



**Nzuki v Muthengi & another (Miscellaneous Civil Application
E001 of 2021 & Miscellaneous Application E003 & E004 of 2021
(Consolidated)) [2022] KEELC 2731 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
MISCELLANEOUS CIVIL APPLICATION E001 OF 2021 &
MISCELLANEOUS APPLICATION E003 & E004 OF 2021 (CONSOLIDATED)**

LG KIMANI, J

JUNE 28, 2022

**IN THE MATTER AN APPLICATION FOR LEAVE
TO FILE AN APPLICATION OUT OF TIME**

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

MUTHUI MULONZYIA NZUKI APPLICANT

AND

DANIEL KILONZO MUTHENGI 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The Applicant's Notice of Motion application dated November 18, 2021 is brought under the provisions of Article 159 (d) and 40 of *the Constitution* of Kenya 2010, Order 50, 51 and 53 of the *Civil Procedure Rules* 2010 and Section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law seeking the following orders:-
 1. Spent



2. That the Honourable Court do set aside the Court Order dismissing the application dated September 21, 2021 on September 30, 2021 herein for having been filed out of time.
3. That leave be granted to the Applicant to file his application dated September 21, 2021 out of time and that the said application be reinstated and fixed for hearing.
4. That there be no orders as to costs.

Brief background

2. The brief background of the application before the court is that the Applicant filed an application by way of chamber summons dated September 21, 2021 seeking leave to apply for Judicial Review orders of Certiorari. The application was certified urgent and the Applicant was directed to serve the same on the parties for inter partes hearing on September 30, 2021 bearing in mind the law under which the application was brought. On September 30, 2021 none of the parties to the suit or their Advocates was present in court and the court proceeded to dismiss the application for having been filed out of time contrary to the provisions of Section 9 (3) of the Law Reform Act and Order 53 (2) of the Civil Procedure Rules 2010.
3. The Applicant subsequently filed an application dated October 29, 2021 under certificate of urgency. The application was placed before the court on November 1, 2021 and was certified as urgent and set for inter partes hearing on November 8, 2021. However, for some unexplained reason instead of the application being filed in this file Misc JR No E001 of 2021 whose orders the Applicant was seeking to set aside, the application was given a new file number being Misc JR number E003 of 2021.
4. Further, the Applicant filed a similar application being the present application dated November 18, 2021 and filed on the same date. To confound matters this application was also not filed in Misc JR No E001 of 2021 and neither was it filed in file number Misc JR number E003 of 2021 but the application was given a new file number being Misc JR number E004 of 2021.
5. Due to the above anomalies the court and the parties mentioned the three files several times with a view to resolving the matter and hearing the correct file. When the matters came up for mention on March 8, 2022 the parties agreed that Misc application No. E001 of 2021, E003 of 2021 and E004 of 2021 be placed together and be heard together with Misc Application E001 of 2021 being the lead file. Counsels for the parties were directed to file written submissions.
6. The Applicant filed written submissions dated April 5, 2022 while the Respondents filed Grounds of Objection dated December 1, 2021 and written submissions dated March 11, 2022.

The Applicants Case and Submissions.

7. The grounds upon which the application is premised is that the Applicant filed an application for leave to apply for Judicial Review orders of Certiorari dated September 21, 2021 which was dismissed on the of September 30, 2021 for having been filed out of time citing Order 53 of the Civil Procedure Rules 2010. The Applicant is of the view that the court relied on a procedural technicality contrary to the provisions of Article 159 (d) of the Constitution which provides that “justice shall be administered without undue regard to procedural technicalities” The Applicant states that he is apprehensive that he will lose his parcel of land if the application dated September 21, 2021 is not reinstated and heard.
8. The Applicant states that the delay in filing the Application was not due to a fault on his part but was caused by the Court Registry in being late in providing him with the typed proceedings and judgment in the Senior Resident Magistrate’s Court at Kyuso. Further, he avers that he erroneously took the



Order/Judgment/directions of the Senior Resident Magistrate's Court at Kyuso to serve as extension of time within which to file an application for leave to apply for judicial review orders of certiorari. The Applicant claims that he has a strong case and that he will suffer irreparable loss if the application is not granted. He further claims that he has a right to seek leave to file his application out of time.

