



REPUBLIC OF KENYA



Ileve v Cabinet Secretary ,Ministry of Land and Physical Planning & another; Ngau (Interested Party) (Judicial Review 3 of 2022) [2022] KEELC 2218 (KLR) (28 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
JUDICIAL REVIEW 3 OF 2022**

**LG KIMANI, J
JUNE 28, 2022**

IN THE MATTER OF JUDICIAL REVIEW UNDER SECTION 8 & 9 LAW REFORM ACT, CAP 26 & ORDER 53 CIVIL PROCEDURE RULES. IN THE MATTER OF ARTICLE AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI

BETWEEN

MWENDE ILEVE APPLICANT

AND

CABINET SECRETARY ,MINISTRY OF LAND AND PHYSICAL PLANNING 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

ZACHARY KAMUTI NGAU INTERESTED PARTY

RULING

1. Before this Court is a Chamber Summons Application dated 15th February 2022 brought under Order LIII Rules 1 and 2 of the *Civil Procedure Rules*, Section 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya and all other enabling provisions of the law seeking for leave to issue to the Applicant to apply for:
 - a) An Order Of Certiorari to remove into this Honourable Court and quash the decision by the 1st Respondent in allowing Appeal in the Minister Case Number 1708/1986 against Land Parcel Number 98 at Kyanika Adjudication Section, Kitui County and directing that the said parcel to be registered in Zachary Kamuti Ngau on 15/10/2020.



- b) An Order Of Prohibition against the 1st Respondent, their agents or anybody acting under them, restraining them from registering Land Parcel Number Land Parcel Number 98 at Kyanika Adjudication Section, Nzambani Sub County to Zachary Kamuti Ngau.
 - c) Any such other or further orders or direction as the Honourable Court may deem just and equitable to grant in the circumstances.
 - d) That leave so granted does operate as a stay of the decision and implementation of the same by the 1st Respondent allowing Appeal to the Minister Case Number 1708/1986 against Land Parcel Number 98 Kyanika Adjudication Section, Nzambani Sub-County and directing the said plot to be registered to Zachary Kamuti Ngau on 15/10/2020 pending the determination of the application.
2. The Application is supported by the Applicants verifying affidavit sworn on 15th February 2022 and Statement dated 15th February 2020.
 3. The ex parte Chamber summons application first came up before the court in chambers on 16th February 2022 when it was certified urgent and the court directed that the same be served for inter partes hearing on 28th February 2022. After service of the application the Interested Party through his Advocate filed a Preliminary Objection dated 23rd February 2022. Counsels for the Applicant and the Interested Party agreed that the objection would be heard by way of written submissions.
 4. What is thus coming up for determination is the Interested Party's Notice of Preliminary Objection dated 23rd February 2022 objecting to the aforementioned Chamber Summons Application on the following grounds:
 - a) That the suit as filed is not compliant with Order 53 of the Civil Procedure Rules.
 - b) That the said Application/suit does not disclose any cause of action, it is incompetent, frivolous, and vexatious and it is otherwise an abuse of the process of this court and as such ought to be dismissed with costs.
 5. The grounds supporting the application are that the Applicant bought the whole land parcel number 98 at Kyanika Adjudication Section, Nzambani Sub County from Mwinzi Kavuu and the boundary was fixed and marked. The Applicant claims that during the adjudication process the said suit land was adjudicated and registered in the name of the Applicant's late husband but the Interested Party appealed to the Minister through Appeal to the Minister case number 1708/1986.
 6. The Applicant states that she and her family stand to lose the only home they know and their inheritance as they have been in occupation and possession and have developed the suit land, planted trees and cultivated crops. She has attached to the affidavit proceedings, findings and decision dated 15th October 2020 in Ministers Appeal number 1708 of 1986 P/NO98 where the parties were Appellant Z Kamutu Ngau And Ngau Mbila (deceased) and Respondents were Mwinzi Kavuu (deceased) John Mumo Mwinzi as representative and Ileve Mutia (deceased) with Mwende Ileve being the representative.

