



Republic v Deputy County Commissioner, Makueni Sub County & 3 others; Masaku (Sued as the Legal Representative of the Estate of Kitemwa Masaku) & another (Interested Parties); Ngwava (Suing as the Legal Representative of the Estate of Ngwamba Kitemwa) (Exparte) (Environment and Land Judicial Review Case E009 of 2021) [2022] KEELC 15295 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15295 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E009 OF 2021
TW MURIGI, J
NOVEMBER 23, 2022

BETWEEN

REPUBLIC APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER, MAKUENI SUB COUNTY 1ST RESPONDENT

THE LAND REGISTRAR, MAKUENI COUNTY 2ND RESPONDENT

THE COUNTY SURVEYOR, MAKUENI COUNTY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

DORCAS KALONDU MSAKU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KITEMWA MSAKU) INTERESTED PARTY

KASUNGUNI DAM PROJECT INTERESTED PARTY

AND

DAVID MUINDI NGWAVA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NGWAMBA KITEMWA) EXPARTE

RULING

1. By a notice of motion dated September 15, 2021 brought pursuant to the provisions of articles 21(1), 23(3)(f), 25(c), 27(1), 47(1), 49(1)(d), 50(2) & 159 of the Constitution, section 9 of the Law Reform



Act, sections 7(2) of the Fair Administration Act and order 53 rule 1 of the Civil Procedure Rules the ex-parte applicant seeks the following orders: -

1. Spent.
2. that the time within which to file an application for leave to institute judicial review proceedings be enlarged.
3. That the annexed draft chamber summons application be deemed as filed upon payment of the requisite costs.
4. That the costs of the application be in the cause.

The Ex Parte Applicant's Case

2. The application is premised on the grounds on its face together with the supporting affidavit of the applicant sworn on the even date. It is the applicant's case that he is the grandson to the late Kitemwa Kitika who was married to four wives. That sometimes in 1974 after his grandfather's demise, his land was divided equally amongst his wives with his grandmother, Kavuli Kitemwa, getting parcel No Makueni/Kasunguni/739. That his grandmother never took possession of parcel No 739 because she had relocated to Iveti Hills with her family. That in 1980 before the demise of his grandmother, Kavuli declared that parcel No 739 be given to the ex-parte applicant's father, Ngwamba Kitemwa, although he was deceased at the time.
3. The ex-parte applicant further stated that his uncle Samuel Mwikya Kitemwa showed him the said parcel No 739 under the instructions of Matheka Kitemwa who initially divided the land. That after being shown the land, he left it in the care of Kyule Kitemwa because he was working in Bungoma. That a survey of the land was done in the year 1986 when the four parcels got their respective parcel numbers and thereafter registered in the names of the wives of the late Kitemwa Kitika. That parcel No Makueni/Kasunguni/739 was registered in the name of Matheka Kitemwa who was the eldest son of Kavuli Kitemwa.
4. That after the survey was done, the late Masaku Kitemwa fraudulently caused the name of Matheka Kitemwa to be deleted from land parcel number Makueni/Kasunguni/739 and he was indicated as the owner of the said land. That sometimes in the year 1992, the late Masaku Kitemwa approached the ex-parte applicant to purchase parcel No 739 but the ex-parte applicant refused for the reason that the land was his inheritance. That together with Masaku Kitemwa, the ex-parte applicant went to the survey office hoping to rectify the register by deleting the name of Masaku Kitemwa and replacing it with that of the ex-parte applicant where they were informed that they would have to pay Kshs 600/= to facilitate the exercise.
5. That as the ex-parte applicant was preparing to pay the money, he learnt that the chief's office was being constructed on the land. That the ex-parte applicant also came to learn that Masaku Kitemwa had earlier illegally donated part of the land to the 2nd respondent for the construction of a dam without seeking his consent. That being aggrieved, he filed an objection against Masaku Kitemwa being Objection No 53 at Kasunguni Adjudication Section and the said objection was heard and a ruling delivered on October 30, 2012. That being aggrieved with the ruling, he filed an appeal to the Minister being Appeal No 50 of 2013.
6. The ex-parte applicant further averred that his appeal before the Minister was never considered and that the proceedings were conducted by a person who was not authorized to conduct the hearing. That further, the Chief who was an interested party was allowed to sit in as secretary to the proceedings and



was allocated land despite not having asked for it. That the appeal was dismissed vide a ruling delivered on October 23, 2019.