9. The Applicant also filed written submissions in support of his application and submitted that Article 159(2) (d) of *the Constitution* provides that justice shall be administered without undue regard to procedural technicalities. In addition, he relied on Article 48 of *the Constitution* of Kenya (2010) on access to justice. The Applicant further relied on Order 50 Rule 6 of the Civil Procedure Rules which permits the filing of an application for enlargement of time even if when time has elapsed.
10. The Applicant further relied on the case of *Ivita v Kyumba* (1984) KLR 441 where the Court held that even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse the action will not be dismissed as a matter of discretion. The Applicant further cited the principles on extension of time as was pronounced in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others*.
11. It is the Applicant's submission that the Court has wide discretion to extend time under Order 50 Rule 6 of the *Civil Procedure Rules* as read with Section 9 (1) of the *Law Reform Act* as he cited the case Misc JR 8 of 2014 *Kenya Bureau of Standards & 3 others v Kenya Maritime Authority Ex parte Car Importers Association* [2014] eKLR where the court held that Order 50 rule 6 provides expressly for enlargement of time. He also relied on the holding in the cases of Misc. Civil Application 12 of 2014 *Republic v General Manager, Moi International Airport & another Ex parte Jared Adimo Odhiambo & another* [2014] eKLR, *Republic v Speaker of Nairobi City County Assembly & another Ex parte Evans Kidero* [2017] eKLR and *Philip Chemwolo & Another vs Augustine Kubende* (1982-1988) KAR at 1040

The 1st and 2nd Respondents' Case

12. The 1st and 2nd Respondents filed Grounds stating that:
 1. That section 9 (3) of the *Law Reform Act* is couched in mandatory terms and the said statute has no provision for extension of time.
 2. That the application as drawn and taken out is bad in law, incompetent and otherwise an abuse of the process of this Honourable Court.
 3. That based on the foregoing, the Notice of Motion is devoid of any merit and that the orders sought should not be granted.
13. In their submissions, the Respondents reproduced Section 9(3) of the *Law Reform Act* as well as the provision replicated in Order 53 Rule 2 of the *Civil Procedure Rules*, 2010 which provides for a time limit of six months after the date of such proceedings or decision to bring a judicial review application for leave to apply for certiorari.
14. Regarding the provisions of Article 159 of *the Constitution*, the Respondents submitted that there was a warning shot from the case of *Nicholas Kiptoo Salat vs IEBC & 6 others* (2013) eKLR and *Africa Oil Turkana Limited & 2 others vs Edward Kings Onyancha Maina & 2 others* (2016) eKLR where the respective courts held that one cannot invoke this Article to oust mandatory rules of procedure.
15. They also submitted that the Applicant has not discharged his burden of proving the reason he seeks for extension of time. They claim that the reasons advanced are incredulous and frivolous. On extension of time, the Respondents submitted that the principles applicable were laid down in *Aviation and Allied Workers Union vs KQ Ltd*.



16. It is the Respondents submission that judicial review proceedings ought as a matter of public policy to be initiated heard and determined within the shortest time possible and thus should be instituted promptly within 6 months and therefore the application should be dismissed with costs.

Analysis and Determination

17. I have considered the application herein dated November 18, 2021, the grounds of objection and submissions filed and I consider that the issues for determination herein are:-
- A) Whether the orders issued by this court on September 30, 2021 dismissing the application dated September 21, 2021 for having been filed out of time should be set aside and
 - B) Whether leave should be granted to the Applicant to file his application dated September 21, 2021 out of time and that the said application be reinstated and fixed for hearing.

