



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPL. NO. 655 OF 2003

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS
IN THE MATTER OF PLOT NO. 258 KALOLO KIBAONI BAYAMAGONZI
SQUATTER UPGRADING SCHEME
IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF
KENYA**

REPUBLIC APPLICANT

VERSUS

1. THE COMMISSIONER OF LANDS

2. KALOLO KIBAONI BAYAMAGONZI SQUATTER

UP GRADING COMMITTEE RESPONDENTS

R U L I N G

In his application dated the 24th October, 2003 Francis Njeru Ireri, the Ex-parte Applicant, sought, under Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of law, leave to apply for the judicial review orders of Certiorari, Prohibition and Mandamus. The decision sought to be quashed was that of Kalolo Kibaoni

R2

Bayamagonzi Squatter Upgrading Committee given on unstated date awarding the parcel of land known as Plot No. KLL 258 Kilifi, Town-ship to Kirema M'Arimba, the Interested party. Realizing that he was going to hit a snag because the time allowed for bringing such a application had expired the Applicant has now applied under Order 49 Rule 5 and Order 50 Rule 2 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act to enlarge time for bringing the application for leave. Except for stating that the District physical planning officer, Kilifi District had ordered that the Applicant be registered in

place of the Interested Party the Applicant does not explain clearly why he did not apply in time. The application is opposed by the Respondents and the Interested Party. Before the Applicant could be heard Mr. Muraya, Counsel for the Interested Party raised a preliminary objection on the competence of the application.

Mr. Muraya submitted that the court has no jurisdiction to enlarge time for bringing an application for leave to seek the judicial review order of certiorari. The law does not permit it, he said. He said that Section 9(3) of the Law Reform Act does not allow the bringing of an application for an order of certiorari after six months from the date the decision sought to be quashed was given. He further submitted that order 49 Rule 5 being subsidiary legislation cannot be allowed to override the provisions of Section 9(3) of the Law Reform Act. He also cited the decision of Justice Pall in **Mokompo Ole Simel & Others –vs- County Council of Narok & Others Nairobi HCCC No. 361 of 1994 (unreported)** Section 9(2) of the Law Reform Act provides:-

“(2) 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 the relevant parts of subsection 3 states:-

“(3) In the case of an application for an order of certiorari to remove any judgement, order, decree, conviction or other proceeding for the purpose of being quashed leave shall not be granted unless

application for it is made not later than six months after the date of the judgement, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law”

I agree with Mr. Muraya that the provisions of Section 9(3) are in mandatory terms. The rules can only shorten the

R4

period but not enlarge it. Can I therefore enlarge time under Order 49 Rule 5?

Rule 5 of order 49 of the Civil Procedure Rules states that where a limited time has been fixed for doing any act or taking any proceedings under the Civil Procedure Rules or by Summary Notice or by an order of the court, the court shall have power to enlarge time upon such terms (if any) as the justice of the case may require. If the provisions of the Section 9(3) of the Law Reform Act were in the Civil Procedure Rules the court would obviously have power to enlarge time. But that is not the case. The time limit of six months has been stated by Parliament in Section 9(3) of the Law Reform Act and as I have already said that provision is in mandatory terms. It is clear order 49 Rule 5 of the Civil Procedure Rules is ultra vires Section 9(3) of the Law Reform Act. The former provisions being subsidiary legislation they cannot override the provisions of an Act of Parliament. Section 31(b) of the Interpretation and General Provisions Act (Cap 2) makes that clear. “No subsidiary legislation shall be inconsistent with the provisions of an

R5

Act.” Order 49 Rule 5 cannot however be held to be void as it applies to other provisions of the law. But as regards the matters provided for in Section 9 of the Law Reform Act it www.kenyalawreports.or.ke cannot apply. In the circumstances I agree with Mr. Muraya that time cannot be enlarged to apply for certiorari.

What about mandamus and prohibition? Mr. Muraya argued that the provisions of Section 9 (2) prohibit any application being brought after a period of six months. With respect I do not agree. The Section states that the rules made under sub-section 1 of that section “shall 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.” (emphasis supplied). My understanding of this provision is that if

the rules do not specify the proceedings in which the application may be brought within a period of six months or such shorter period the same can be brought at any time.

That is why in the case of certiorari subsection (2) specifically provides that it cannot be brought after a period of six months. If parliament intended that applications for

R6

leave to apply for all judicial review orders have to be made not later than six months it would have stated so and it could not have singled out applications for certiorari to be brought not later than six months. The function of the court is to interpret the statute law and not to make it. Where the provisions of a statute are plain and unambiguous, as those of section 9(2) of the Law Reform Act are, no question of interpretation or construction arises. The duty of the court is to apply such law as it is. To do otherwise would be to usurp the legislative functions of parliament. In my judgement therefore except in specified proceedings there is no time limit for applying for leave to seek the judicial review orders of mandamus and prohibition. There is nothing before me to show that any rule made under Section 9(1) of the Law Reform Act requires that the proceedings in this matter should be brought within a period of six months or within any period shorter than that. That being so this application is as far as it seeks enlargement of time to apply for leave to apply for the judicial review orders of mandamus and prohibition is totally superfluous. The Applicant can proceed

R7

with his earlier application without any order for extension. In the circumstances this entire application has no merit and the same is dismissed with costs to the respondent.

DATED this 8th day of June, 2004

D.K. MARAGA

AG. JUDGE