



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Civ Appli 1278 of 2005**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT**

**9CAP 221 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF AN APPLICATION BY MOSES BUVI KITHI FOR EXTENSION OF  
LIMITATION PERIOD UNDER SECTION 27 AND 28 OF THE LIMITATION OF ACTIONS  
ACT**

**JUDGMENT**

The applicant brought an Originating Summons dated 26<sup>th</sup> August, 2005 expressed to be grounded under Sections 27 and 28 of Limitations of Actions Act (Cap 22 of Laws of Kenya) and Order 36 rules 3C and 7 of the Civil Procedures Rules.

The applicant seeks to be allowed to file an application for leave to apply for an order of certiorari to quash a decision concerning land adjudication made by the District commissioner on 14<sup>th</sup> October, 2004. He says that he was prevented from filing the application within 6 months of the decision due to poverty. He has cited authorities and also filed written submissions. The Respondents who did not attend court when the matter was argued before me on 17<sup>th</sup> November, 2006, filed a replying affidavit on 13<sup>th</sup> March 2006 opposing the application. They have strongly argued in the replying affidavit that the application is bad in law and it ought to be struck out or dismissed.

I have taken into account the grounds set out in the application and I have also considered the authorities cited on behalf of the applicants namely:

- 1) *REX LONDON COUNTY COUNCIL ex-parte Swan and Edgar* The Law Times of 30<sup>th</sup> November, 1928 where Lord Hewart, Chief Justice held that the Civil Procedure rules on enlargement of time applied to judicial review application.
- 2) *MAHAJA v KHUTWALO (1983) KLR 561* where Hancox J.A. in an obiter Hancox JA seemed prepared to apply the enlargement principle in the *LONDON COUNTY COUNCIL CASE*
- 3) *REPUBLIC v JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIRS & 3 OTHERS* Ex-parte HON MWALULU & 8 OTHERS [2004] e KLR where Nyamu J, Ibrahim and Makhandia JJ held that any matters not contemplated by O 53 rule 2 such as nullities are outside the six months limitation period. Once a nullity always a nullity. Where there is no jurisdiction ab initio it can never be acquired and excluding clauses are in effective see *ANIMISTIC v FOREIGN*

COMPENSATION 1969 2 AC 147.

(1) The first hurdle for the applicant is that this application ought to have been brought under the inherent powers of this court. It has repeatedly being held that other Acts except the Law Reform act cap 26 do not apply to judicial review. The application is therefore incompetent.

(2) The second hurdle is that the applicant does not say why he did not invoke the courts inherent jurisdiction to be allowed to file the necessary application for leave as a pauper

(3) The third hurdle is that after the Hancox obiter concerning enlargement of time the Court of Appeal in several cases has held that Civil Procedure Act and Rules do not apply to judicial review – see *CHARLES AKO v SPECIAL DISTRICT COMMISSIONER FOR KISUMU* (unreported). *THE LONDON COUNTY COUNCIL* case principle does not therefore apply to Judicial Review.

(4) Turning to the *REPUBLIC v JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDEN AFFAIR & 3 OTHERS Ex-parte HON MWALULU & 8 OTHERS* (supra) the ratio decidendi is that nullities can be struck out by the court any time and certainly even after the 6 months and that the publication of the notice in that case was something outside the formal orders as set out in O53 rule 2 and that not all decisions constitute proceedings envisaged.

However turning to the facts of the case it is clear that even on the findings of *MAHAJA v KUTWALO* (supra) the process conducted by the District Commissioner was a proceeding hence the provisions of O 53 rule 2 do apply including the 6 months limitation

(5) The fifth reason why this application must fail is that it has been held many times even by this court that promptness is the hallmark of judicial review jurisdiction. Targeted bodies amenable to judicial review jurisdiction cannot be held to ransom by the courts and their decision making functions and implementation unreasonably stalled. This explains the reason behind the 6 months limitation in certiorari. The impugned or challenged decisions must be attacked in court in good time and where it is meritorious they should be speedily quashed to enable the decision makers to remake the decisions again in accordance with the law or the right procedure. It is now over 2 years after the decision and titles hve either been issued or in the process of being issued. A sale to a third party is also possible or even further sub divisions in the intervening period. It would be unjust to unravel such transactions. While this court recognizes that access to the court is a constitutional right, a party has to demonstrate that he did try in good time to access the court or to explain the difficulties in accessing the court. This applicant has not done so.

For the above reasons the application by way of an Originating Summons is struck out. The respondent having failed to turn up at the hearing. I give no order as to costs.

DATED and delivered at Nairobi this 24<sup>th</sup> day of November, 2006.

**J.G. NYAMU**

**JUDGE**