A. Whether the orders issued by this court on 30th September 2021 dismissing the application dated 21st September 2021 for having been filed out of time should be set aside

18. I have noted from the outset that the application dated 21st September 2021 was certified urgent and the Applicant was directed to serve the same on the parties for inter partes hearing on September 30, 2021 bearing in mind the law under which the application was brought. On September 30, 2021 none of the parties to the suit or their Advocates was present in court and on that ground the court could have dismissed the said application for non-attendance. However, the court proceeded to consider the application on merit based on the documents filed and in a reasoned decision the court dismissed the application for having been filed out of time contrary to the provisions of Section 9 (3) of the Law Reform Act and Order 53 (2) of the Civil Procedure Rules 2010.
19. The Applicant has not made any attempt to explain the reason for his absence from court on the date the matter was scheduled for hearing. The arguments being advanced in the present application would have been advanced in support for the application dated September 21, 2021. The Applicant has not shown to the Court any provision of the law that enables the court to make an order setting aside an order dismissing an application for leave under Section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules. In the case of Mirugi Kariuki v Attorney General [1992] eKLR the court heard an appeal against an order of the High Court refusing to grant leave to institute an application for judicial review of certiorari and mandamus and the court stated;
- “In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders.”
20. In the present case the court considered the merits of the application for leave and was not satisfied that a prima facie case had been made to warrant granting the orders sought. The court was not satisfied that on the material placed before it and without going into the matter in depth, that there was an arguable case for granting leave. This was especially considering that the on the face of the application before court and the supporting documents, the application was filed outside of the mandatory period allowed in law. The test used by the court in dismissing the application for leave was guided by law and



the case of *Samuel Muchiri W’Njuguna & others v Minister for Agriculture* Civil Appeal No. 144 of 2000, Justices of Appeal Omolo, Shah and O’Kubasu said:-

“It cannot be denied that leave should be granted, if on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave.”

21. I am of the considered view that if the Applicant was dissatisfied by the findings and order of the court he ought to have lodged an appeal to the Court of Appeal against the said order. In the circumstances of this case I hold that it is the court of Appeal that has the power to either uphold the court’s decision refusing to grant leave or set it aside. Indeed the application before court is seeking to have the court sit on appeal on its own decision. In the *Mirugi Kariuki* case (*supra*) the court set aside the order refusing to grant leave and proceeded to grant leave. The court stated as follows;

In the present appeal, the appellant has asked the Court to set aside the order of the High Court dismissing his application for leave to apply for the writs of certiorari and mandamus; to grant him leave to apply for these writs; and costs of this appeal.

From what we have endeavoured to set out above, we are in no doubt that the appellant ought to have been granted leave to apply for orders of certiorari and mandamus. The dismissal of his application in this regard by the High Court was without sound legal basis. Accordingly we allow this appeal; set aside the order of the High Court dismissing the appellant’s application as mentioned above; and pursuant to the provisions of section 3(2) of the *Appellate Jurisdiction Act*, *supra*, order that the appellant be, and is hereby granted leave to apply for the writs of certiorari and mandamus. He will have the costs of the appeal.”

22. The law provides for a six-month time limitation for filing an application for leave under Section 9 of the *Law Reform Act* from the time of the decision sought to be quashed. Section 9(3) of the *Law Reform Act* 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.”

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.”

23. It is the courts view that when considering an application for leave to apply for an order of certiorari the court has an obligation to consider whether the application is time barred as provided under Section 9 (2) of the *Law Reform Act* and Order 53(2) of the *Civil Procedure Rules* (2010).



24. The Applicant relies on Article 159 (d) and 40 of *the Constitution* of Kenya 2010 in seeking orders of setting aside the dismissal of the application dated 21st September 2021. Article 159 (d) provide that;

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles— justice shall be administered without undue regard to procedural technicalities;”

25. He further relies on Article 40 which provides for Protection of right to property. The Applicant further relies on the provisions of Section 1A, 1B and 3B of the *Civil Procedure Act*. The question for consideration by this court is whether the limitation of time for filing an application for leave to apply for judicial review orders of certiorari under the provisions of section 9 (3) of the *Law Reform Act* and Order 53 (2) of the Civil Procedure Rules is a technicality that ought curable and/or and excusable under Article 159 (d) of *the constitution*. Further, whether the limitation of time can be excused by exercise of inherent powers under Section 1A, 1B and 3B of the *Civil Procedure Act*. The said sections provide as follows;

