



**Republic v Minister for Lands and Settlement & 2 others; Kipeno (Interested Party)
(Judicial Review 3 of 2021) [2022] KEELC 3409 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3409 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
JUDICIAL REVIEW 3 OF 2021
EM WASHE, J
MAY 25, 2022
(FORMERLY JUDICIAL REVIEW NO. E005/2021-NAROK)
IN THE MATTER OF AN APPLICATION BY JOHN SAKAJA NTUKUSOI FOR
JUDICIAL REVIEW FOR ORDERS OF PROHIBITION AND CERTIORARI
AND
IN THE MATTER OF AN APPEAL TO THE
MINISTER LAND APPEAL CASE NO.139 OF 1998
NKEDIENYE OLE KIPENO AGAINST JOHN SAKAJA NTUKUSOI
AND
IN THE MATTER OF OBJECTION NO.24 OF 1990 NKEDIENYE
OLE KIPENO AGAINST JOHN SAKAJA NTUKUSOI
AND
IN THE MATTER OF : THE LAND ADJUDICATION , CAP 284 LAWS OF KENYA
AND
IN THE MATTER OF : FAIR ADMINISTRATION ACTIONS ACT
AND
IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010
AND
IN THE MATTER OF: NKARARO LAND ADJUDICATION SECTION
BETWEEN
REPUBLIC APPLICANT
AND



MINISTER FOR LANDS AND SETTLEMENT 1ST RESPONDENT
DISTRICT COMMISSIONER TRANSMARA WEST (MINISTER DELEGATED
POWERS) 2ND RESPONDENT
DISTRICT LAND REGISTRAR, TRANSMARA 3RD RESPONDENT

AND

NKEDIENYE OLE KIPENO INTERESTED PARTY

JUDGMENT

1. The application for determination was filed by way of a notice of motion dated July 5, 2021 seeking for the following orders;-
 1. That leave be granted to the ex-parte applicant to commence judicial review proceedings out of time.
 2. That an order of prohibition be issued directed at the 1st respondent whether by themselves, his servants, agents, officers, successors and/or assigns prohibiting him from implementing the decisions made on March 30, 2004 or in any other way implementing the said decision.
 3. That an order of *certiorari* be issued to remove to this honourable court the decision of the 2nd respondent, the District Commissioner Transmara West, made on the March 30, 2004 in total abrogation of the *ex-parte* applicant's right to fair administrative action for purposes of being quashed.
 4. That an order of prohibition prohibiting the respondents from proceeding with the implementation of the decision delivered on the March 30, 2004 to the extent of sub-division of parcel No 212 within Nkararo Adjudication Section.
 5. That a declaration be issued that the 2nd respondent's, on account of the various matters complained of in this application with respect to parcels No 212 of Nkararo Adjudication Section has breached the *ex-parte* applicant's right of fair administrative action, as guaranteed under the article 47 of the Constitution and as provided further under sections 3, 4, 5 and 6 of the Fair Administrative Action Act.
 6. That a declaration be issued that the actions and/or omissions by the respondents herein, to extent that they violate the *ex-parte* applicant's rights to fair hearing as enshrined under article 50 of the Constitution of Kenya, 2010 and that it amounts to an unfair administrative action.
 7. That a declaration be issued that, in the exercise of his powers as vested in him by statute and otherwise, the 2nd respondent through delegated powers has failed to comply with the requirements and tenets of fair administrative action contrary to the provisions of section 5 of the Fair Administrative Action Act and articles 10 and 50 of the Constitution of Kenya, 2010.
 8. That this honourable court makes such other orders or further relief that it may deem just and expedient to grant for the justice to be met in the circumstances.
 9. That the costs of this application be in the cause.