7. That being aggrieved, the ex-parte applicant filed an application seeking leave to institute judicial review proceedings vide a chamber summons application dated December 12, 2019. That the respondents then filed a preliminary objection on the grounds that the ex-parte applicant lacked *locus standi* to bring the said suit and prayed that the application be dismissed with costs.
8. He further averred that vide a judgment delivered on May 11, 2021 the court struck out his suit for lack of *locus standi*. That he had since obtained the relevant letters of administration for the estate of Ngwamba Kitemwa deceased and he now has locus standi to bring this suit. He contended that the mandatory period for filing judicial review proceedings has since lapsed and it is therefore in the interest of justice that time be enlarged to allow him to challenge the decision of the Minister made on October 23, 2019.
9. He argued that his case has high chances of success. That he will suffer irreparably if the Minister's ruling is allowed to stand since he was not granted a fair hearing.

The Respondents' Case

10. Opposing the application, the respondents filed grounds of opposition dated November 29, 2021. These grounds are:-
 - i. That section 9(3) of the *Law Reform Act* is couched in mandatory terms and the said statute has no provision for extension of time.
 - ii. That the application discloses no cause of action against the 2nd and 3rd respondents hence they should be struck out as parties to the suit.
 - iii. That the application as drawn and taken out is bad in law, incompetent and otherwise an abuse of the court process of this honourable court.
11. The application was canvassed by way of written submission.

The Ex Parte Applicant's Submissions

12. The ex-parte applicant submissions were filed on September 6, 2022.
13. Counsel argued that the main issue for determination is whether this court can extend time for filing of judicial review cases. Counsel for the ex-parte applicant argued that the consideration to be taken by the court is whether a satisfactory explanation for the delay has been provided. Counsel contended that the ex-parte applicant had accounted for the delay in instituting these proceedings detailing how the earlier suit ie ELC JR No 13 of 2019 had been struck out on the grounds that the applicant did not have locus standi to institute the same.
14. Lastly, it was submitted that the respondents will not suffer prejudice if the application is allowed because all the parties will have an opportunity to ventilate the issues in controversy. Counsel argued that the provisions of sections 8 and 9 of the *Law Reform Act* must be read in conformity with the *Constitution* in order to allow the applicant to challenge the violations which threaten his proprietary rights.
15. To buttress her submissions counsel placed reliance on the following authorities: -
 1. *Republic v Kenya Revenue Authority Ex-parte Stanley Mombo Amuti* [2018] eKLR; and



2. [George Kang'ethe Waruhiu v Esther Nyamweru Munene & another](#) [2021] eKLR.

The Respondents' Submission

16. The respondents submissions were filed on September 20, 2022. The Attorney General submitted that order 53 rule 2 of the [Civil Procedure Rules](#) prohibits leave being granted after the expiry of six months from the date when the impugned decision and thus enlargement of time to institute judicial review proceedings ought not to be granted. That the said provision was derived from section 9(3) of the [Law Reform Act](#) and time which is limited by statute cannot be extended. Reliance was placed upon the following authorities: -
 1. [Wilson Osolo v John Ojiambo Ochola & another](#) [1996] eKLR; and
 2. [Republic v Kenya Revenue Authority Ex-parte Stanley Mombo Amuti](#) [2018] eKLR.

Analysis and Determination

17. 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.
18. Having considered the application, affidavit, grounds of opposition and the rival submissions this court is of the view that the only issue that arises for determination is whether this court has the jurisdiction to enlarge time for filing of judicial review proceedings.
19. 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.”
20. 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.”
21. 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.
22. 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 October 23, 2019 by the 1st respondent.



23. The ex-parte applicant averred that he had initially filed Makueni ELC JR No 13 of 2019 seeking orders of judicial review of the said decision. That his case was struck out vide the judgment of Court delivered on May 11, 2021 on the grounds that he had no *locus standi* to present the suit.
24. Subsequently, the applicant applied for a grant of letters of administration ad litem and the same was issued on August 5, 2021. On September 17, 2021, the ex-parte applicant filed the present application seeking enlargement of time to file judicial review proceedings.
25. In the case of *Republic v 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.”
26. In the *Republic v 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.
27. The instant application was filed on September 17, 2021, 4 years after the decision was made. The law is very clear that judicial review application should be made within six months.
28. Learned counsel for the applicant submitted that the provisions of section 8 and 9 of the *Law Reform Act* must be in conformity with the *constitution* or be construed with such adaptations, alterations, modifications so as to conform with the *Constitution*.
29. The limitation period is provided under section 9(3) of the *Law Reform Act*.
30. 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.
31. Although counsel argued that the provisions of section 8 and 9 of the *Law Reform Act* have to be in conformity with the *Constitution*, 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*.



32. 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 applicant is therefore at liberty to find other avenues to address his grievances.

33. Accordingly, the application dated July 15, 2021 is dismissed. Each party to bear its own costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF NOVEMBER, 2022.

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: --

Court assistant – Mr. Kwemboi

Ms Munyao for the Applicant