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - a) the just determination of the proceedings
 - b) the efficient disposal of the business of the Court
 - c) the efficient use of the available judicial and administrative resources
 - d) the efficient disposal of the business of the Court
 - e) the efficient use of the available judicial and administrative resources
 - f) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

Section 3A Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

26. On the applicability of Article 159 (2) (d) of *the Constitution*, the Supreme Court in the case of Raila Odinga & 5 Others v IEBC & 3 others (*Supra*) rendered itself as follows:

“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of *the Constitution* which obliges a Court of law to administer justice without undue regard to



procedural technicalities. The article simply means that a court of law should not pay attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.

27. The foregoing decision was reaffirmed in many cases and I have no reason to depart from it. I therefore find that the Applicant has not convinced the court that the legal provisions he relies on being Article 159 (2) (d) of *the Constitution* of Kenya 2010 and Sections 1A, 1B and 3B of the *Civil Procedure Act* can oust the obligation to comply with procedural imperatives as he seeks justice from this court.

28. The Applicant herein made a choice when he made his application for leave dated 21st September 2021 and anchored it on the provisions of the *Law Reform Act* and Order 53 of the Civil Procedure Rules. In the case of *National Social Security Fund v Sokomania Ltd & another* [2021] eKLR Okongo J stated as follows: -

“Leave is however still required in my view where an applicant for judicial review moves the court under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules. Following the promulgation of *the Constitution* of Kenya, 2010 and Fair Administrative Action Act, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under *the Constitution* of Kenya 2010 and/or the Fair Administrative Action Act, 2015 in which case they will not need leave of the court or go for the same relief under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the court.”

29. The position of the law is that the requirement for filing an application for leave within six months from the date of the decision sought to be reviewed is a requirement of Section 9 (3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules. As stated in the above case of National Social Security Fund (supra), the Applicant herein had a choice and he chose to anchor his application for leave under the provisions of Order 53 Rule 1 (1) and (2) of the *Civil Procedure Rules*. In my view he was bound to comply with the procedure set out under Section 9 (3) of the *Law Reform Act* and Order 53 Rule 2 and file the application for leave for an order of certiorari to remove the judgment, order, decree or other proceedings for the purpose of its being quashed, within the six months period.

30. I further agree with the court’s decision in the case of *Thitu Wambua v Minister for Lands & 2 others* [2018] eKLR where the court held that the issue of limitation of time is not a procedural technicality because it goes to the root of the jurisdiction of the court;

“On the issue of limitation of time, the Motion was filed without any Application to enlarge time. Without an Application for enlargement of time, the provision of Section 9(3) of the *Law Reform Act* prevails. The issue of limitation of time is not a procedural technicality because it goes to the root of the jurisdiction of the court.”

31. I therefore re-affirm the decision of the court made on 30th September 2021 and find that failure by the applicant to file the application for leave within the time given under Section 9 (3) *Law Reform Act* and Order 53 (2) *Civil Procedure Rules* rendered the application incompetent. I find that no reason has been given by the applicant to warrant setting aside of the order issued on 30th September 2021 since the said order was well grounded on the correct position of the law.



B. Whether leave should be granted to the Applicant to file his application dated 21st September 2021 out of time and that the said application be reinstated and fixed for hearing.

32. The Applicant herein has relied on the provisions of Order 50 rule 6 of the Civil Procedure Rules, 2010 in seeking extension of time. The said Order provides that:

“the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

33. It is noted that under the above provision the power to extend time is provided for only to the extent that it relates to situations where “a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court”. This in my view is in contrast to situation where time for doing something is limited by a statute, in this case the Law Reform Act. This position was held by the court of Appeal in *Wilson Osolo v John Ojiambo Ochola & Attorney General* [1995] eKLR where it was held:

“As can readily be seen ----- Order 53 Rule 2 is derived from Section 9 (2) of the Law Reform Act. Whilst the time limited for doing something under Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, the procedure cannot be availed of the extension of time limited by statute in this case, the Law Reform Act.”

