



**Diffu & another (Suing as Administrators of the Estate of Charles Naule Diffu)
v County Government of Bungoma & another; Ministry of Lands and Physical
Planning & another (Interested Parties) (Environment and Land Judicial Review
Case E001 of 2024) [2024] KEELC 6727 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2024**

**EC CHERONO, J
OCTOBER 11, 2024**

BETWEEN

**JOSEPHINE NAOI DIFFU 1ST APPLICANT
ANTHONY GABRIEL MASIBO 2ND APPLICANT
SUING AS ADMINISTRATORS OF THE ESTATE OF CHARLES NAULE DIFFU**

AND

**COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT
COUNTY EXECUTIVE MEMBER, MINISTRY OF LANDS, URBAN,
PHYSICAL PLANNING, HOUSING AND MUNICIPALITIES (BUNGOMA
COUNTY) 2ND RESPONDENT**

AND

**MINISTRY OF LANDS AND PHYSICAL PLANNING INTERESTED PARTY
LAND REGISTRAR, BUNGOMA COUNTY INTERESTED PARTY**

RULING

1. The applicant moved this Honourable court vide a Chamber Summons application under certificate of urgency dated 20/05/2024 seeking the following orders;
 1. (Spent)
 2. Leave do issue to the applicant to file an application for an order of certiorari to remove into Environment and land court and quash, forthwith, the decision of the 2nd Respondent as



communicated vide letter ref; CG/BGM/LUPH &M/L.M/VOL.1 dated 31st July 2023 and addressed to Director, Land Administration, Nairobi.

3. Leave do issue to the applicant to file an application for an order of mandamus directed at the first and second interested parties to forthwith register the lease for Webuye Municipality Block 4/333 as per the letter Ref; 117741 dated 30th May 2023 addressed to it by the Cabinet Secretary in charge of the 1st interested party to the 2nd interested party.
 4. Leave do issue to the applicant to file an application for an order for general damages be issued against the Respondents for the violation of the applicants' rights guaranteed under Article 40 and 47 of *the Constitution* of Kenya, 2010
2. The application is based on grounds that the applicant was offered a letter of allotment of an un-surveyed plot in Webuye Township by the 1st interested dated 16th September, 1986 on the following terms and conditions;
 - i. Area Measuring 0.955 Ha.
 - ii. Term 99 years from 1st October, 1986.
 - iii. Stand premium of Kshs. 30,000/=
 - iv. Annual Rent of Kshs. 6,000/=
 - v. Grant to be made under the provisions of the Government Lands Act CAP 280 and the Title to be issued under Registration of Titles Act CAP 281 of the Laws of Kenya.
 3. The applicants averred that upon meeting the terms and conditions set out in the allotment letter referred herein, they took possession of the suit property to date.
 4. The applicants further stated that vide a letter to the 1st interested party dated 25th September 2019, they sought an approval part development plan for the suit property for the purposes of survey and subsequent processing of the Title. By way of a response, the 1st interested party approved the request vide a letter ref; PPD/63/V/(41) dated 15th October 2019. By a letter ref; 117741 dated 30/07/2019, the Director of Land Administration sought from the Director of Surveys an amended R.I.M to facilitate documentation. A similar letter ref; 117741/10 dated 30/10/2020 was sent by the Director Land Administration to Director of Surveys again seeking an amended R.I.M to facilitate lease processing. The author of the said letter confirms authenticity of the allotment letter.
 5. The applicant stated that on 16th May 2022, the 1st interested party wrote to a private Surveyor he had contracted to prepare a survey plan for the suit property NO. Webuye Municipality Block 4/333 informing him that the survey plan he had presented in respect of the suit property had been approved. By a letter ref; 117741 dated 30/05/2023, the 1st interested party forwarded to the 2nd interested party the lease documents (in triplicate) duly executed in respect of the allotted plot for registration.
 6. The Ex parte Applicant further stated that by a letter ref; CG/BGM/LUPH&M/L.M/VOL.1 dated 31st July 2023, the 2nd Respondent notified the Interested Party as follows;

“ please be notified that the place of this parcel is developed with an auction ring for livestock market for Bungoma County Government and there is no space for allocation”
 7. The Ex-parte Applicant stated that following the said communication, the proposed lease in his favour is yet to be registered to date and that he is therefore aggrieved with the assertion by the Respondent that the place of the parcel is developed with an auction ring is simply a lie as there is no development



whatsoever on the suit plot. He stated that once he accepted the offer for allotment of the suit plot on 16th September 1986, he became the legitimate lessee for a term of 99 years. He further stated that the vide the said letter dated 31st day of July 2023, the second Respondent is a brazen attempt to dispossess her of her interests in suit plot as it did not indicate when and how his interest in the suit plot was ceased, terminated or brought to an end.

