the leave to file the Motion or indeed applied anew for other leave to found the basis of filing the substantive motion. Thus, the substantive Motion was basically filed without leave of the Court. It was a nullity and can only be dismissed as such.
31. While the Ex parte Applicant never even sought extension of time or leave, this Court is guided by the decision of the Supreme Court in *Senate & 3 others v Speaker of the National Assembly & 10 others* (Petition 19 (E027) of 2021) [2023] KESC 7 (KLR) (Civ) (17 February 2023) (Ruling) where it held,
- “We also reiterate the caution we issued in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* (supra), that it is highly irregular and presumptive in this court to file documents out of time without leave and thereafter seek court’s stamp of approval to deem them to be regularly on record. It is in the same spirit that we reject the submissions filed out of time and without prior leave by 1st and 2nd respondent on January 20, 2023 as well as those of the 4th respondent filed on January 26, 2023. They are, in our words in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* (supra), “a nullity and of no legal consequence”. We follow the course we adopted in that case, and expunge those sets of submissions from the record.”
32. The Respondents preliminary objection dated 13th November, 2024 is merited. It is allowed with costs to the parties that raised and supported it. The Judicial Review Application is dismissed with costs to the parties who supported the Objection.
33. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 23RD DAY OF APRIL 2025.

**HON. DR. IUR NYAGAKA,
JUDGE**

