



Mativo & another v Minister for Housing & Lands through the Deputy Commander & 2 others; Mainga (Interested Party) (Environment and Land Judicial Review Miscellaneous Application E008 of 2021) [2022] KEELC 12804 (KLR) (15 July 2022) (Ruling)

Neutral citation: [2022] KEELC 12804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E008 OF 2021**

TW MURIGI, J

JULY 15, 2022

BETWEEN

JOHN MATIVO 1ST APPLICANT

MUTINDA KISUKI 2ND APPLICANT

AND

**MINISTER FOR HOUSING & LANDS THROUGH THE DEPUTY
COMMANDER 1ST RESPONDENT**

**LAND ADJUDICATION & SETTLEMENT OFFICER MAKUENI
COUNTY 2ND RESPONDENT**

CHIEF LAND REGISTRAR MAKUENI COUNTY 3RD RESPONDENT

AND

JOHN NGUMBI MAINGA INTERESTED PARTY

RULING

1. By a Chamber Summons application dated July 15, 2021, brought pursuant to the provisions of Sections 1A, 1B, 3, 3A, 95 of the [Civil Procedure Act](#), Order 50 Rule 5 of the [Civil Procedure Rules](#), Article 47 of the [Constitution](#) of Kenya 2010, the Applicants seek for the following orders: -
 - i. Spent.
 - ii. That leave be granted to the Applicants to commence Judicial Review Proceedings out of time.
 - iii. That the costs of the application be in the cause.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of John Mativo sworn on the even date.

The Applicants Case

3. A summary of the grounds and the averments is that sometime in 2008, the adjudication process with respect to land parcel number 2953 Kasikeu Adjudication Section was concluded after the Minister upheld on appeal, the decisions of the Arbitration and the Objection boards. The Applicants averred that the Minister's decision was made without taking into account the existence of a valid Court judgment. That being aggrieved by the Minister's decision, the Applicants instructed the firm of Kasyoka and Associates to commence judicial Review Proceedings. That thereafter, they kept visiting the offices of the said firm where they were assured that the matter had already progressed. That sometime in July 2021 the Applicants were surprised when they discovered that the said firm had not acted on their instructions which prompted them to instruct the firm of DKM Law Advocates to act on their behalf. The Applicants argued that the delay in filing the judicial Review proceedings was solely attributed to the indolence on the part of their previous Advocate which should not be visited upon them.
4. The Applicants argued that the final decision of the adjudication process should not interfere with the existing judgment of the Court. The Applicants further argued that they had demonstrated sufficient cause why the Judicial review proceedings were not filed on time. The Applicants contend that they will suffer irreparable loss if they are not granted leave to institute Judicial Review Proceedings out of time.

The Respondents Case

5. The Respondents opposed the application through the grounds of opposition dated April 26, 2022 in which the following grounds were listed: -
 1. The application is fatally defective, incompetent, malapropism and untenable both in substance and form and contrary to the provisions of Order 53 under which it is brought thus it should be dismissed.
 2. The Chamber Summons application is hopeless, misleading and devoid of any merit as the applicants have failed to demonstrate the actions of the Respondents were laced with abuse of process.
 3. The Chamber Summons is an abuse of Court process as the Applicants have failed to demonstrate the reasons for the delay in filing the application and are guilty of indolence; the decision was made more than two and a half years without them taking any action.
 4. The Chamber Summons application is a non-starter as the allegations of inaction by the purported law firm of Kasyoka & Associates amounts to nothing more as hearsay as one is unable to ascertain that the firm had taken up the Applicants case.
 5. The Chamber Summons Application dated July 15, 2021 is misconceived, without merit and an abuse of the Court's process and the same should be dismissed with costs.

The Interested Party's Case

6. In opposing the application, the Interested Party vide his replying sworn on November 8, 2021 averred that he actively participated in the adjudication process with respect to Land Parcel 2953 Kasikeu Adjudication Section which was finalized after the Minister upheld the decisions by the Arbitration and the Objection Board. The Interested Party argued that the Applicants have not demonstrated that



the firm of Kasyoka and Associates had received instructions on December 5, 2018 or that they paid legal fees towards the same. The Interested Party contends that the Applicants have not demonstrated sufficient cause for not filing the application on time as it was over three years since the Minister's decision was made. He argued that the application was an afterthought, bad in law, an abuse of the Court process and brought in bad faith. He urged the Court to dismiss the application.

