Kiptala Cheboi v Deputy Commissioner of Baringo Central & 6 others; Kirui (Interested Party) (Environment and Land Miscellaneous Application E006 of 2022) [2022] KEELC 4850 (KLR) (19 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4850 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2022

L WAITHAKA, J

SEPTEMBER 19, 2022

FORMERLY ELDORET ELC MISC. APPLICATION NO. E006 OF 2022

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS OUT OF TIME FOR AN ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA, THE LAND ADJUDICATION ACT (CAP 284) LAWS OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF PLOT NOUMBER 1264 SALAWA ADJUDICATION SECTION (BARINGO CENTRAL SUB - COUNTY)

AND

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

BETWEEN

PHILIP KIPTALA CHEBOI .... APPLICANT

AND

DEPUTY COMMISSIONER BARINGO CENTRAL SUBCOUNTY .... 1ST RESPONDENT

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

LANDS REGISTRAR BARINGO LANDS REGISTRY .... 3RD RESPONDENT

COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER BARINGO .... 4TH RESPONDENT

DIRECTOR LAND ADJUDICATION AND SETTLEMENT .. 5TH RESPONDENT

CHIEF LAND REGISTRAR .... 6TH RESPONDENT

ATTORNEY GENERAL .... 7TH RESPONDENT

AND

FRANCIS KKIRUI .... INTERESTED PARTY

RULING

1. Philip Kiptala Chebon, the applicant herein, filed the chamber summons dated February 2, 2022 seeking leave to commence judicial review proceedings against the decision of the deputy county commissioner, Baringo Central Sub-County (the 1st respondent herein) made on May 30, 2019, out of time. The applicant also seeks stay of execution of the decision pending the hearing and determination of the intended judicial review proceedings. In particular, the applicant seeks leave to apply for judicial review orders of *Certiorari* and Prohibition of the decision of the 1st respondent made in case no 201 of 2014 restraining him from claiming plot no 1264 Salawa adjudication section.

2. The application is premised on the grounds that the 1st respondent allowed the interested party's appeal in Land Case no 201 of 2014; that in allowing the appeal, the 1st respondent misapplied the principles of law by introducing new parcel no 1263 which was not subject of the dispute at the committee stages; that the 1st respondent failed to understand the issues involved thereby arriving at the wrong finding to the *ex parte* applicant's deteriment; that the delay in filing for leave to institute judicial review proceedings was occasioned by the *ex parte* applicant's previous counsel who misadvised the *ex parte* applicant to file an ordinary suit instead of applying for judicial review; that the *ex parte* applicant's suit was dismissed preliminarily on March 4, 2021; that the *ex parte* applicant applied for certified copies of proceedings in order to pursue the next course of action; that there was delay in supply of the typed proceedings as they were supplied on September 14, 2021; that upon obtaining the proceedings, the *ex parte* applicant sought advice from his current advocate who advised him to seek leave to apply for judicial review out of time; that the delay in applying for judicial review was not intentional; that there is an error apparent on the record of the 1st respondent and that no prejudice will be occasioned on the interested party if the application is allowed.

3. Neither the respondents nor the interested party filed a response to the application.

4. The instant application being one for leave to apply for judicial review out of time, the sole issue for determination is whether the applicant has made a case for being granted the orders sought.

5. The question as to whether a court has jurisdiction to grant leave to commence judicial review out of time was considered in the case of *Peter Orego Migiro (Suing on behalf of the late Christopher Orenge Makori) v Samwel Omagwa James & 2 Others* (2022)eKLR where 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."

6. In that case, the court referred to the case of *Republic v Kenya Revenue Authority Ex-parte Stanley Mombo Amuti* (2018) eKLR where it was stated:-

> "The entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of the court to in such cases guided by the purposes, values and principles of the *Constitution* and the constitutional dictate to develop the law on that front. First, parties, who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the court is now constitutionally guaranteed. It would require a compelling reason that would pass an article 24 analysis test to deny a litigant the right to approach the court. Where a party applies for extension of time as in this case, the court should exercise its discretion and examine the period of the delay and the reasons offered for the delay. Third, an order of judicial review is one of the reliefs for violation of fundamentals rights and freedoms under article 23(3)(f). Fourth, section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8 or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the Act provides for grounds for applying for judicial review. Fifth, Article 159 commands courts to administer justice without undue regard to procedural technicalities."

7. In *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another* (2014) eKLR it was stated that court decisions should boldly recognize the *Constitution* as the basis for judicial review; that court decisions should boldly recognize access to courts as a fundamental right guaranteed under the *Constitution* which can only be limited in a manner that can pass constitutional muster; that it is a constitutional dictate that in applying the bill of rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Concerning developing the law, the court stated:-

> "Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of decisions. Time has come for our courts to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop judicial review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the *Constitution*. Judicial review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the *Constitution*. It is therefore my conclusion that in an application for extension of time such as the one before me, all that an applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay. It will also be a consideration that the impugned decision seeking to be challenged violates or threatens to violate the Bill of Rights or violation of the *Constitution*".

8. In the case of *National Social Security Limited v Sokomanja Limited* (2021 eKLR it was observed: -

> "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."

9. It is clear from the above decisions that 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. Be that as it may, if one opts to file an application for Judicial Review under the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*, he 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. In this regard, see the case *Wilson Osolo v John Ojiambo Ochola & Another* 1995 eKLR where the Court of Appeal stated: -

> "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".

10. In 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 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 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 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."

11. 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) :-
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>> 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 the Civil Procedure Rules, 2010, which in order 53 rule 2 provides as follows :-
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>>> "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"

12. In the above case, Rosaline Tubei (*supra*) it was further stated:-

> "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 March 1, 2011. This application was filed on March 31, 2014, about 3 years after the adoption of the award by the magistrate's court. The application is therefore clearly out of time. 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. 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."

13. 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 Civil Procedure Rules 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.

14. The upshot of the foregoing determination is that the application is found to be lacking in merits and dismissed with no orders as to costs as it is unopposed.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 19TH DAY OF JULY 2022.

L N WAITHAKA

JUDGE