Republic v Deputy County Commissioner, Baringo North Sub-County & 6 others; Rotich (Exparte); Kiptui (Interested Party) (Environment and Land Judicial Review Case 08 of 2022) [2022] KEELC 4787 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEELC 4787 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 08 OF 2022

L WAITHAKA, J

JULY 26, 2022

(FORMERLY ELDORET ELC JUDICIAL REVIEW CAUSE NO. 8 OF 2020)

IN THE MATTER OF AN APPLICATION BY MICHAEL K. ROTICH FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 284) LAWS OF KENYA

AND

IN THE MATTER OF PLOT NUMBER 3425 KAPKOIWO ADJUDICATION SECTION (BARINGO NORTH SUB-COUNTY)

AND

ITEN ELC J/R NO. 8 OF 2022 (RULING)

IN THE MATTER OF THE DECISION OF THE DEPUTY COUNTY COMMISSIONER, BARINGO NORTH SUB- COUNTY

BETWEEN

REPUBLIC ..... APPLICANT

AND

DEPUTY COUNTY COMMISSIONER, BARINGO NORTH SUB-COUNTY ..... 1ST RESPONDENT

CABINET SECRETARY FOR LANDS, HOUSING AND URBAN DEVELOPMENT ..... 2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 3RD RESPONDENT

LAND REGISTRAR, BARINGO LANDS REGISTRY ..... 4TH RESPONDENT

DIRECTOR OF LAND AND ADJUDICATION AND SETTLEMENT .... 5TH RESPONDENT

CHIEF LAND REGISTRAR ..... 6TH RESPONDENT

ATTORNEY GENERAL ..... 7TH RESPONDENT

AND

MICHAEL K. ROTICH ..... EXPARTE

AND

JOHN K. KIPTUI ..... INTERESTED PARTY

RULING

1. This ruling is in respect of the notice of preliminary objection (P.O) raised by the 1st to 7th respondents, through the Attorney General dated 1st April, 2021. The P.O seeks to strike out the suit herein on the grounds that it was filed out of time, it is bad in law and incurably defective and that it is otherwise an abuse of the process of the court.

2. Pursuant to directions given on 15th February, 2022 the P.O was disposed of by way of written submissions.

3. I have carefully read and considered the submissions filed by the ex parte applicant and the Interested party concerning the P.O (The respondents had not filed their submissions at the time of writing the ruling). The sole issue arising from the submissions is whether the suit is bad in law for having being filed out of time.

4. Concerning that issue, the ex parte applicant has admitted that the suit was filed outside the time stipulated in the *Civil Procedure Rules* and the *Law Reform Act* but submitted that the time bar contemplated in order 53 rule 2 of the *Civil Procedure Rules* (CPR) and Section 9(3) of the *Law Reform Act*, Cap 26 Laws of Kenya, does not apply in the circumstances of this case where the decision sought to be quashed is that of the Minister under Section 29 of the *Land Adjudication Act*, Cap 284 Laws of Kenya. In that regard reliance is made on the case of *Victor Njeri Njugu & 3 Others; Njugu Kaigeri alias Ndumberi Kaigeri (deceased) interested party* (2010) e KLR where it was stated:-

> " The court is of the opinion that the phrase "or other proceedings should be interpreted ejus dem generis so that such proceedings must fall within the class of a judgment, order, decree or conviction. It is thus evident that the decision of the Minister under section 29 of the *Land Adjudication Act* is not the product of judicial proceedings. The statutory limitation of 6 months stipulated in both the *Law Reform Act* (Cap 26) and the *Civil Procedure Rules* are therefore inapplicable".

5. Based on the provisions of order 53 rule 2 of the CPR and Section 9(3) of the *Law Reform Act* which provides that in case of an application for an order of Certiorari to remove any judgment, order, decree, conviction or other proceedings for the purposes of it being quashed, leave to bring such application shall not be granted unless the application for leave is made not later than 6 months after the date of judgment, order, decree, conviction or other proceeding; and the case of Republic vs. Mwangi Nguyai

& 3 others ex parte Haru Nguyai High Court at Nairobi, Constitutional & Judicial Review Division, Miscellaneous Application No. 89 of 2008 where it was stated:-

> "Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings..... As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes";

6. Further reliance is made on the case of *Rosaline Tubei & 8 others v. Patrick K. Cheruiyot & 3 others* (2014) e KLR where the court stated:-

> "It was held that a court cannot grant leave to a party seeking to file an application for judicial review out of time; and if such leave is granted, it can be challenged at the substantive hearing of the motion."
>
> and on the case of Republic vs. Minister for Lands & Settlement & Others Mombasa HCMCA No.1091 of 2006 where it was held that legal business can no longer be handled in a sloppy and careless manner and some clients must realize at their cost that the consequences of careless and leisurely approach must fall on their shoulders and submitted that the door to access the remedy of judicial review is firmly shut.

Analysis And Determination

7. As pointed out herein above, it is not in dispute that the judicial review proceedings herein were brought outside the time stipulated in Order 53 Rule 2 of the CPR and Section 9(3) of the *Law Reform Act*. It is noteworthy that the application for judicial review is expressed as having been brought under the said provisions of the law.

