REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

JUDICIAL REVIEW E1 OF 2020

IN THE MATTER OF THE APPLICATION FOR LEAVE TO COMMENCE

PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW OUT OF TIME

AND

IN THE MATTER OF RICE HOLDING NUMBER 2428A THIMBA SECTION UNIT H3

AND

IN THE MATTER OF THE NATIONAL IRRIGATION

BOARD-MWEA IRRIGATION SETTLEMENT SCHEME

AND

IN THE MATTER OF THE NATIONAL IRRIGATION BOARD

ADVISORY COMMITTEE PROCEEDINGS DATED 1ST FEBRUARY 2019

BETWEEN

REPUBLIC.....APPLICANT

AND

NATIONAL IRRIGATION BOARD.....1ST RESPONDENT

FLESIA WANJA CHERU.....2ND RESPONDENT

AND

PETER MURIITHI MURIUKI.....EX PARTE APPLICANT

RULING

Summary of facts

Vide an Ex-parte Chamber Summons dated 7th September 2020, the Ex-parte Applicant herein prayed for the matter to be certified as urgent and also prayed for leave to file an application for an order of certiorari to quash the 1st Respondent's arbitral award in Section H3 given on 1st February 2019. The Ex-parte applicant noted that six months had lapsed since the giving of the arbitral award and attributed the delay to the 1st Respondent who delayed in providing the arbitral award to the Ex-Parte Applicant.

That on 13th October 2020, the 2nd Respondents herein raised a preliminary objection to the effect that the leave sought by the Ex-Parte applicant could not be granted in light of the mandatory and strict parameters set under *Section 9 of the Law Reform Act and Order 53 Rule 2*

of the Civil Procedure Rules, 2010.

Submissions

The 2nd Respondents filed their submissions on 24th November 2020 and cited the following cases in support of their view that once the six-month limit had lapsed, it could not be extended by court: *Odinga & Others Vs Nairobi City Commission [1990-1994]; John Muketha Nkanata Vs District Commissioner of Meru Central & Another (High Court of Kenya at Meru Misc.Civil Application No.193 of 2002); Re an Application by Gideon Waweru Githunguri (Misc. Criminal Application No.2 of 1962 [1962].*

The Ex-Parte Applicant filed his submissions on 3rd December 2020 citing *Articles 47(1), 50(1) and 159(2)(d) of the Constitution, 2010*, urging the court to uphold their right to fair administrative action and noted that the cited Constitutional provisions have engendered a more lenient approach in the manner in which *Sections 8 and 9 of the Law Reform Act* are dealt, post-constitution. He quoted the case of *Republic Vs Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] e KLR* to underscore the point that an applicant ought to be granted an extension of time, subject to showing that he had a good reason for not complying with the set statutory timelines. He also faulted the 2nd Respondent's authorities on the ground that they were all rendered prior to the promulgation of the 2010 Constitution.

On 20th January 2021, the 2nd Respondents filed a response to the Ex-Parte Applicant's submissions, observing that the case relied on by the Ex-Parte Applicant was distinguishable and cited three, post 2010 decisions, to wit: *Republic Vs The Attorney General & Another Ex-Parte George Peter Bwire Ogendo (Kakamega Environment and Land Court Judicial Review Application No. 7 of 2017); Republic Vs The Cabinet Secretary of Lands & Others (Machakos High Court Judicial Review Application No.231 of 2018); Hon. Martha Wangari Karua Vs The Independent Electoral & Boundaries Commission & 3 Others (Petition No. 3 of 2019).* The 2nd Respondent's maintained that even after the promulgation of the Constitution, the timelines under *Section 9 of the Law Reform Act* were still strictly observed.

Issues for determination

Whether the Court can grant leave for an application of an order of certiorari upon the lapse of the statutory period of six months prescribed under *Section 9 of the Law Reform Act.*

Legal analysis and opinion

Section 9(3) of the Law Reform Act is the relevant starting point on the stipulated timelines for the application for an order of certiorari. The Section provides as follows:

> "*In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. (*underline, mine*).*

The wording in ***Order 53 Rule 2 of the Civil Procedure Rules, 2010*** mirrors the provisions of the ***Law Reform Act. Rule 2*** provides as follows:

> "*Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding 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. (*underline, mine).

The provisions are clear, that upon the lapse of six months from the date of any judgment, order, decree, conviction or other proceeding, the court will be disabled from granting leave to apply for an order of certiorari aimed at quashing the relevant judgment, order, decree, conviction or other proceeding.

