



**Republic v The Land Disputes Tribunal Magarini (Now Defunct) & another;
Mole & another (Exparte); Bashora (Interested Party) (Environment & Land
Miscellaneous Case 18 of 2021) [2022] KEELC 3753 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND MISCELLANEOUS CASE 18 OF 2021**

**MAO ODENY, J
JUNE 23, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**THE LAND DISPUTES TRIBUNAL MAGARINI (NOW
DEFUNCT) 1ST RESPONDENT**

PRINCIPAL MAGISTRATES COURT AT MALINDI 2ND RESPONDENT

AND

ESTHER JOHN MOLE EXPARTE

CHRISTINE JONATHAN KENGA EXPARTE

AND

SAMUEL BASHORA INTERESTED PARTY

RULING

1. This ruling is in respect of an application by way of Chamber Summons dated May 18, 2021 seeking leave to institute judicial review proceedings of *certiorari* to quash the proceedings and award of the Disputes Tribunal Magarini of August 8, 2006, and the judgment and decree of the Principal Magistrate’s court Malindi dated November 23, 2006; and that leave if granted do operate as a stay against the execution of the said judgment and decree by the Principal Magistrates Court.
2. The background is that on April 13, 2006, the interested party herein filed a trespass claim against the *ex-parte* applicants, before the Magarini Disputes Tribunal, Land Dispute no 9/4 of 2006. The



tribunal made its decision on August 8, 2006 which was adopted as an order of the court on November 23, 2006 vide the Principal Magistrates court in PMCC 17 of 2006.

3. That the *ex-parte* applicants then filed an appeal no 442 of 2006 to the provincial land disputes tribunal but before the same could be heard and determined, the then Land Disputes Tribunal Act was repealed causing the appeal to be transferred to the Chief Magistrates Court at Malindi.
4. According to the *ex parte* applicants, they were at that time acting in person hence not aware of the change in law hence the appeal proceeded to finality before the Chief Magistrates Court without their knowledge. Further it was the applicant's evidence that the appeal ought to have been transferred to this court as opposed to the Chief Magistrates Court which lacked the requisite jurisdiction.
5. The respondents, through the office of the Attorney General, opposed the application and filed grounds of opposition dated November 25, 2021 whereby they stated that there has been inordinate delay in filing the present application and that following the repeal of the said Land Disputes Tribunal Act active matters before the tribunals or magistrates courts continued to be heard in forums.
6. Further that the *ex -parte* applicant could not plead ignorance and that the applicants failed to demonstrate that the appeal was indeed transferred to the Chief Magistrate's Court.

Counsel agreed to canvas the application vide written submissions which were duly filed

***Ex-parte* applicants' submissions**

7. Counsel for the *ex-parte* applicants' submitted that the Magarini Land Dispute Tribunal acted in excess of its jurisdiction conferred under section 3 of the then Land Disputes Tribunal Act, 1990, which conferred to the tribunals jurisdiction to deal with disputes related to division of land, determination of boundaries, claim to occupy or work land and trespass to land.
6. Ms Marubu submitted that the jurisdiction did not extend to matters of ownership, title, costs and damages as it was held in the case of *Joseph Mikeya Khatoji v Chairman Shinyalu Land Disputes Tribunal* [2021] eKLR; and in *Richard Jumabsambuli v Chairman Bumula Land Disputes Tribunal and Western Province Appeals Committee; Patrick Mutoto and another* [interested parties] [2019] eKLR.

Counsel therefore urged the court to allow the application in the interest of justice.

Respondents' submissions

7. Counsel relied on the grounds of opposition filed and stated that the issue for determination by the court was whether the present application is competent. Counsel submitted that the applicants seek leave to file for judicial review sixteen years (16) after the decision of the then Magarini Land Disputes Tribunal was rendered, which delay is inordinate and unreasonable hence should be dismissed.
8. Mr Mkala further submitted that the applicants excuse for failure to prosecute their appeal before the Appeals Tribunal is that the appeal was transferred to the magistrates court after the appeals tribunal was repealed, and that section 30 of the *Environment and Land Court Act* provides that matters which were active before the magistrates court of tribunals shall continue to be heard from those courts or tribunals.
9. It was counsel's submission that the applicants claim that they have taken long time because they were unrepresented and laypersons is not tenable as ignorance of the law is no defence.
10. On the issue whether this application is competent counsel submitted that judicial review is only concerned with the decision making process and not the merits of a decision. That no evidence was



tendered by the applicant herein to show that the proceedings of the Magarini Land Disputes Tribunal were marred by illegality, procedural unfairness and irrationality to warrant judicial review.

