



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Misc Appli 107 of 2006

**IN THE MATTER OF AN APPLICATION BY JAMES MORE NJANO AND BERNARD
GACHOKI FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION
AND MANDAMUS**

AND

IN THE MATTER OF THE COUNTY COUNCIL OF KIRINYAGA

BETWEEN

JAMES MURI NJANO.....1ST APPLICANT

BERNARD GACHOKI.....2ND APPLICANT

VERSUS

KIRINYAGA COUNTY COUNCIL.....DEFENDANT

RULING ON PRELIMINARY OBJECTION

The applicant seeks Orders of Certiorari to quash what is referred to as “Recommendation made by County Council of Kirinyaga a local authority (hereafter cited the Council) authority regarding plot known as plot No. 150/79 Kianyaga.

It is also sought to issue prohibition restraining the implementation that recommendation resulting into giving title to one Grace Muthoni. And a mandamus Order is sought to compel the Council to revert ownership of the said plot to the experte Applicants and to issue to them a letter of allotment before the hearing of the Notice of Motion the Respondent raised Preliminary points:-

1. that the application was filed out of time
2. that there has been inordinate delay in filing this application
3. that the application has been overtaken by events.

The grounds of Preliminary Objection are supported by the Replying Affidavit filed by the Council

(Respondent) showing that the recommendation were made on 30/6/2005 and there has been inordinate delay on the part of the applicant and that there was a hearing of the dispute after which the recommendation was made that the plot belongs to Grace Muthoni as per Minute WTPM and H71/05. The applicant should have raised the matter within 6 months as provided under Order 53 (2) CPC. The statutory statement filed shows that on 16/9/2005 the Town Clerk endorsed the recommendation **“The plot in dispute (lock up.150) at Kianyaga belongs to Grace Muthoni.”**

It is also shown that the applicant’s filed suit **RMCC No. 19 of 2006 at Gichugu Magistrate’s Court** but the said court declined jurisdiction and dismissed the matter. This caused delay in bringing this Judicial Review proceedings. It is therefore admitted by the Exparte Applicant the decision sought to be quashed was made on 30/6/2005 by relevant Committee and endorsed by the Executive Officer of the Respondent, Town Clerk on 16.9.2005. These proceedings were commenced on 11/8/2006 at Nairobi which is well over six months from 30/6/2005 and even 16/9/2005. The limitation of time in the matter of Judicial Review Order of Certiorari is contained in the Law Reform Act Cap 26 which requires that Rules may be made limiting the period in which Order of Certiorari may be sought not exceeding 6 months. The rules made in this respect are contained under Order 53 C.P.C.

Order 53 rule 2 reads **“Leave shall not be granted to apply for an order of Certiorari to remove 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 proceedings or such shorter prescribed by any Act.....”** This issue of limitation of time to six months was discussed in great detail in the High Court at Nairobi. **Misc Application No. 449/2006 Republic versus Judicial Commission of Inquiry into the Goldenberg Affair and others Ex-parte Hon. Jackson Mwalulu and others.** This authority is cited in the arguments here. The 3 Judges sitting in that Application observed that court derives its jurisdiction from the provisions of:-

1. written laws
2. Doctrines of common law and equity as application on 12/8/1887.

And that the court is empowered under section 60 of the constitution to quash nullities and illegalities and that the power of court goes beyond Order 53 (2). Quoting the case of **D.P.P Vs Hutchings [1990] AL 783 House of Lords:**

“The basic principle is that an ultra vires enactment such as a by law is void ab initio and of no effect” The court also applied the maxim **“ ex Nihilo Nihil fit” “ out of nothing comes nothing”**

A close examination of the said Judgment shows clearly that there are instances when on good reasons is called for court to exercise jurisdiction without consideration of the time limitation. I entirely agree with the decision of the 3 Judges.

At this stage the parties are dealing with preliminary objection the matter is not argued.

I find that the point raised as to time is not merited and the same is dismissed. On the issue of delay in filing this application I have taken into consideration that the applicant was not sitting idle but that action for declaration had been filed in the lower court. This took time and it is a good explanation for the delay occasioned.

On the issue that the application has been overtaken by events, I find this point can only be ascertained after the hearing of the Notice Motion for indeed if there was a nullity ab initio the court has jurisdiction to stretch its hand to remedy the illegality or any nullities by quashing them.

I therefore do not uphold the Preliminary Objection the same is dismissed with costs. The application for leave exparte should now be fixed for hearing as provided by law.

Dated this 29/1/2007

J. N. KHAMINWA

JUDGE

29/1/12007

Khaminwa – Judge.

Kithaka –Clerk

Mr. Njagi

N/A for Gitonga.

Ruling read in open court.

J. N. KHAMINWA

JUDGE