The question now is whether, the disability placed upon court on the lapse of the six-month timeline, can be overridden by the ***2010 Constitutional Provisions and chiefly, Article 159 (2).***

The rival authorities shared by the parties have been noted and evaluated. First, the case ***Republic Vs Mwangi Nguyai & 3 Others ex-parte Haru Nguyai, High Court at Nairobi, Constitutional & Judicial Review Division, Miscellaneous Application No. 89 of 2008*** rationalizes the 6-month limit prescribed in the ***Law Reform Act and in the Civil Procedure Rules*** in the following words:

> "*Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available*

to indolent who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes."

Secondly, after evaluating the following cases decided after the promulgation of the 2010 Constitution, it is apparent that courts continue to uphold the plain and mandatory language with which the timelines under *Sections 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules are couched*. The 2nd Respondent has already provided 3 such decisions.

*In **Republic Vs Council of Legal Education & another Ex parte Sabiha Kassamia & another [2018]** e KLR, the Court cited with approval the Court of Appeal Case of **Wilson Osolo -Vs John Ojiambo Ochola & Another** [1995] e KLR:*

> *"It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act". There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.''*
>
> *The Court went on to hold as follows: "…*
>
> > *The above decisions were rendered by the Court of Appeal. They are binding to this Court. I find no reason to depart from them. My finding is reinforced by the clear language of the above provisions."*

*In **Republic Vs Director of Land Adjudication and Settlement & 2 others [2017] e KLR***

> *"Section 9 of the Law Reform Act, Cap 26 is very explicit in the time frame within which an order for certiorari may be app*lied and has similar provisions as the Civil Procedure Rules aforestated. 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.' Guided by the above provisions of the law and having found that the decision was delivered as dated on 5/3/08, it then follows that the application for leave having been filed on the 18/9/09 was brought before the Court out of time and the same is time barred having been filed approximately 16 months after the date of the decision.

While the Ex-Parte Applicant sought to rely on Justice Mativo's decision in ***Republic Vs Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti[2018] e K.L.R,*** we agree that the decision is doubtful in light of a later decision in which the Judge seemed to have changed perspective. See ***Republic Vs Council of Legal Education & another Ex parte Sabiha Kassamia & another [2018] e KLR*** where **Justice Mativo** was emphatic about the absoluteness of the wording used under ***Section 9 (3) of the Law Reform Act.*** He stated as follows:

> *"Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines:- Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction…[25] - Standard Bank Ltd vs Van Rhyn (1925 AD 266)… The above being the clear prescriptions of the meaning of the word shall, Parliament in its wisdom prescribed a period of six months within which applications for Certiorari, may be brought. Time starts running from the date of the challenged decision. I find and hold that the above provisions are couched in mandatory terms and must be complied with." (*emphasis mine*)*

It therefore appears that the position and the mandatory prescriptions of *Sections 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules* remain in force even after the promulgation of the Constitution. Courts have dutifully attempted to frame the correct perspective with which litigants ought to approach *Article 159 (2) of the Constitution* as well as the Overriding Objectives governing rules of Civil Procedure; not as a magic wand to waive away rules and procedures set out in law but as provisions enriching already defined principles and allowing for a greater reality for justice between the parties. The following Court of Appeal decisions are instructive:

Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 6 others [2013] e KLR

> *"Neither Article 159 of the Constitution nor the 'oxygen principles' in Section 3A and 3B of the Appellate Jurisdiction Act could be seen as a panacea to aid a party who flagrantly violates the Rules of Court. Counsel contended that the appellant's defaults rendered his appeal incompetent and not curable by an order of costs to the applicants. Justice looks at both sides of the Highway and must be administered in accordance with the law and no court should encourage the disobedience of its rules out of sympathy for the defaulting party, for that amounts to caprice… I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."*

Kiaga J in the above cited case, highlighted with approval the rightful effect of ***Article 159 (2)*** in ***City Chemist (Nbi) & Anor Vs Oriental***

Commercial Bank*, *Civil Appl. Nai 30-2 of 2008.

> **"…***That however is not to say that the new thinking totally uproots well-established principles or precedents in the exercise of discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."*

On the premises, I would agree with the 2nd Respondent that the Court is disabled from granting the extension sought by the Ex-Parte Applicant.

Consequently, the Ex-parte Chamber Summons application dated 7th September 2020 lack merit and the same is hereby dismissed with each party to bear her own costs.

Ruling READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 12th day of March, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Ms Kiragu holding brief for Muchiri for 2nd Respondent*
2. *Mrs Makworo for the Ex-parte Applicant*
3. *Kabuta – Court clerk.*