REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Misc Civ Appli 1091 of 2006

IN THE MATTER OF: ORDER LIII R. 1 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION BY MOHAMED ABUSHIRI

MKULLU FOR LEAVE TO APPLY FOR ORDERS

OF CERTIORARI AND PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE TRUST LAND ACT (CAP. 288) THE LAND TITILES

ACT (CAP. 282). THE LAND ADJUDICATION ACT (CAP

284) & THE REGISTERED LAND ACT (CAP. 300)

AND

IN THE MATTER OF:THE KWALE LAND ADJUDICATION TRIBUNAL, WASINI ISLAND

AND

IN THE MATTERS OF: KWALE LAND APPEALS CASE NO. 42 OF 1984, MOHAMED ABUSHIRI MKULLU VS MASSUD ABDALLA MHEMBA &ALDO SOPRANI; AND KWALE ADJUDICATION OBJECTION NO: 24 OF 1979 – 80 MOHAMED ABUSHIRI MKULLU VS KWALE COUNTY COUNCIL.

BETWEEN

THE REPUBLIC ……..…….……. APPLICANT

- V E R S U S –

1. THE MINISTER FOR LANDS & SETTLEMENT

2. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT

3. THE REGISTRAR OF LANDS, KWALE DISTRICT ….....… RESPONDENTS

AND

1. MASSUD ABDALLA MHEMBA

2. ALBERTO SOPRANI

3. KWALE COUNTY COUNCIL

4. THE DEPARTMENT OF DEFENSE.....INTERESTED PARTIES

RULING

This is an Ex-parte application for leave to bring judicial review proceedings and seek for the orders of certiorari, prohibition and mandamus. The order of certiorari is intended to be sought to quash the decisions of the Kwale Land Adjudication Tribunal, Wasini Adjudication Section given -

a) On the 15th November 1985 in Kwale Land Appeals Case no. 42 of 1984 relating to Title No. Kwale/Wasini Island/1, and

b) On 23rd October 1981 in Kwale Adjudicaton Objection No. 24 of 1979 – 80 relating to Title No. Kwale/Wasini Island/2.

The order of certiorari is also intended to quash:

a) The decision of the Chief Land Registrar to cause the registration of the said Title Nos. Kwale/Wasini Island/1 and Kwale/Wasini Island/ 2, Wasini Adjudication Section to be effected in terms of the said decisions of the Kwale Land Adjudication Tribunal Case No. 42 of 1984 and No. 24 of 1979 – 80,

b) The decision of District Land Registrar Kwale to register the said Title Nos. Kwale/Wasini Island/1 and Kwale/Wasini Island/2 in the names of the persons other than that of the Ex-parte Applicant,

c) The decision of the District Land Registrar Kwale to allow the subdivision of Title No. Kwale/Wasini Island/2 into subdivision Numbers 457, 458, 459 and 460, and

d) The decision of the District Land Registrar Kwale to issue Title Deeds to the said Title No. Kwale/Wasini Island/1, Kwale/Wasini Island/2 and the said subdivisions.

The order of prohibition the Ex-parte Applicant intends to apply for is to prohibit the District Land Registrar, Kwale District from registering any dealings in the registers of the said parcels of land or the said subdivisions until the Notice of Motion to be filed after leave is heard and disposed of while that of mandamus is intended to compel the Land Registrar to register those parcels of land and the sub divisions in the name of the Ex-parte Applicant.

The application is made on a myriad of grounds which are to the effect that contrary to law the Respondents jointly and severally irregularly applied the Land Adjudication Act Cap. 284 to Wasini Island despite the fact that the island was part of the 10 miles coastal strip; that contrary to the rules of natural justice the Respondents caused the said parcels of land which, for over 300 years, had been owned by the Ex-parte Applicant's family to be registered in the names of the interested parties and that the Adjudication Committees which allocated the said parcels of land to the interested parties were irregularly constituted in that they lacked quorum and consisted of members who had vested interest in the parcels of land.

The reason the Ex-parte Applicant gives for his laches in the matter is that as a result of the complaints he

raised about the ownership of those parcels of land he was, due to the persecution by the Provincial Administration, forced to flee to Tanzania where he has been living as a refugee until the change of government in Kenya in the year 2002.

