



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**JUDICIAL REVIEW NO. 15 OF 2019**

**IN THE MATTER OF AN APPLICATION BY STEPHE KATHUTHU**

**M'TURUCHIU ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THAU MUMUI ADJUDICATION SECTION AND IN**

**THE MATTER OF APPEAL TO THE MINISTER NO. 172 of 2005**

**IN THE MATTER OF PARCEL NO. 80 THAU MUMUI ADJUDICATION SECTION**

**AND**

**IN THE MATTER OF THE ADJUDICATION ACT CAP 284 LAWS OF KENYA**

**BETWEEN**

**STEPHEN KATHUTHU.....EX PARTE APPLICANT**

**VERSUS**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT**

**OFFICER TIGANIA EAST AND WEST.....1<sup>ST</sup> RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**STEPHEN MICHUKI KIUNGA.....INTERESTED PARTY**

**RULING**

1. This Judicial Review suit was filed on 27.8.2019, where the exparte applicant seeks the following orders:-

**(1) That this Honorable Court do grant the ex parte applicant an order of Judicial Review in the nature of certiorari to bring and quash the proceeding directions and decisions of the Minister of Lands dated 20/08/018 over appeal case No. 172 of 2005 regarding THAU MUMUI ADJUDICATION Section Parcel No. 80.**

**(2) That this Honorable Court do grant the ex parte applicant an order of Judicial Review in the nature of Mandamus to**

bring and quash the proceeding directions and decisions of the Minister of Lands dated 20/08/018 over appeal case No. 172 of 2005 regarding THAU MUMUI ADJUDICATION Section Parcel No. 80.

(3) That the costs of the application be provided for.

**Preliminary Objection dated 28.1.2020**

2. The Interested Party has filed a preliminary objection, on the grounds that the Judicial Review Application is incurably defective and bad in law in that;

**1) The Judicial Review application was filed outside the 6 months period limit provided for under the Law Reform Act and Order 53 of the Civil Procedure Rules and it is therefore an abuse of the court process.**

**2) The Judicial Review application is so hopelessly untenable, incorrigible and bad in law and should be struck out.**

3. By consent the parties agreed that the preliminary objection be heard by way of written submissions, the ex parte applicant filed his submissions on 11.1.2021, whereas the interested party filed his submissions on 19/02/2020.

4. The interested party submitted that the judicial review was filed without leave to file the suit out of time or extension of the same and that the prayers sought are not available as the court derives its jurisdiction to grant judicial review remedies from the provisions of the Law Reform Act, which prescribes that orders have to be sought within 6 months from the challenged action. He relied on the following cases; **John Kaberia V District Land Adjudication and Settlement Officer Igembe South District & 2 others [2018] eKLR, Mombasa Technical Institute V Agnes Nyevu Charo & Ors Mombasa [2012] eKLR, Republic v Public procurement Administrative Review Board & 2 others [2013] eKLR and Wilson Osolo V John Ojiambo Ochola & Another (1995) eKLR.**

5. The ex parte applicant submitted that vide an application by way of chamber summons dated 5<sup>th</sup> March 2019 seeking leave to file out of time an application for an order of certiorari, the court in its ruling delivered on 18<sup>th</sup> September 2019 noted;

***“...I believe that the applicant means that he did not have the significant legal advice to guide him on the filing of the application within the 6 months period. Adopting the emerging jurisprudence on the issue, I am inclined to allow the application dated 5/03/2019.”***

6. The ex parte applicant avers that he wrote to 2<sup>nd</sup> respondent vide a letter dated 22/08/2018 requesting for certified copies of the judgment which copies were availed to him on 17/05/2019 and he filed his application for leave for judicial review on 27/08/2019 which is within the six months stipulation. He urges the court to exercise its discretion and inherent power as a court of law exists to administer justice; He relied on the following cases; **The Kings Bench In Rookeys Case, Ivita V Kyumba [1984]KLR 441, Equity Bank Limited V West Link MBO Ltd Civil Application (appeal) No. 78 Of 2011 And Republic V Speaker Of Nairobi County Assembly & Another Ex Parte Evans Kidero [2017] eKLR.**

7. This court notes with concern, that there is no such an application dated 5/03/2019 in the court file nor the alleged ruling of 18.9.2019. If these proceedings were conducted in a different file, the applicant ought to have made reference to that other file. Better still, the applicant ought to have availed the aforementioned documents as annexures. As at now, this court has no idea on the nature and extent of the alleged application of 5.3.2019 and the subsequent ruling. What is even more perplexing is that the alleged ruling allowing the applicant to file his application for leave was allegedly delivered on 18.9.2019, but the application for leave on record was filed on 1.8.2019!

8. The provisions of Order 53 Rule 2 of the Civil Procedure Rules provide as follows:

***“Leave shall not be granted to apply for an order of certiorari to remove 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 6 months after the date of the proceedings or such shorter period as maybe described by any act; and where the proceedings 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”.***

9. Section 9 of the Law Reform Act, Cap 26 is very explicit in the time frame within which an order for certiorari may be applied and has similar provisions as the Civil Procedure Rules aforesated. Section 9(3) of the Law Reform Act read together with order 53 rule 2 are couched in mandatory terms;

***“...leave shall not be granted unless the application for leave is made not later than 6 months after the date of the decision”.***

10. The appeal No. 172 of 2005 before the minister was determined and a decision was given on 20/08/2018, while the chamber summons seeking leave to file Judicial Review was filed almost a year later on 01/08/2019. The ex parte applicant was aware of this decision as he wrote a letter two days after the decision was rendered requesting to be supplied with certified copies of the proceedings. The fact that the said copies were availed to him on 17/05/2019 does not revive the limitation period. This means that leave to apply for certiorari was therefore done out of time.

11. In **Musa Tapem (Suing as the Administrator of the Estate of the late Danger Tabim) v Director of Land Adjudication and Settlement & another [2020] eKLR**, the court cited the case of **Joram Kaberia -vs- District Land Adjudication and Settlement Officer and 2 Others 2018 eKLR** where the court observed that;

***“Though leave had been granted to the ex-parte applicant to bring these proceedings, the observation of this court is that the leave stage is usually conducted ex-parte unless the court gives directions to the contrary. A look at the case of Rosaline Tubei & 8 others v Patrick K. Cheruiyot & 3 others [2014] eKLR will underline the seriousness with which the issue of limitation of time in judicial review proceedings must be regarded. In that case the applicant sought for extension of time within which to apply for judicial review orders. While dismissing the application, the court observed as follows:***

***“It follows that a court cannot grant leave to a party seeking to file an application for judicial review out of time, and if such leave is granted, it can be challenged at the substantive hearing of the motion. It is upon the ex-parte applicants to find other avenues to push their grievances, for the door to access the remedy of judicial review, is now firmly shut and the key to open the door is not available, for it was thrown into the proverbial sea by effluxion of time.....”.***

12. In like manner, the exparte applicant’s Judicial review suit rest on quick sand for having been lodged out of time. I therefore find that the preliminary objection has merits and is hereby allowed. Consequently, this Judicial Review suit is hereby dismissed with costs to the interested party.

**DATED, SIGNED AND DELIVERED AT MERU THIS 17<sup>TH</sup> DAY OF MARCH, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 27.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**