



Odus v Principal Magistrate, Bondo Law Court & another; Odus (Interested Party) (Environment and Land Judicial Review Miscellaneous Application E002 of 2022) [2022] KEELC 14741 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIIAYA
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E002 OF 2022**

AY KOROSS, J

NOVEMBER 10, 2022

BETWEEN

MARTIN OHAYO ODUS APPLICANT

AND

DISTRICT LAND REGISTRAR, BONDO 1ST RESPONDENT

PRINCIPAL MAGISTRATE, BONDO LAW COURT 2ND RESPONDENT

AND

BARRACK OWINO ODUS INTERESTED PARTY

RULING

1. The application that is the subject of this ruling is a Chamber Summons application by the applicant dated 25/07/2022. The motion has been moved pursuant to the provisions of Order 53 Rule 1 (1), (2) and (4) of the *Civil Procedure Rules*. He has sought the following reliefs;
 - a. An order of stay of execution to restrain the interested party, his duly authorised agents, servants and personal representatives from evicting, dispossessing and demolishing the applicant's ancestral home situate on Siaya/Got-Agulu/39 pending hearing and determination of this application, further court orders and directions;
 - b. Leave to commence judicial review proceedings for an order of mandamus to compel the District Lands Registrar Bondo to cancel the present registration of land parcel Siaya/Got-Agulu/39 and revert it to the name of the deceased proprietor Robert Ohayo Odus as the title was obtained fraudulently without conducting requisite succession; and



- c. Leave to commence judicial review proceedings for an order of certiorari to quash the decision of the Principal Magistrate Bondo who issued eviction orders against the applicant in Bondo PM ELC Case No. 13 of 2020 without hearing the defence case.
2. The motion is based on the grounds set out on its face and on the statutory statement and verifying affidavit of the applicant Martin Ohayo Odus both dated 25/07/2022 together with annexures thereto.
 3. The applicant and interested party are siblings. He contended that the 1st respondent had unprocedurally effected the transfer of land parcel No.Siaya/Got-Agulu/39 (“suit property”) from the name of their deceased father Robert Odus Ohayo to the interested party at the exclusion of all beneficiaries of the estate including himself.
 4. He further averred that the 2nd respondent had irrationally denied him an opportunity to be heard in Bondo PM ELC Case No. 13 of 2020 Barrack Owino Odus v Martin Ohayo Odus without considering that the suit property was ancestral land.
 5. The court directed the applicant’s Counsel Mr. Sala to file his written submissions. As this court pens down this ruling, the applicant’s counsel has not complied with the directions of the court and if at all the submissions will be filed, which as at now it has not, this court will consider them as having been filed out of time and will not consider them.
 6. The Attorney General who though not a party, was served but it did not tender any responses or submissions. Having interrogated the summons, the question that arises is whether it is merited.
 7. The intent of leave before filing a substantive notice of motion is to ensure frivolous and vexatious applications that are an abuse of the court are weeded out. This was the position held in the case of *Republic v County Council of Kwale & another ex parte Kondo & 57 others*, Mombasa HCMCA No. 384 of 1996 as follows;

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration... It is an exercise of the court’s discretion but as always it has to be exercised judicially.”
 8. Has the *ex parte* applicant established grounds for this court to grant the leave sought? The answer lies in establishing whether the *ex parte* applicant has established an arguable prima facie case.
 9. Whether by oversight or otherwise, there are certain pertinent legal hurdles and this court must first address itself on.
 10. The republic is typically the applicant and not the aggrieved person. Obviously in these proceedings, the proper applicant has not been properly intitled. Similarly, the attorney general who is the chief legal adviser and would ordinarily represent the respondents as public officers has not been joined in these proceedings.
 11. In judicial review proceedings, the attorney general is joined as a party for purposes of notification of civil proceedings, service of court pleadings and representation of parties. This failure may be the reason why the attorney general was reluctant to participate in these proceedings. Bearing in mind that the summons is merely one that seeks leave of the court to institute judicial review proceedings, this is not a substantive issue at this stage.



12. I will now proceed to address the issue of whether the motion is time barred. section 9 of the of the [Law Reform Act](#) as read together with Order 53 of the [Civil Procedure Rules](#) postulates that judicial review applications must be filed within 6 months from the date of the impugned decision. In the decision of *Ako v Special District Commissioner Kisumu & another* [1989] eKLR the Court of Appeal held as follows;

“It is plain that under sub-section (3) of section 9 of the [Law Reform Act](#) (cap 26) leave shall not be granted unless application for leave is made inside six months after date of judgment”.

13. It is not lost to this court that the decision the applicant is seeking leave to institute an order of mandamus against the 2nd respondent was rendered on 21/2/2014. This is close to 8 years ago which falls outside the statutory timelines. Suffice to say, it is my finding that this relief is time barred.

14. Apart from the mandamus, the applicant sought leave to commence judicial review proceedings for the order of certiorari against the decision of the lower court that was rendered on 3/02/2022. The applicant contended that the proceedings of the impugned judgement were rendered in a manner that was irrational and unprocedurally unfair.

15. This court has perused the evidence that has been presented before it and in the court’s opinion, the applicant has established an arguable case. There is no evidence that the decree emanating from the impugned judgment has been executed. It therefore follows that the said action is still continuing to be implemented.

16. Being privy that the alleged suit property was allegedly ancestral land and there is high likelihood the interested party may evict the applicant from the suit property, there is need for this court to forestall the implementation of the lower court decision pending determination of the legality of the 1st respondent’s decision. It is my view therefore that an order of stay ought to issue. See [James Opiyo Wandayi v Kenya National Assembly & 2 others](#), (2016) eKLR

17. Based on the reasons stated above, it is my finding that the summons is partially merited and I allow it in the following terms;

- a. The applicant is granted leave to commence judicial review proceedings for the order of certiorari to quash the decision of the Principal Magistrate Bondo in Bondo PM ELC Case Number 13 of 2020;
- b. leave shall operate as stay of execution in Bondo PM ELC Case Number 13 of 2020 pending the hearing and determination of the motion for judicial review orders of certiorari;
- c. The *ex parte* applicant shall file and serve all the parties with the substantive Notice of Motion within 21 days from the date hereof together with written submissions;
- d. This matter shall be mentioned for directions on 6/12/2022; and
- e. There shall be no orders as to costs.

HON. A. Y. KOROSS

JUDGE

10/11/2022

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In the Presence of:

N/A for the parties.

Court assistant: Ishmael Orwa

