



**Pijay Investment Company v Mohamed & 4 others (Miscellaneous Civil Application E5 of 2020) [2022] KEELC 2303 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2303 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
MISCELLANEOUS CIVIL APPLICATION E5 OF 2020**

**MAO ODENY, J**

**JUNE 27, 2022**

**IN THE MATTER OF: AN APPLICATION BY PIJAY INVESTMENT COMPANY FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS;  
IN THE MATTER OF: THE TITLES AND ALLOCATION OF PLOT NUMBERS CHEMBE/KIBABAMSHE 691 AND CHEMBE KIBABAMSHE/692 (ORIGINAL TITLE NO. CHEMBE/KIBABAMSHE/408 ALLOCATED TO PIJAY INVESTMENT COMPANY  
IN THE MATTER OF: AN APPLICATION FOR THE ORDER OF MANDAMUS SEEKING THE EXECUTION AND RELEASE OF TITLES BY LANDS REGISTRAR KILIFI AND NATIONAL LANDS COMMISSION**

**BETWEEN**

**PIJAY INVESTMENT COMPANY ..... APPLICANT**

**AND**

**ATHMAN MOHAMED ..... 1<sup>ST</sup> RESPONDENT**

**CHATIA KEA SAMUEL ..... 2<sup>ND</sup> RESPONDENT**

**CHATIA KEA SAMUEL ..... 3<sup>RD</sup> RESPONDENT**

**LANDS REGISTRAR KILIFI ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 17<sup>th</sup> November 2020 by the Applicant seeking the following orders; -
  1. That an order of Certiorari do issue to quash the publication and advertisement of the Gazette Notice No. 11009 dated November 22, 2019



2. That an order of Mandamus do issue to direct the 4<sup>th</sup> and 5<sup>th</sup> Respondents to confirm the allocation of Plot Numbers Chembe/Kibabamshe 691 and Chembe/Kibabamshe/692 (Original Title No. Chembe/Kibabamshe/408) to the applicant.
3. That an Order of Mandamus directed at the 4<sup>th</sup> and 4<sup>th</sup> respondents to authorize the due execution and release of titles of Plot numbers Chembe/Kibabamshe/691 and Chembe/Kibabamshe/692 (Original Title No. Chembe/Kibabamshe/408) in the name of the Applicant herein.
4. That the grant of leave herein do operate as a stay against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally by themselves, their agents, servants, employees and assignees restraining them from remaining on, trespassing upon, building upon and/or in any manner whatsoever from tampering with Plot Numbers Chembe/Kibabamshe/691 and Chembe/Kibabamshe/692 (Original Title No. Chembe/Kibabamshe/408) in any way until the determination of this Judicial Review proceedings or until further Orders are made by this Honourable court.
5. That costs of and incidental to this application be awarded to the applicant
6. That such further or other relief as the Honourable court may deem just and expedient to grant.

The 5<sup>th</sup> Respondent filed a Notice of Preliminary Objection date July 7, 2021 on the following grounds: -

- a. The matter before this court contravenes Order 53 Rule 2 of the Civil Procedure Rules as the Judicial Review application has been filed after the lapse of 6 months from the determination of the National Land Commission.
  - b. That the Judicial review application filed by the Applicant Contravenes Section 9 (2) of the Law Reform Act where an Application for an Order of Mandamus, prohibition or Certiorari shall in specified proceedings be made within six months or such shorter period.
  - c. The Applicant has not been granted leave to commence the Judicial Review Application in contravention of Order 53 Rule 1 of the *Civil Procedure Rules* as there is no order from the court granting him leave in his pleadings.
2. Counsel agreed to canvas both the applications and the Preliminary Objection vide written submissions which were duly filed but the 4<sup>th</sup> respondent relied on the Replying Affidavit filed by the Land Registrar.
  3. The Applicant's case is that it is a limited Company duly registered under the provisions of the Companies Act and has been the registered proprietor of the leasehold interest in the suit property until sometime when the Interested Parties trespassed and occupied the suit property.
  4. The Applicant deponed that he filed a suit against the interested parties in ELC No. 86 of 2011 whereby judgment was entered in favor of the applicant on 11<sup>th</sup> June 2019.
  5. It was the Applicant's that the Respondents dishonestly caused to be published an advertisement vide a Gazette Notice No. 11009 dated November 22, 2019 seeking to cancel the Applicant's title over the suit property which is an illegality and would be against the said decree. Further that his efforts to have titles issued to him have been futile and urged the court to grant the orders as prayed.
  6. The 4<sup>th</sup> Respondent filed a replying affidavit dated 23<sup>rd</sup> April 2021 stating that the publication of the Gazette Notice seeking to cancel the Applicant's title over the suit property was sought by the Estate



of Mashobo Nyaki Mwachambi. That the subsequent publication and cancellation were done after the National Land Commission awarded the original parcel of the suit property to the late Mashobo Nyaki Mwachambi via Gazette Notice dated July 17, 2017.

7. He stated that while in the process of implementing the National Land Commission's decision, their office was served with a court order dated 11<sup>th</sup> September 2019 by the Applicant and in compliance with the court order they halted the process. Further, that apart from the said court order, they have no other documents that can help verify the legitimacy of the title held by the Applicant.