8. The Ex-parte Applicant also stated that the Respondents' action and/or decision is inconsistent with and/or violates the Applicant's rights and fundamental freedoms as guaranteed under Article 40 of the Constitution of Kenya and that at no point was he involved in the process culminating in the alleged decision to the effect that the suit land was developed with an auction ring for livestock market for Bungoma County Government.
9. In conclusion, the Ex parte Applicant stated that Respondent's action and/or decision are malicious and bereft of any colour of right and that he only became aware of the said letter ref; CG/BGM/LUPH&M/L.M/VOL.1 dated 31st July 2023 some time in the month of March 2024 when his curiosity and concern after he visited the offices of the 1st Interested party to enquire why the registration of the lease was taking inordinately long only to be furnished with a copy of the same.
10. By way of a response, the 1st and 2nd Respondents opposed the application and filed a Notice of Preliminary Objection on the following grounds;
 - i. The suit is time barred having filed after period allowed by law.
 - ii. The suit does not disclose a reasonable cause of action.
 - iii. The Ex-parte applicant has not given any sound reason for delay in bringing this suit. The delay is inordinate.
 - iv. The suit is bad in law, an abuse of the process of this court and an academic exercise.
 - v. The entire suit should be dismissed with costs forthwith.

Applicant's Written Submissions

11. The Ex-parte Applicant through the Firm of Ario & Company Advocates filed written submissions and further submissions dated 10th and 20th August 2024 respectively. According to the Ex-parte Applicant, after the Interested party allocated him the suit property Parcel NO. Webuye Municipality Block 4/333, the same fell under the category of private land having been alienated from public land vide a letter of allotment dated 16th September, 1986. He submitted that once the interested party allotted him the suit property herein, the letter by the 2nd Respondent addressed to the 1st Interested party purporting that the place of this parcel is developed with an auction ring for livestock market for Bungoma County Government and that there was no space for allocation is devoid of any or any legal basis, ultra vires and ought to be Quashed.
12. As regards the Notice of Preliminary objection, the Ex-parte Applicant submitted that after he as allotted the suit property vide the letter of allotment dated 16th September 1986, he accepted the offer and promptly met all the terms and conditions set out thereunder. However, the 2nd Respondent wrote a letter to the 1st Interested party dated 31st July 2023 informing him that the suit property was not available for allocation on grounds that the place is developed with an auction ring for livestock market for Bungoma County Government. He stated that although the said letter is dated 31st July 2023, the same is neither addressed nor copied to him and that said letter falls of indicating specific details as to the manner in which and when the applicants' disentitlement in the suit property was effected and



whether due process was followed. He submitted that as a result of above, the Ex-parte Applicants have suffered loss and damages and breaches of their rights to property under the law.

13. The Applicants referred to the following cases and authorities; Fleur Investments Ltd v Commission of Domestic Taxes & Another (2018) KLR, Republic v Municipal Council of Mombasa Ex-parte Mazrui & 2 Others (200) KLR, Order 53 CPR and Section 9 of the Law Reform Act CAP. 21 and 26 of the Laws of Kenya respectively.

1st & 2 Respondents Written Submissions

14. The 1st & 2nd Respondents through the Firm of Rabala & Company Advocates submitted that the Applicants' application is devoid of merit, a fishing expedition, scandalous, an afterthought, frivolous and should therefore be dismissed with costs. The learned Counsel submitted on the following four issues;
- i. Whether the instant suit is time and statute barred?
 - ii. Whether a public utility can give rise to private proprietary interest capable of being protected by a court of law?
 - iii. Whether a letter of allotment (in itself) confers a transferable title to property?
 - iv. Whether the ex-parte Applicants have given sound reason for delay in bringing the suit?
15. On the first issue, the learned Counsel submitted that the issue of limitation is not a procedural technicality which can be cured by application of Article 159(2) of the Constitution because in view of the special nature of Judicial Review Orders and the limited jurisdiction provided by statute to the court, an application for judicial Review must be filed or made within six(6) Months of the decision made by a public body.
16. He submitted that in the circumstances of this case, a decision was made by the 2nd Respondent and communicated vide letter ref; CG/BGM/LUPH&L.M/VOL.1 dated the 31st July 2023 on or before the said date. He further submitted that time started to run on the said date and that the instant suit was filed on 3rd June 2024, about a year later after the decision was made by the Respondents. The following cases and/or authorities were relied; Wilson Osolo v John Ojiambo Ochola & Another (1995) KLR, Order 53 Rule 2 and Section 9(2) &(3) of the Law Reform Act.
17. As regards the 2nd issue, the 1st & 2nd Respondents submitted that the Ex-parte Applicant was informed by the Respondent vide a letter ref; CG/BGM/LUPH&LM/VOL.1 dated 31st July 2023 that parcel NO. Webuye Municipality Block4/333 was a public utility developed with an auction ring livestock market set aside for the County Government of Bungoma and that the allotment letter issued on 16th September 1986 to the Ex-parte Applicant as alleged in this application does not and cannot grant proprietary interest or rather convert land set aside for public use to private use. Reliance was made to the following cases and authorities; Dina Management Limited v County Government of Mombasa & 5 Others (Petition NO.8(E010) of 2021),
18. On the 3rd issue, the 1st&2nd Respondents urged this Honourable court to be persuaded that the Ex-parte Applicant cannot and would not be protected and/or cushioned by the law in any manner in respect of the suit land as he does not qualify to receive such protection as envisaged by Article 40 of the Constitution of Kenya as read with Sections 24, 25 and 26 of the Land Registration Act. He submitted that the parcel of land was to be obtained irregularly and unlawfully through fraudulent and a corrupt scheme. He relied in the Supreme Court of Kenya case of Republic v Minister for Transport & Communication & 5 Others Ex-parte Waa Ship Garbage Collector & 15 Others, Mombasa HCMCA