The Applicants' Response

7. In a further affidavit sworn on May 11, 2022, the Applicants averred that the Respondents and the Interested party had not denied that there existed a valid Court judgment in relation to Plot No 2953 Kasikeu Adjudication Section. The Applicants reiterated that the land adjudication process should not interfere with an existing Court decision. The Applicants argued that it would be in the interest of justice if the application is allowed to avoid undue hardship on the part of the Applicants and their families.
8. The application was canvassed by way of written submissions.

The Applicants Submission

9. The Applicants submissions were filed on July 21, 2021.
10. Learned Counsel for the Applicants submitted that prior to the promulgation of the Constitution 2010, Judicial Review Proceedings were governed by the Law Reform Act and Order 53 of the Civil Procedure Rules. That Section 9 of the Law Reform Act outlines the rules that govern the Courts and sets the time lines for filing judicial review proceedings.
11. That by dint of Article 47 of the Constitution, judicial review proceedings have now been given constitutional recognition.
12. Counsel submitted that Section 81 of the Civil Procedure Act empowers the Rules Committee to make rules relating to the procedure in civil Courts and that the rules shall not be inconsistent with the Civil Procedure Act, while Section 95 and Order 50 Rule 5 empowers Courts to exercise its discretion to enlarge any period fixed or granted that may have expired. That in addition, Section 3A of the Civil Procedure Act bestows the Courts with inherent powers to make such orders as may be necessary for the ends of justice or to prevent an abuse of the Court process. Counsel went on to submit that from the foregoing, it is clear that Order 53 Rule 2 of the Civil Procedure Rules is inconsistent with the Civil Procedure Act as it seeks to limit the powers of the Court and hence the Rules Committee exceeded its powers given by the enabling statutes.
13. Counsel argued that the Applicants were seeking leave to appeal against the Minister's decision which was made without taking into consideration the existence of a valid court judgment and hence an abuse of the Court process.
14. Counsel submitted that the provisions of Section 8 and 9 of the Law Reform Act were repealed by Article 47(3) of the Constitution after parliament enacted the Fair Administrative Act of 2015. Counsel contends that the timelines set for an order of Certiorari in Section 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules are no longer applicable as they have led to harsh and undesirable results.
15. Counsel submitted that the delay in filing the application for judicial review was occasioned by the Applicants previous Advocate and thus, the Applicants should not be made to suffer for the mistake of their Advocate.



16. Counsel urged the Court to make a finding that the Section 9 of the Law Reform Act has been repealed by the Fair Administrative Act of 2015.

The Respondents Submissions

17. The Respondents submissions were filed on April 26, 2022.

18. The Respondents raised the following issues for the Court's determination: -

- i. Whether the ex parte applicant has explained the inordinate delay.
- ii. Whether the orders sought can be granted.

19. With regards to the issue whether the Applicants have explained the inordinate delay, the Attorney General submitted that Order 53 of the Civil Procedure Rules and Section 9(3) of the Law Reform Act provides that judicial review proceedings seeking orders of Certiorari must be filed within six months from the date when the decision was made. That in the instant case, the Applicants failed to comply with the provisions of the law. Counsel went on to submit that the Applicants have not demonstrated sufficient cause to persuade the Court to exercise its discretion in their favour since the instruction note marked as annexure JM2 is a mere intention to appoint the Advocate. Counsel argued that there was no evidence to demonstrate that the Applicants had complied with the instruction note nor did the firm of Kasyoka and Associates file a replying affidavit to confirm the Applicants assertions. Counsel argued that the Applicants did not demonstrate what steps they took to ensure that the judicial review proceedings were filed and prosecuted.

20. With regards to the issue whether the orders sought should be granted, Counsel submitted that although with the enactment of the Fair Administrative Action Act 2015 there has been a relaxation of instituting judicial review proceedings, the Applicants have elected to bring the judicial review proceedings under Order 53 of the Civil Procedure Rules and are therefore bound by the express time limits to institute such proceedings.

21. Counsel further submitted that the Court has no jurisdiction to extend time to file for leave to institute judicial review proceedings.

22. To buttress its submissions, the Attorney General cited the following authorities: -

1. *Nairobi JR No 270 of 2016 Cabinet Secretary Information and Communication & Technology & 3 Others Vs Ex Parte Celestine Okuta & Others.*
2. *Rosaline Tubei & 8 Others Vs Patrick K Cheruiyot & 3 Others (2014) eKLR.*
3. *The Minister for Lands & Settlement & Others Mombasa HCMCA No 1091 of 2006.*
4. *Republic Vs Chairman Amagoro Land Disputes Tribunal & Another Ex-parte Paul Mafwabi Wanyama (2014) eKLR.*
5. *Republic Vs Mwangi Nguyai & 3 Others Ex-parte Haru Nguyai [2013] eKLR.*

23. The authorities were not attached to the submissions and as such, I will not take the authorities into consideration.