### **Respondent's Submissions on the Preliminary Objection**

8. Counsel submitted that the application has been made pursuant to the provisions of Order 53 of the Civil Procedure Rules but it is in contravention of the said provisions and Section 9 (3) of the Law Reform Act which stipulates that an application for an order of Certiorari ought to be brought within six months and that the publication/ advertisement of Gazette Notice 1109 was done on 22<sup>nd</sup> November 2019. The Applicant filed this suit on the November 17, 2020 nearly 12 months after the order.
9. Mr. Kiilu relied on the case of Republic v Attorney General Cabinet Secretary of Agriculture & another where Judge N.A Matheka relying on *Raila Odinga & 6 Others v Nairobi City Council* Nairobi HCCC No. 899 of 1993; (1990-1994) EA 48 dismissed the application as there was unexplained delay in filing the application. Counsel urged the court to uphold the Preliminary Objection and dismiss the application.

### **Applicant's Submissions**

10. Counsel for the Applicant gave a brief background to the case which has been enumerated above by the deponent. Counsel identified two issues for determination as whether the application is made under Order 53 of the Civil Procedure Rules and whether the Applicant qualifies for the remedy sought.
11. Counsel relied on Article 22 (3) and (4) of the Constitution and submitted that the Applicant has enumerated the alleged violation of the rights and reliefs sought Counsel also cited the case of *Nation Media Group Ltd v Attorney General* [2007] 1 EA 261 and urged the court to allow the application and dismiss the preliminary objection with costs.

### **Analysis and Determination**

The law on judicial review is anchored on Order 53 of the Civil Procedure Rules

Rule 2 states; -

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.

Section 9 (3) of the Law Reform Act provides;

“In the case of an application for an order of Certiorari to remove any judgement, 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 judgement, order,



decree, conviction or other proceeding or such shorter period as may be prescribed under any written law.”

12. Further *the Constitution* of Kenya, 2010, has given the High Court jurisdiction to review the administrative actions of public (and private) bodies under Article 47 of *the Constitution* as read together with Article 23 of *the Constitution*. Parliament has, further, enacted the FAAA to give effect to Article 47 of *the Constitution*.
13. In the case of *James Gacheru & 22 others v Kiambu County Assembly & 3 Others* [2017] eKLR Justice J. Ngugi observed the following: -

“Section 9 of the Kenya *Law Reform Act* and Order 53 of the Civil Procedure Rules were introduced into our law to give the High Court special jurisdiction to issue the writs of certiorari, mandamus and prohibition. Prior to that, the High Court did not have any such jurisdiction. However, in *the Constitution* of Kenya, 2010, the jurisdiction of the High Court to review the administrative actions of public (and private) bodies is now expressly provided for in Article 47 of *the Constitution* as read together with Article 23 of *the Constitution*. Parliament has, further, enacted the FAAA to give effect to Article 47 of *the Constitution*. In other words, it is no longer necessary to rely on the *Law Reform Act* as the law that clothes the High Court with jurisdiction to review administrative decisions and actions by public bodies: *the Constitution* bequeaths that jurisdiction to the High Court directly by constitutionalizing the right to Fair Administrative Action.

It is important to recall that the right to fair administrative action is a fundamental right included in the Bill of Rights of *the Constitution*. The Article provides as follows:

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.

It follows, then, that when a person is aggrieved by an administrative decision, that person’s fundamental right as defined in Article 47 of *the Constitution* is potentially violated and that such a person may choose to bring a suit for enforcement of her fundamental rights under Article 23 of *the Constitution*. Parliament, in giving effect to Article 47 of *the Constitution* has now enacted the FAAA which provides an avenue for bringing such a suit by an aggrieved party. That avenue is provided for in Section 9 of FAAA.”

14. The Applicant herein invoked the provisions of Order 53 of the Civil Procedure Rules and Section 9 of the *Law Reform Act* and therefore he must stick to the provisions that he is seeking his relief from.



15. In the case of *National Social Security Limited v Sokomanja Limited* [2021] eKLR the Court observed as follows: -

“Judicial review as a relief is provided for in among others; Article 23 (3) of *the Constitution* of Kenya 2010, section 8 of the *Law Reform Act* Chapter 26 Laws of Kenya, section 13(7) of the *Environment and Land Court Act* 2011, section 7 of the *Fair Administrative Action Act* 2015 and the Common law. In my view, no leave is required to seek judicial review as a relief under Article 23(3) of *the Constitution* where proceedings are instituted to enforce the Bill of Rights under Article 22 of *the Constitution* or where proceedings have been brought under section 7 of the *Fair Administrative Action Act*, 2015 for the review of an administrative action. Such leave is also not required under the *Environment and Land Court Act* 2011 before such relief is sought.

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.”

16. Similarly, in the case of *Peter Orengo Migiro (Suing On Behalf Of The Late Christopher Orengo Makori) v Samwel Omagwa James & 2 others* [2022] eKLR Jane Onyango J held that: -

“What can be gleaned from the decisions is that indeed the scope of Judicial Review is no longer confined to the legal framework under the *Law Reform Act* and Order 53 of the *Civil Procedure Act* but is now entrenched in *the Constitution* and the Fair Administrative Act. However as correctly held in the in NSSF (supra), if one opts to file an application for Judicial Review under the *Law Reform Act* and Order 53 of the Civil Procedure Rules, one must apply for leave within six months of the decision as the court has no discretion to enlarge time within which to file the application for leave.”

17. Further it is on record that there is a similar suit pending before the Deputy Registrar ELC E 17 of 2021 involving the same parties, the same parcel of land in respect of ownership. The Applicant has also not explained the delay in filing this application which the law and procedure stipulates that it should be filed within a period of 6 months from the date of the decree or the impugned order.
18. I find that the Preliminary Objection has merit and is therefore upheld consequently application is struck out with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF JUNE, 2022.**

**M.A. ODENY**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