The Ex- parte Applicant further contends that his title to the said parcels of land and the subdivisions thereto "having been recognized under the Land Titles Act (Cap 282), the entire adjudication process was a nullity and consequently this Honourable Court is not bound by the limitations imposed by law as to time within which to entertain the present application." In support of and as authority for this contension counsel for the Ex-parte Applicant cited and urged me to follow the decision of the constitutional court in **Republic –vs- Judicial Commission into the Goldenberg Affair and 3 others, Ex-parte Mwalulu & others [2004] eKLR.** (The Goldenberg case)

It is clear to me that this very old matter is being resurrected on the basis and authority of the said constitutional court decision. In that case, in as far as it is relevant to this matter, the constitutional court was called upon to consider the limitation period of six months, imposed by section 9 of the Law Reform Act Cap. 26 and Order 53 Rule 2 of the Civil Procedure Rules, within which an application for leave for an order of certiorari should be made. For clarity let us read the provisions. Section 9(2) reads:

"**Subject to the provisions of subsection (3) rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates."**

And Rule 2 reads:

"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 being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act, and where the proceeding 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."

After considering these provisions and the matter before it the constitutional court held that the limitation period applied only to "formal judgments, orders, decrees, conviction (sic) or other proceedings of an inferior court or Tribunal." It further held that the limitation does not "include anything covered by the principle of *ultra vires* or any nullities or decision made without jurisdiction at all."

With profound respect I am unable to follow that decision. What the Ex-parte applicant in this application is asking me to do is to add my voice to the contension that except in the cases of decisions of subordinate courts and statutory tribunals orders of certiorari can and should now issue with abandon to question decisions of public officers, statutory bodies and any other bodies amenable to the judicial review jurisdiction even after several decades. If the few applications I have seen recently are anything to go by, that decision is now being cited as a *carte blanche* solution to all manner of indolence and in other cases like this one to resurrect matters long decided and forgotten. If this application were to succeed I cannot see why the past decisions of all the Land Adjudication Committees and Land Adjudication Appeals Tribunals in the whole country cannot come up for review. I cannot think of anything more absurd if that were to be allowed.

Whereas I have not doubt in my mind that courts will deal with each application on its own merit I deprecate the notion that the courts should in the first place entertain such applications.This is because in my humble view there is no legal basis for doing so.

Before I saw the judgment in the **Goldenberg case** I had had occasion to interprete the meaning of the words "or other proceeding" in section 9(2) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules in the case of Kenya

ries Ltd. –vs- Municipal Council of Mombasa & Others HC. MISC. APP. No. 260 of 2001. The issue in that case was whether or not those words should be interpreted *ejusdem generis* with the preceding words in those provisions, that is, "any judgment, order, decree [and] conviction." I held that those words must be understood:

"…within the context of the judicial review jurisdiction as extended to its present day scope. [That jurisdiction] … must be understood to encompass the proceedings or record and or the decisions … of the public bodies or public officers …. To go to the definition of 'other proceeding' or 'proceeding' in judicial dictionaries or other legal literature[to interpret the provision] will give a misleading meaning [of those words]."

I say that the words "or other proceeding" must be understood to refer to the decisions of public bodies and public officers amenable to the judicial review jurisdiction because of the origin and purpose of that jurisdiction. In Kenya that jurisdiction is donated by section 8(2) of the Law Reform Act which reads:

"In any case in which the High Court of England is, by virtue of the provisions of section 7 of the Administration of Justice [Miscellaneous Provisions] Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order."

So we have to go to the origin of that jurisdiction in England to see in what situations those orders were issued.

The issuance of prerogative orders in England arose from the immunity given to judicial officers in the discharge of their duties. Public policy demanded that no judge should be harassed by the thought that "if I did this or that I might be sued by this or that prisoner or litigant." Rather than subject a judge or inferior tribunal to influences of that kind, the law provided, as section 6 of our Judicature Act does, that no litigant or prisoner could bring an action against a judicial officer for anything done by him in his judicial capacity. But that did not mean that nothing could be done by anyone else. An unjust judge of an inferior tribunal was not to be free from control. Although he did not owe a duty to a prisoner or a litigant as such he did, however, owe one to the state and the state could call upon him to account.

In the old times in England the King was regarded as the state and the state as the King. It was therefore for the King to call upon any judge of an inferior tribunal to account for his actions whenever a complainant was raised. The King did that by the prerogative writ of certiorari. The very words "prerogative writ" showed that it was issued by the royal authority of the King. No subject could issue it on his own. He had no authority to issue it as that would amount to an action by an individual against a judge or judicial officer. All that the subject was required to do was to inform the King's Judges, the Kings Bench, of his complaint and if satisfied the King's Judges would then authorize the issue of a writ in the King's name.