34. The position that there is no power to grant leave to file an application for leave out of time in circumstances similar to those of the present case was further confirmed in Republic -vs- Council of Legal Education & another Ex parte Subina Kasamia & another [2018] eKLR the court held ;

“Section 9 (3) of the Law Reform Act is couched in mandatory terms “shall” and imports a form of command or mandate and that Parliament prescribed a period of six months within which application of certiorari may be brought and a court has no discretion to extend time.”

35. And further in the case of *Ako v Special District Commissioner Kisumu & another* [1989]eKLR where the Court of Appeal held;

“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.”



36. Osolo v John Ochola & Another 1995 e K.L.R, the Court of Appeal held as follows:

“It can readily be seen that Order 53 Rule 2 (as it stood) is derived verbatim from Section 9 (3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, that procedure cannot be availed of for the extension of time limited by statute, in this case the Law Reform Act. There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (Cap 22 Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here”. Emphasis added

37. I am of the view that the cases of Republic v Speaker of Nairobi City County Assembly & another Ex parte Evans Kidero [2017] eKLR, Republic v Public Procurement Administrative Review Board Ex parte Syner - Chemie Limited, [2016] e KLR and Kenya Bureau of Standards & 3 others v Kenya Maritime Authority Ex parte Car Importers Association [2014] eKLR cited by the Applicant are all distinguishable from the present case and the findings in the cited cases do not apply. This is for the reason that the decisions in the above cases were rendered when the courts were dealing with applications for leave to apply for orders of certiorari which had been filed within the required period of six months and the said leave was dully granted. However, for various reasons the parties failed to file the substantive notice of motion within the timelines set by the Court or by Order 53 of the Civil Procedure Rules. The court in the Kenya Bureau of Standards & 3 others case stated as follows:

“With respect, I have taken the view that while the provision relating to the 6 month period for commencement of proceedings certiorari is statutory being expressly provided for under section 9 of the Law Reform Act, the requirement for filing of the Notice of Motion upon grant of leave is prescribed by the subsidiary legislation of the Civil Procedure Rules, which contain a rule (O.50 r.6) providing expressly for enlargement of time for doing any act prescribed under the Rules. I also consider that the 21-day rule for the filing of the Notice of Motion is a matter of procedure rather than substantive rule of jurisdiction of the court in judicial review matters, and is therefore open to extension in accordance with the substantial justice principle of Article 159 of the Constitution.”

38. I am of the considered view that even if the power to extend time as proposed by the Applicant is available, the application herein is made on the assumption that the application for setting aside the orders of 30th September 2021 will be allowed. The application for extension of time could only have been tenable if made before making the application for leave or at the same time as the application for leave. As it is the Applicant put the cart before the horse and applied to extend time for making an application that has already been dismissed.

39. In the final analysis I find that no reason has been given by the applicant to warrant setting aside of the order issued on 30th September 2021 since the said order was well grounded on the correct position of the law.

40. Further, I am of the view that the Applicant has not shown that provision in law that supports extension of time within which to apply for leave under Section 9 (3) of the Law Reform Act and Order 53 (2) of the Civil Procedure Rules. He has further not shown that Article 159 (2) (d) of the Constitution of Kenya 2010 and Order 50 Rule 6 as well as Section 1A, 1B and 3A of the Civil Procedure Rules allow for the extension of time beyond the six month period allowed under the law.



41. I therefore find that the application dated November 18, 2021 filed in Misc Application E004 of 2021 lacks merit and the same is hereby dismissed with costs to the Respondents. For the avoidance of doubt and in line with the directions given on March 8, 2022 with the consent of the parties herein the application dated October 29, 2021 filed in Misc Application E003 of 2021 is hereby dismissed with no order as to costs.
42. I further direct that the files in Misc Application E001 of 2021, Misc Application E003 of 2021 and Misc Application E004 of 2021 all between Muthui Mulonzya vs Daniel Kilonzo Muthengi and the Hon. Attorney General be closed.

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

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE KITUI

Ruling read in open court in the presence of-

C. Nzioka Court Assistant

.....Advocate for the Applicant

.....for the Respondents