2. The chamber summons application seeking leave to institute judicial review proceedings was filed on the June 15, 2021.
3. The court considered the chamber summons application dated June 15, 2021 and granted leave to the *ex-parte* applicant to file the substantive judicial review application pursuant to the orders June 16, 2021.
4. The *ex-parte* applicant in compliance of the directions issued on the June 16, 2021 filed the application before court for determination on the July 15, 2021.
5. The application was duly served on all parties on the February 17, 2022 and the appropriate affidavit of service filed on the February 22, 2022.
6. However, no party filed any pleadings in opposition of the application and the court proceeded to give directions regarding the disposal of the same on the November 22, 2021.
7. The *ex-parte* applicant filed their written submissions on the February 22, 2022 and now the court seeks to adjudicate on the issues for determination.
8. The application before court raises two main issues which are as follows;-
 1. Whether or not the court should extend the time for the applicant to institute judicial review proceedings.
 2. Whether or not the court should exercise its discretion and grant the prayers of prohibition, certiorari and/or declarations sought in the substantive application.
9. On the first issue, the court observes that the application herein was filed on the July 15, 2021.
10. The application before court is based on the provisions of section 8 and 9 of the [Law Reform Act](#), cap 26 and read together with section 53 of the [Civil Procedure Rules, 2010](#).
11. Section 9 (3) of the [Law Reform Act](#), cap 26 reads as follows; -

“In the case of an application for an order of *certiorari* to remove any judgement, order, decree, conviction or other proceedings for the purposes 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 judgement, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgement, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for 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.

Order 53 Rule 2 of the [Civil Procedure Rules, 2010](#) provides as follows;-

“Leave shall not be granted to apply for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceedings for the purposes 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 the act; and where the proceeding is subject to appeal and a time is limited by law for bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appeal has expired.”



12. A plain reading of the above two sections of the [Law Reform Act](#), cap 26 and order 53 of the [Civil Procedure Rules, 2010](#) requires the court to confirm where or not a period of six (6) months have lapsed since when the judgement, order, decree, conviction being quashed was made.
13. In the event that a period of six months has lapsed since the judgment, order, decree or conviction being quashed was made, then leave should not be granted.
14. The use of the word “shall” in section 9 of the [Law Reform Act](#), cap 26 and order 53 of the [Civil Procedure Rules, 2010](#) lie emphasizes of the need to comply with this pre-condition before leave is granted to institute judicial review applications.
15. Prayer No 1 in the application for determination is seeking to enlarge time for the applicant to file judicial review proceedings.
16. The *ex-parte* applicant takes notice that indeed the judgement and/or orders of which this judicial review application seeks to challenge were pronounced on the March 30, 2004.
17. The period between when judgement was pronounced on the March 30, 2004 by the 2nd respondent to the time the *ex-parte* applicant filed for leave to institute judicial review proceedings was more than seventeen (17) years.
18. The *ex-parte* applicant has not cited any provision of the [Law Reform Act](#), cap 26 or the [Civil Procedure Rules, 2010](#) that expressly allow the court to entertain an application for enlargement of time after the lapse of the mandatory six months provided by the law.
19. In the *ex-parte* applicants submissions filed on the February 22, 2022, it is submitted by counsel that various decisions of the superior courts point to the shift from the strict interpretation of section 9 of the [Law Reform Act](#), cap 26 and order 53 of the [Civil Procedure Rules](#) under the old [Constitution](#) to a more proactive mode of interpretation of these sections under the 2010 Kenyan [Constitution](#).
20. The *ex-parte* applicant’s counsel relied on the case of [Republic v Public Procurement Administrative Review Board Ex-parte Syner-chemie](#) [2016] eKLR. The learned judge in this decision observed the following under paragraph 97, 98 and 99.

“97. With the enactment of [Fair Administrative Action Act, 2015](#) which Act implements Article 47 of the [Constitution](#) to give effect to the right to fair administration action, the above act effectively modifies the [Law Reform Act](#) and order 53 of the Civil Procedure Rules on the flexibility in the application of the law to the circumstances of a particular case, with the sole intention of achieving substantive justice for the parties and especially where no prejudice is shown to be occasioned to the respondents or interested parties herein.

98. In my modest view, no statute can be enacted with the sole intention of doing an injustice to parties. Article 47 of the [Constitution](#) elevates fair administrative actions from common law action to a constitutional right under the bill of rights. The same position applies to article 48 of the [Constitution](#) which commands the state to ensure that all persons are facilitated to access justice without any impediments.