11. Counsel cited the cases of *Republic v KRA ex parte Yaya Towers Limited* [2008] eKLR; *Republic v Zacharia Kabuthu & another {sued as trustees and on behalf of and as officials of the Kenya Evangelical Lutheran Church}*; *Johannes Kutu Ole Meliyio & 2 others {interested parties} ex parte Benjamin Kamala & another* [2020] eKLR; and in *Republic v National Transport and Safety Authority & 10 others ex parte James Maina Mugo* [2015] eKLR.
12. Counsel also relied on part VI of the *Law Reform Act* (cap 26) which provides for *mandamus*, *prohibition* and *certiorari*, the rules of the court provided state as follows;

“In the case of an application for an order of *certiorari* to remove any judgement, order, decree, conviction or other proceeding 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 described under any written law; and where that judgement, 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 the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”
13. Counsel therefore submitted that by virtue of part VI of the *Law Reform Act* and order 53 of the *Civil Procedure Rules*, the present application is time barred having been filed 16 years after the decision was rendered. That the delay in filing the application is inordinate and relied on the case of *APA Insurance Company v Vincent Nthuka* [2018] eKLR.

Analysis and Determination

14. This is an application for leave to file an application to commence judicial review of *certiorari* to quash the proceedings and award of the Disputes Tribunal Magarini of August 8, 2006, and the judgment and decree of the Principal Magistrate’s Court Malindi dated November 23, 2006; and that leave if granted do operate as a stay against the execution of the judgment and decree by the principal magistrates court.
15. The applicable law on leave is order 53 rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. Such leave must pursuant to order 53 rule 2 be sought within a period of six months. Rule 1 and 2 above read as follows: -
 1. Applications for *mandamus*, prohibition and *certiorari* to be made only with leave [Order 53, rule 1.]
 2. No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefor has been granted in accordance with this rule.
 3. 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.

4. 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.
5. 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.

1. Time for applying for *certiorari* in certain cases [Order 53, rule 2.]

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.

16. Further, the reason for seeking leave was explained by Waki J (as he then was), in *Republic vs County Council of Kwale & Another ex Parte Kondo & 57 Others*, Mombasa HCMCA no 384 of 1996 as follows: -

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

17. It is therefore trite that in an application for leave the court ought not to delve deeply into the arguments of the parties, but should make a quick perusal of the evidence and make the decision as to whether there is an arguable case for granting the relief and whether there is a case fit for further investigation at the inter partes hearing.
18. The Land Dispute Tribunal Act no 18 of 1990 was repealed but pursuant to section 30 of the said *Environment and Land Court Act* the Chief Justice Hon CJ Dr Willy Mutunga (as he then was) vide



Gazette Notice no 16268 issued Practice directions following the establishment of the Environment and Land Court where Practice direction no 6 stated as thus; -

“all proceedings which were pending before the magistrates courts, having been transferred thereto from the now defunct District Land Disputes Tribunal shall continue to be heard and determined by the same courts”.

19. Under practice direction No. 11 the Hon. Chief Justice directed that appeals from Magistrates Courts and Tribunals shall lie in the Environment and Land Court pursuant Section 13 (4) of the Environment and Land Court Act. The position therefore is that the Environment and Land Court Act has jurisdiction to hear and determine appeals from tribunals such as the Land Dispute Tribunals as they existed then.
20. In the present application, the *ex parte* applicants averred that they were not informed of the change of forum where their appeal could be heard, after the repeal of the Land Disputes Tribunal the applicants stated that the appeal was transferred to the Chief Magistrates Court but from the record there is no evidence of transfer which would not be of any effect as the applicants did not take any steps to ensure that their appeal was transferred, or even heard and determined in whichever forum, for over 15 years.
21. The applicants are indolent since they did not take any action within the prescribed time No reason has been advanced to the delay of 16 years which is inordinate. In the present application even article 159 cannot come to the rescue of the applicants as was held in the case of APA insurance Company v Vincent Nthuka [2018] eKLR, (*supra*) the honourable judge stated as follows: -
26.It is my view article 159(2) (d) of the Constitution cannot be a panacea for all ills. It cannot be relied upon to revive a claim which is expressly extinguished by statute since the provision does not give rise to a cause of action. In my view it is not meant to destroy the law but to fulfil it. It is meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issue of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought....”
27. I find that this application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23 RD 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 Rulingt has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