The Interested Parties Submissions on the Preliminary Objection

7. Counsel for the Interested Party filed written submissions in support of the notice of Preliminary Objection stating that the Chamber Summons Application offends the provisions of Order 53 Rule 2 for the reason that the decision in the Appeal to the Minister was made on the 15th October 2020 while the Chamber Summons Application was filed on 15th February 2022. Counsel relied on Section 9 (3)



of the Law Reform Act and Order 53(2) of the Civil Procedure Rules (2010) both of which provide that leave shall not be granted to apply for an order of Certiorari unless the application for leave is made not later than six months after the date of such judgment, order, decree, conviction or other proceeding. Counsel further relied on the decision in Republic v National Irrigation Board & another Ex parte Peter Muriithi Muriuki [2021] eKLR where the Court took the strict approach to the above statutory provision on the six month limitation period.

8. The Interested Party also submitted that Article 159 (2) (d) of the Constitution cannot aid the Applicant in this matter as he relied upon the case of Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (IV) & another (Interested Parties); Exparte Magal Security Systems Ltd/Firefox Kenya Limited (IV) [2019] eKLR where Justice Mativo held that the above provisions are couched in mandatory terms and stated that Article 159 of the Constitution is not a panacea for all problems.
9. For this reason, the Interested Party submitted that the Application for leave herein was filed after the lapse of 6 months and therefore lacks merit and should be dismissed with costs.

The Applicant's Submissions on the Notice of Preliminary Objection

10. The Applicant filed written submissions in rebuttal to the Preliminary Objection and stated that the Chamber Summons application herein is compliant with Order 53 Rule 2 of the Civil Procedure Rules by virtue of the doctrine of discovery. The Applicant claims that she only became aware of the 1st Respondents adverse decision made on 15th October 2020 after learning of the scheduled implementation of the same through a letter dated 7th February 2022.
11. Counsel for the Applicant submitted that Article 47 of the Constitution guarantees fair administrative action and that the 1st Respondent failed to communicate their decision to the Applicant. The Applicant relied on the decision in Republic v National Irrigation Board and another Ex-parte Muriithi Muriuki [2021]eKLR where the Court held that a decision is only an authority for what it actually decides. The Applicant also quoted Odunga J in Republic v Mwangi Nguyai & 3 others (2013) eKLR who observed that it was high time that Section 9 of the Law Reform Act was amended to provide for extension of time in cases where strict adherence to the limitations manifest in a miscarriage of justice.
12. In addition, Counsel for the Applicant submitted that the Court cannot uphold a statutory provision that is based on traditional common law in the face of our current Constitutional dispensation. On this Counsel relied on the case of Raval vs The Mombasa Hardware Ltd (1968) EA 39 2 where it was held that the reason for a court resorting to inherent jurisdiction which is not conferred by any statute or constitutional provision is to prevent a miscarriage of justice, especially where the adverse party is not prejudiced in any way if the court extended time. In conclusion, the Applicant submitted that the Court cannot ignore the process due to the limitations of time, in the interest of Justice.

Analysis and Determination

13. The Preliminary Objection at hand raises the question of whether the Chamber Summons application dated 15th February 2022 seeking leave to apply for orders of judicial review of certiorari should be struck out for being time barred. A look at the impugned decision by the Deputy County Commissioner, Nzambani Sub- County shows that it was delivered on the 15th October 2020 while the Applicant's Chamber Summons application was filed on the 15th February 2022. On the face of it the Chamber Summons for leave is clearly filed outside of the time anticipated under the Section 9 (3) of the Law Reform Act and Order 53(2) of the Civil Procedure Rules (2010) and the Preliminary



Objection raises the issue that the delay in filing the application offends the said provisions and renders the same bad in law and the subject of striking out.

14. The test of the true definition of a preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors ltd* (1969) EA 696.

“So far as I’m aware, 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.”

It was further stated: -

“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.”

15. The question raised in the Objection is a point of law as it stems from statute and subsidiary legislation. Order 53 (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 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.”

16. Order 53 (2) of the Civil Procedure Rules (2010) is copied directly from the provisions of Section 9 (3) of the [Law Reform Act](#) which provides that;

“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.”

17. Does failure to file the application for leave render the entire application incompetent leading to striking out? Counsel for the Interested Party has relied on the case of [Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 \(IV\) & another \(Interested Parties\); Ex parte Magal Security Systems Ltd/ Firefox Kenya Limited \(IV\)](#) [2019] eKLR (Supra) where Justice Mativo applied strictly the 6 month limitation period and found as follows:-

“In conclusion, it is my finding that the provisions discussed above are couched in mandatory terms and must be complied with. Further, Order 50 Rule 6 which permits for extension of time being a subsidiary legislation cannot override the provisions of sections 8 and 9 of the [Law Reform Act](#). Article 159 (2) (d) of [the constitution](#) of Kenya 2010 enjoins courts to determine cases without undue regard to technicalities. I must however point out that Article 159 of [the Constitution](#) is not a panacea for all problems. It is not lost to this



court that the provisions of Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010 are couched in Mandatory terms. The applicant cannot seek refuge under Article 159 (2) (d) of *the constitution* under the present circumstances in view of the mandatory and express provisions cited above.”

