



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 374 of 2003

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR
ORDERS OF CERTIORARI**

AND

IN THE MATTER OF FRANCIS NJUGUNA KUBAI

AND

IN THE MATTER OF CO-OPERATIVES ACT

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER OF CO OPERATIVES.....RESPONDENT

EX-PARTE

FRANCIS NJUGUNA KUBAI.....SUBJECT

AND

ESTATE OF PETER NDUNGU KUBAI THAARA.....1ST INTERESTED PARTY

JUMATATU FARMERS CO-OPERATIVE SOCIETY.

.....2ND INTERESTED PARTY

RULING

The first interested party filed a Notice of Preliminary Objection dated 20th July, 2004 to the applicant's application for an order of certiorari to bring to this court and quash the decision of the Commissioner of Co-operatives dated 25/2/2003.

Three arguments were advanced in the preliminary objection:-

- (a) That the application was incompetent in law and did not lie because the decision that the subject wished to have quashed was dated 25th February, 2002 and the leave to challenge the decision was granted on 13th May, 2003 and the substantive application was filed on 21st October, 2003.
- (b) That leave was initially granted on 13th May, 2003 (out of time and without jurisdiction) and latter a second leave was given on 17th October, 2003 and there was no leave granted to extend time within which to institute a substantive motion on Notice for Judicial Review proceedings.

(c) That the Notice of Motion was bad in law in that the first interested party cited as Estate of PETER KUBAI THAARA is not a legal entity known that can sue or be sued or made a party to any court proceedings.

The first interested party therefore prayed that the preliminary objection be allowed and the Notice of Motion dated 21st October, 2003 be struck out with costs.

Mr. Karanja Mbugua for the first interested party submitted that the leave should have been sought within 6 months from the date of the order sought to be quashed and the main application should also have been filed within the same time frame and if there was any ground for applying to seek leave after 6 months, the application should have been served upon the other side.

Counsel cited two decisions in support of his application:-

1. MAHAJA VS KHUTWALO Civil [1983] K.L.R. 553.

2. RE AN APPLICATION BY GIDEON WAWERU GATHUNGURI [1962] E.A. 520.

Mr. Kahiga for the applicant opposed the application. He submitted that under Order VIII Rule 2 what was required was the filing of the application before expiry of 6 months. He said that the first application for leave was filed on 20/8/2002 and was heard on 13/5/2003 and leave was granted and the court ordered that the main application be filed within 21 days thereafter. However, a legible copy of the judgment was not available within the given period of time and an application was made for extension of the 21 days and the same was allowed on 7/10/2003 and thereafter the substantive motion was filed within time.

Regarding the issue of the administrator, he submitted that the issue could not be raised as a preliminary objection saying that the person who was raising that issue should have stated whether he was the administrator or not.

The application dated 21st October, 2003 shows that the subject filed an application for leave to file the application for judicial review vide High Court Misc. Civil Application No. **263 of 2003**. That in itself shows that the application for leave must have been filed sometimes in the year 2003. On 13/5/2003 the court granted the leave as prayed and ordered that the substantive application be filed within 21 days thereafter. That was not done and on 7th July, 2003 an application seems to have been made to extend the leave earlier granted. On 7th October, 2003 the applicant was granted leave to file the substantive motion for the writ of certiorari within 14 days. The first 21 days had expired on 3rd June, 2003 or thereabout. By the time this application was filed the 21 days period had already expired.

Order LIII Rule 3(1) states as follows:-

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by Notice of Motion to the High Court...”

In my view, the use of the words “shall be made within 21 days” implies that there is no discretion granted to the court to grant a period in excess of 21 days or extend the period after expiry of the set period.

But a more serious issue is that the decision that was sought to be quashed was dated 25th February, 2002 and so the six months limitation period was to expire on 24th August, 2002. Mr. Kahiga submitted that the first application for leave was filed on 20/5/2002 and is the one that was heard on 13th May, 2003. He further submitted that Order LIII Rule 2 requires that the application be made not later than six months after the date of the proceedings/order sought to be quashed. The rule did not specify that the application be filed, heard and determined within a period of six months as submitted by Mr. Karanja Mbugua.

There is nothing to show that the application for leave was filed on 20th August, 2002. Annexure **FNK**

III is a copy of a Chamber Summons dated 16th August 2002. It was made in Misc. Civil Application No. 265 of 2002 but does not indicate when the original thereof was filed. However, in paragraph 2 of the affidavit sworn on 21st October, 2003, the deponent stated as follows:-

“That I filed an application for leave to file a substantive application for judicial review vide NAKURU HIGH COURT MISC APPLICATION NO. 263 OF 2003”.

This statement under oath is clear that the application for leave was sought in Misc. Application No. 263 of 2003 and not vide Misc. Application No. 265 of 2002 in which event, if the application for leave was filed any time in 2003, then the same was out of the six (6) months limitation period. If that was the case, then the leave that was granted on 13th May, 2003 and again on 17th October, 2003 was irregular as it was granted out of time.

That being the case, I allow the first two grounds of preliminary objection dated 20/7/2004 and strike out with costs the Notice of Motion dated 21st October, 2003.

DATED at Nakuru this 28th day of September, 2004.

DANIEL MUSINGA

AG. JUDGE

28/9/2003