The established method by which the court of the King's Bench from the earliest times exercised superintendence over the due observance by inferior courts of their limitations, checked the usurpation of jurisdiction and maintained the supremacy of the royal courts was by writs, (later orders) of certiorari prohibition and mandamus. This established method was later called judicial review.

The proceeding by certiorari was a special proceeding by which the court of the Kings Bench required inferior courts and tribunals to transmit the record of their proceedings for review.

It is common knowledge that over the years the judicial review jurisdiction was extended to cover, initially, executive and administrative acts of public bodies and public officers who were under duty to act judicially – The much quoted passage from the judgment of Atkin LJ in **R –vs- Electricity Commissioner [1923] ALL ER. 161** makes this clear. In **Ridge –vs- Baldwin [1964] ALL ER 40,** the jurisdiction was extended to cover all acts of public bodies and public officers and not necessarily those performed in judicial or quasi- judicial capacities. In **O'Reilley –VS- Mackman [1983] ALL ER 237** Lord Diplock broadened Atkins limitation in the Electricity case by stating at page 279:-

"Whenever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described [decisions of a statutory tribunal or any other body of person having legal authority to determine questions affecting the common law or statutory rights or obligations of other persons or individuals] it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness, viz to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made".

Since the decisions in **Re H.K. (an Infant [1967] 2 QB 617)** and **O'Reilly –VS- Mackman]1982) 3 ALL ER 1129** the emphasis these days is on fair play.

Most of these English decisions have been adopted in Kenya. In **Kadama –VS- Municipality of Kisumu [1985] KLR 954** Justice Platt stated at page 978 that:-

"**For a number of years now the decisions in *Padfields case, [Padfields & others –vs- Minister of Agriculture, Fisheries and Food & Others [1968]. 1 ALL ER 694],* and *Ridge –VS- Baldwin (Supra)* have been adopted in Kenya and there is no longer any need to distinguish between judicial and administrative acts . . . "**

This historical background makes it quite clear that it is the judicial review jurisdiction initially intended to control the acts of the inferior courts and tribunals that was extended to cover the executive and administrative acts of public bodies, public officers and all other bodies amenable to judicial review. It is for this reason that I am of the view that the words "**or other proceeding**" in Order 53 Rule 2 of the Civil Procedure Rules must be understood within the context of the judicial review jurisdiction and as referring to the administrative acts of public bodies and public officers which, as the provision clearly states, should also be subject to the six months limitation period.

There is one other reason why I am of the strong view that administrative decisions of public bodies and public officers should also be subject to the limitation period of six months in that provision. It is common knowledge that the decisions of parastatals and public bodies like Kenya Revenue Authority, Kenya Ports Authority and the Communication Commission of Kenya and many others involve millions and sometimes billions of shillings. In my view public policy demands that the validity of those decisions should not be held in suspense indefinitely as the constitutional court decision in the **Goldenberg case** suggests. 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. Our economy with the current volatile financial markets cannot afford to have such uncertainty. Deploring such uncertainty Lord Diplock had this to say in **O'Reilly -VS- Mackman [1982] 2 AL 237, 280H – 281A:**

"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

Sight should not be lost of the fact that the judicial review jurisdiction is a special jurisdiction – **The Commissioner of Lands –vs- Kunste Hotel Limited, Nakuru Civil Appeal No. 234 of 1995 (CA).** Judicial review remedies are exceptional in nature and 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.

It is for these reasons that I am constrained not to follow the constitutional court decision in the Goldenberg case.

In England from where we got the judicial review jurisdiction the limitation period within which leave should be sought applies also to the administrative act of public bodies and public officers. **See R – VS- Inland Revenue Commisioners, ex- parte National Federation of Self-Employed and Small Business Ltd [1982] AC 617, 643 A – B.** And since 1981, when the Supreme Court Act replaced the Administration of Jusitce (Miscellaneous Provisions) Act 1938, the period has been reduced from six to three months on account of the public policy I have referred to.

To quash administrative decisions like the ones in this case made almost three decades ago will be disruptive and will affect very many people who may not be parties to such an application. It will also lead to countless past transactions being reopened. As I have said it is not in the public interest to do any such a thing.

In the circumstances I must reject this application and the same is hereby dismissed.

DATED and delivered this 9th day of March 2007.

D.K. MARAGA

JUDGE

9.3.2007

Before Maraga – Judge

Kithi for Applicant

Court clerk – Mitoto

Court – Ruling delivered in court.

D.K. MARAGA

JUDGE