8. The sole issue arising from the submissions is whether the time bar stipulated in Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the CPR is inapplicable in the circumstances of this case.

9. As pointed out above, the ex parte applicants have argued that the subject matter of these proceedings being an application for judicial review of the decision of the Minister arising from Section 29 of the *Land Adjudication Act* is not subject of the time bar stipulated in Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the CPR. That argument is premised on the persuasive decision of Olola J., in the case of Victor Njeri Njugu & 3 Others; Njugu Kaigeri alias Ndumberi Kaigeri cited herein above.

10. I have considered the persuasive decision relied on by the ex parte applicants and the cases cited by the Interested Party among other cases like the case of *Peter Orego Migiro (Suing on behalf of the late Christopher Orenge Makori) v. Samwel Omagwa James & 2 Others* (2022)eKLR; *Republic vs Mwangi Nguyai & 3 Others ex-parte Haru Nguyai*, High Court at Nairobi, Constitutional & Judicial Review Division, Miscellaneous Application No. 89 of 2008 and the *Rosaline Tubei & 8 others vs. Patrick K. Cheruiyot & 3 others* (supra).

11. In the case of *Peter Orego Migiro (Suing on behalf of the late Christopher Orenge Makori) v. Samwel Omagwa James & 2 Others* (supra), it was stated:-

> "The question as to whether the court has the discretion to extend time for filing of an application for Judicial Review has been the subject of litigation and the Courts have

held divergent views on the matter.....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.

18. 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."

12. In arriving at that decision, the court was guided by the Court of Appeal decision in *Wilson Osolo v John Ojiambo Ochola & Another* 1995 eKLR where the Court held that:

> " It can readily be seen that Order 53 Rule 2 (as it then 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 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 of the Laws of Kenya which gives some limited right for extension of time to the suits after expiry of a limitation period. But this Act also has no relevance here".

13. In the case of *Republic vs Mwangi Nguyai & 3 Others ex-parte Haru Nguyai* (supra) it was stated:-

> "Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that

judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes."

14. In *Rosaline Tubei & 8 others vs. Patrick K. Cheruiyot & 3 others* (2014) e KLR the court stated: -

> " ....applications for prerogative orders, have a limitation period. The *Law Reform Act*, CAP 26, Laws of Kenya, provides as follows at Section 9 (3) :-
>
> 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.
>
> The above provision is echoed in the Civil Procedure Rules, 2010, which in Order 53 Rule 2 provides as follows: -
>
> "O.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 no later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and the 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.
>
> 10. It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of the decision. The decision of the tribunal which is sought to be quashed was made in the year 2010 and the decision of the Magistrate's court, sought to be quashed, was made on 1 March 2011. This application was filed on 31 March 2014, about 3 years after the adoption of the award by the Magistrate's Court. The application is therefore clearly out of time.
>
> 11. There is nevertheless a prayer within this application, for time to be extended, so that the ex-parte applicants can proceed to apply for the order of certiorari, out of time. No law nor authority was cited by counsel for the applicant to support this prayer.
>
> 12. I am aware that by dint of the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the Rules. Following this provision, it may be arguable

that time may be enlarged to make an application for judicial review outside the 6-month limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provision set out in Section 9(3) of the *Law Reform Act* (above), and it is trite law that Rules made under statute, cannot override a statutory provision. The *Law Reform Act*, itself, has no provision for extension of time. I have therefore seen no law, which can entitle me to enlarge time for the filing of an application for certiorari, outside the 6-month limitation period..... It follows that a court cannot grant leave to a party seeking to file an application for judicial review out of time, and if such leave is granted, it can be challenged at the substantive hearing of the motion."

15. In applying the principles enunciated in the cases cited herein above to the circumstances of this case where the applicant has moved the court under Order 53 of the CPR among other provisions of the law and on the strength of the persuasive decision of Rosaline Tubei & 8 Others supra, I find and hold that this court has no jurisdiction to extend time to grant the orders sought by the applicant.

16. Being of the view that Tribunals/offices established under the *Land Adjudication Act* exercise quasi-judicial functions, I am of the considered opinion that any person desirous of challenging those decisions through Judicial Review has to move the court within the timelines stipulated in the law pursuant to which the jurisdiction of the court is invoked. In the circumstances of this case, the ex parte applicant invoked a none existent jurisdiction of the court as the court has no power to extend time within which to seek leave to apply for certiorari.

17. Whilst Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the CPR specifically addresses the remedy of Certiorari and cognizance of the fact that the ex parte applicant also seeks an order of prohibition, it is important to point out that an order of prohibition is not efficacious as it does not correct the course, practice or procedure of an inferior Tribunal, or a wrong decision on the merits of the proceedings. In that regard see the case of *Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Noroge & 9 Others* (1997) e KLR.

18. The upshot of the foregoing is that notice of preliminary objection by the respondent is found to be merited and is upheld. Consequently, the notice of motion dated 14th July 2020 and filed on an even date is found to be bad in law and is dismissed with costs to the respondents and the interested party.

19. Orders accordingly

DATED, SIGNED AND DELIVERED, AT ITEN THIS 26TH DAY OF JULY 2022.

L. N. WAITHAKA

JUDGE