24. In response, the Applicants filed further submissions on May 25, 2022.

25. Counsel submitted that the instruction note from the Firm of Kasyoka & Associates Advocates was a clear indication that the Applicants had instructed the firm within the shortest time possible. Counsel



argued that the Respondents did not dispute the existence of the instruction note. Counsel contends that the instant application is based under the Fair Administration Action Act 2015 and not the Law Reform Act and Order 53 of the Civil Procedure Rules as it was filed after the Act came into force.

26. By the time of writing this ruling Counsel for the interested Party had not filed his written submissions.

Analysis And Determination

27. Having considered the application, affidavits, the grounds of opposition and the rival submissions, I find that the only issue for determination is whether the Court has jurisdiction to extend the time to file judicial review proceedings out of time.

28. Section 9(3) of the Law Reform Act provides for the time lines within which an application for an order of Certiorari should be made and states as follows;

' In the case of an application for an order for 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 proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to an appeal, and a time is limited by the 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.'

29. The above provision is echoed in Order 53 Rule 2 of the Civil Procedure Rules which provides as follows;

' Leave shall not be granted to apply for an order of certiorari to remove to court any judgment, order, decree, conviction or other proceedings 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.'

30. It is clear from the above provisions that an application seeking for leave to apply for orders of certiorari must be filed within a period of six months.

31. The Applicants have sought for leave to be extended so that they can apply for an order of Certiorari out of time. The impugned decision was made on September 20, 2018 by the 1st Respondent. The Applicants averred that they had instructed the firm of Kasyoka and Associates to commence Judicial Review proceedings on their behalf but they later discovered that their Advocate did not initiate the same. In this regard the Applicants produced an instruction note dated December 5, 2018 from the firm of Kasyoka and Associates. The Applicants submitted that the failure by their Advocate's to commence judicial review proceedings should not visited upon them. The Respondents on the other hand argued that the Applicants had not demonstrated that they had paid the legal fees required to commence the proceedings. The instruction note is dated December 5, 2018. It has a breakdown of the fees payable and the mobile and identification numbers of the Applicant. However, it does not bear the signatures of the Applicant.



32. In the case of Republic Vs Mwangi Nguyai & 3 Others Ex – parte Haru Nguyai High Court Constitutional & Judicial Review Division Misc Application No 89 of 2008 the court stated as follows;

' 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 recognized 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 the affairs in light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to far that their investment 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 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.

33. In the Republic Vs The Minister for Lands and Settlement & Others Mombasa HCMCA No 1091 of 2006 the court held that the legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.

34. The instant application was filed on July 19, 2021, 4 years after the decision was made. The law is very clear that judicial review application should be made within six months.

35. Learned Counsel for the Applicants submitted that Section 95 of the *Civil Procedure Act* and Order 50 Rule 5 of the Civil Procedure Rules gives the Court discretionary power to enlarge any period fixed or granted that may have expired.

36. It is clear from the above provision that the Court has power to enlarge time where there is limited time for doing any act or taking any proceedings under the rules. However, the only instances where the court has jurisdiction to extend time is where the initial order for doing the act has been given by the court. In the instant case, the period of filing the judicial review proceedings has been fixed by the statute and not the Court.

37. The limitation period is provided under Section 9(3) of the *Law Reform Act*. The *Law Reform Act* has no provision for the extension of time. It is trite law that Rules made under a statute cannot override a statutory provision. In so finding, I am persuaded by the Court of Appeal decision in the case of *Wilson Osolo Vs Ojiambo Ochola & Another (1995) KLR* where it was 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 is 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*.'

38. The *Law Reform Act* does not make provision or room for extension of time. This Court therefore has no jurisdiction to enlarge time for filing of an application for certiorari outside the six months limitation period. Although Counsel argued that the provisions of Section 8 and 9 of the *Law Reform*



Act have been repealed by the provisions of Article 47 the Constitution which in turn has established the Fair Administration Act of 2015, the mandatory provisions of section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules are still in force even with the promulgation of the Constitution.

39. It therefore follows that this Court cannot grant leave to a party seeking to file an application for judicial review out of time. The Ex parte Applicants are therefore at liberty to find other avenues to address their grievances.
40. In the end, the application dated July 15, 2021 is dismissed. Each party to bear its own costs.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF SEPTEMBER, 2022.

IN THE PRESENCE OF: --

Court assistant – Mr. Kwemboi

In absence of the parties.