18. The above position is taken from a long list of previous cases. In *Ako v Special District Commissioner Kisumu & another* [1989] eKLR the Court of Appeal laid down the position that leave shall not be granted unless an application for leave to apply for certiorari is made inside six months after the date of the judgment.

“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*.

19. Counsel for the Applicant, on the other hand, relied on a doctrine he cites as “the doctrine of discovery” where he states that the Applicant only got to be aware of the adverse decision of the 1st Respondent after service of a letter from Kitui lands office on 3rd February 2022 informing him of a scheduled implementation of the Ministers decision. I however find that the explanation given by the Applicant for the delay in filing the application herein is a matter of fact that was made during submissions by Counsel instead of filing an affidavit sworn by the Applicant. I find that the statements of facts are improperly made and the same are inadmissible. The letter referred to in the submissions is also not part of the record and cannot be ascertained. In any event I do find that any explanation for delay in filing the application for leave would have been considered tenable in an application for extension of time which in the present case the Applicant has not sought. The Applicant has cited two cases in his submissions that is; *Raval vs The Mombasa Hardware Ltd* [1968] EA 392 and Odunga J’s holding in *Republic V Mwangi Nguyai & 3 others Ex Parte HaruNguyai* [2013]Eklr. It is noted that in the two cases the court was dealing with applications for extension of time whereas the Applicant in this case has not sought an order for extension of time. Odunga J in *Republic v Mwangi Nguyai & 3 others* (*supra*) decision found that:-

“In my view it is high time the provisions of Section 9 of the *Law Reform Act* were amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period. Whether the Court would be entitled to “read in” a provision for extension of time in line with the new Constitutional dispensation, is outside the scope of this decision since the matter before me is not an application for extension of time.”

20. Unfortunately, Parliament has not amended Section 9 (3) of the *Law Reform Act* in order to allow for extension of time as suggested by the Judge above.



21. In a case similar to the present one, the Court while dealing with an Applicant who had brought an application under the provisions that contained the six month rule held that she was bound by the rules. The Court in Republic v Deputy County Commissioner Baringo Central & 5 others Ex parte Gideon Kandagor & another; Charles Kigen (Interested Party) [2022] eKLR held that:

“...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.”

22. The Applicant has further relied on the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010 for the submission that “justice shall be administered without undue regard to procedural technicalities”. The Applicant states that the court ought to exercise its inherent jurisdiction in order to prevent miscarriage of justice. However this court is guided by the judgment of the Supreme Court in the case of Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR where the court cited with approval the dictum of Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR states:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

23. For the foregoing reasons, I uphold the Preliminary objection dated 23rd February 2022 raised by the Interested Party and find that the Chamber Summons Application dated 15th February 2022 is not compliant with Section 9 (3) of the Law Reform Act and Order 53 (2) of the Civil Procedure Rules having been made after expiry of six months after the date of the decision of the Respondent dated 15th October 2020 in the Appeal to the Minister Case Number 1708/1986 against Land Parcel Number 98 at Kyanika Adjudication Section, Kitui County.

24. With regard to the prayer for leave to file an application for an order of Prohibition against the 1st Respondent, their agents or anybody acting under them, restraining them from registering Land Parcel Number Land Parcel Number 98 at Kyanika Adjudication Section, Nzambani Sub County to Zachary Kamuti Ngau, I find that the said prayer is predicated on the grant of leave to apply for an order of certiorari. Having found that the prayer for leave to apply for an order of certiorari is time barred, the



order of prohibition cannot issue and I am persuaded that the said prayer is also incompetent and it is hereby disallowed.

25. I therefore find that the said Chamber Summons dated 15th February 2022 is incompetent and lacks merit and the same is hereby struck out with costs to the Interested Party.

DELIVERED, DATED AND SIGNED AT KITUI THIS 28TH DAY OF JUNE 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE KITUI

Judgment read in open court in the presence of-

C. Nzioka Court Assistant

.....Advocate for the Appellant

.....Advocate for the Respondent