99. Further , article 20(3) (a) of the [Constitution](#) commands that in applying a provision of the Bill of Rights like in this case article 47 of the [Constitution](#) on the right to fair administrative actions which is invoked by the *ex-parte* applicant in this case, a court should develop the law to the extent that it does not give effect to a right or fundamental freedom;



and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

21. The court took the liberty to thoroughly go through the above cited authority in an effort to appreciate the context in which the learned judge made the above observations.
22. The reading of the authority above clearly outlines the circumstances of that cited authority to be fundamentally different from the ones in this application.
23. In the cited authority above, the circumstances of the case were that the *ex-parte* applicant had filed for leave within the prescribed time under section 175 (1) of the [Public Procurement and Asset Disposal Act](#).
24. However, upon being granted leave to file the substantive notice of motion application, the *ex-parte* applicant failed to do so within the time granted by the court.
25. In other words, the learned judge in the above cited authority was dealing with the enlargement of time to file the substantive notice of motion application and not time within which to seek leave for instituting judicial review application.
26. Turning to this file before the court, the chamber summons application filed on the June 15, 2021 contained the following orders’;-
 1. Spent
 2. Spent
 3. That leave be granted to the *ex-parte* applicant to commence judicial review proceedings out of time.
27. The orders that were issued upon the consideration of the learned judge on the June 16, 2021 were as follows;-
 - A. That the application be and is hereby certified as urgent.
 - B. That leave be and is hereby granted to the *ex-parte* applicant to apply for orders of judicial review against the orders to implement the decision of the Minister made on the March 30, 2004.
 - C. That the application be filed and served within 21 days.
28. Looking at the above orders issued on the June 16, 2021, the issue of extension of time under section 9 of the [Law Reform Act](#), cap 26 and order 53 of the [Civil Procedures Rules, 2010](#) for the *ex-parte* applicant to file the chamber summons for leave was not adjudicated.
29. In the absence of an order for extension of the six (6) months period provided under section 9 of the [Law Reform Act](#), cap 26 and order 53 of the [Civil Procedure Rules, 2010](#), the leave granted to the *ex-parte* applicant was then done outside the mandatory period of sixty (60) days contrary to the provision of the [Law Reform Act](#), cap 26 and order 53 of the [Civil Procedure Rules, 2010](#).
30. The subsequent effect is that the leave issued on the June 16, 2021 fails to meet the legal threshold within the meaning of section 9 of the [Law Reform Act](#), cap 26 and order 53 of the [Civil Procedure Rules, 2010](#) and renders the chamber summons incapable of being adjudicated due to lack of jurisdiction.



31. In the Court of Appeal decision in Civil Application 41 of 2013 *Paul Mafwabi Wanyama v Jacinta Papa & Amogoro Land Disputes Tribunal*, the Court of Appeal held as follows:-

The judicial review applications before the learned judge, which have given rise to this appeal, were therefore special in nature and the learned judge erred in importing the provisions of the *Civil Procedure Act* and *Rules* to proceedings governed by the said provisions of the *Law Reform Act* and order 53 of the *Civil Procedure Rules*.

We agree with the learned counsel for the applicant that the learned judge erred in extending time which he had no jurisdiction to do.

This appeal is therefore allowed with the consequences that the order extending time for filing judicial review proceedings is hereby set-aside.”

32. This court’s interpretation on the above decision by the Court of Appeal in the above cited authority is that superior courts do not have jurisdiction to extent time of instituting judicial proceedings when time has expired under section 9 of the *Law Reform Act*, cap 26 or order 53 of the *Civil Procedure Rules, 2010*.
33. It is however key to point out that this is different from instances where leave to institute judicial proceedings was granted within the prescribed time but the ex-parte applicant failed to comply with the period in which the substantive notice of motion was to be filed as envisaged in the case of *Republic v Public Procurement Administrative Review Board Ex-parte Syner-chemie* [2016] eKLR.
34. In conclusion therefore, in the absence of an order for extension of the time provided under Section 9 of the *Law Reform Act*, cap 26 and order 53 of the *Civil Procedure Rules, 2010*, this honourable court declines to enlarge or extend time for the applicant to commence judicial review proceedings out of time or prosecute the notice of motion application dated July 5, 2021 as the same is dismissed with costs.

DATED, SIGNED & DELIVERED VIRTUALLY BY ELC KILGORIS ON 25TH DAY OF MAY 2022.

EMMANUEL M WASHE

JUDGE

In the Presence of:

Counsel for the applicant: No appearance

Counsel for the respondent: No appearance