NO.617 of 2003 (2006) 1KLR (E&L), *Alberta Mae Gacci v Attorney General & 4 Others* (2006) eKLR

19. On the last issue whether the Ex-parte Applicants have given sound reasons for the delay in bringing this suit, the learned Counsel answered in the negative and submitted that judicial Review are equitable reliefs and delay defeats equity. He submitted that the inordinate delay by the Ex-parte Applicants exposes them to no other remedy than dismissal of this suit with costs. Reliance was made to the case of *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi* (2014) eKLR

Legal Analysis And Determination

20. I have considered the Chamber Summons application dated 20th May 2024, grounds shown thereunder, verifying affidavit, statutory statement and the submissions by both sides as well as the applicable law.
21. Judicial Review jurisdiction is a special jurisdiction which is neither Civil nor Criminal and is governed by Section 8 & 9 of the [Law Reform Act](#) as the substantive Law and Order 53 of the Civil Procedure Rules as the procedural law. Guided by those provisions, this Honourable Court may is mandated to issue orders of Certiorari, Mandamus or prohibition in judicial Review proceedings.
22. From the application, the Ex-parte Applicant is seeking leave to file a substantive Motion to Quash the contents of a letter ref; CG/BGM/LUPH&M/L.M/VOL.1 dated 31st July 2023 written by the 2nd Respondent to the 1st Interested party. In the said letter, the 2nd Respondent was notifying the 1st Interested party that the place of the suit property is developed with an auction ring for livestock Market for Bungoma County Government and that there was no space for allocation.
23. It is trite that an application for prerogative orders have a limitation period. Section 9(3) of the [Law Reform Act](#) CAP 26 Laws of Kenya 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 proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings 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.”
24. It is trite from the above provisions of the law that a party seeking leave to apply for orders of Certiorari is obligated to bring such application within a period of six (6) months of the decision. The decision that the Ex-parte Applicant seeks to be quashed is contained in a letter ref;CG/BGM/LUPH&M/LM/VOL.1 dated 31st July 2023. The present application for leave dated 20/05/2024 was filed in court the same date. The application is therefore statute barred and filed out of time.
25. The Court of Appeal in *Wilson Osolo v John Ojiambo Ochola & Another* (1996) eKLR held as follows;
- “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.”

26. Again in the case of Republic v Chairman Amagoro Land Dispute Tribunal & Another Ex-parte Paul Mafwabi Wanyama (2014) eKLR, D.Maraga JA (as he then was) held thus;

“The judicial review proceedings before the learned judge, which have given rise to this appeal were therefore special in nature and the learned judge erred in importing provisions of the Civil Procedure Act and Rules to proceedings governed by the said provisions of the Law Reform Act and Order 53 Civil Procedure Rules. We agreed with the learned Counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do.”

27. I agree with the above decisions by the superior court which are binding on me that the Law Reform Act itself has no provision for extension of time. I do not also find any refuge in the often quoted cure for all, Article 159(2) (d) of the Constitution of Kenya 2010, which require courts to administer justice without undue regard to procedural technicalities.

28. In view of the foregoing, I find that failure by the Ex-parte applicant to file these proceedings within six (6) months stipulated under the law exposes them to no other remedy than dismissal of the same.

29. The upshot of my analysis and finding is that the Chamber Summons application dated May 20, 2024 is devoid of merit and the same is hereby dismissed with costs.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF OCTOBER, 2024.

HON. ENOCK C.CHERONO

ELC JUDGE

In the presence of;

Mr. Aloo for the Ex-parte Applicant.

Mr. Karanja H/B for Rabala for the 1st & 2nd Respondents.

Bett C/A.

