



**M'ngondu v Deputy County Commissioner – Igembe North & 2 others; M'Atheru (Interested Party) (Judicial Review E008 of 2023) [2023] KEELC 20511 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20511 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
JUDICIAL REVIEW E008 OF 2023  
CK NZILI, J  
OCTOBER 4, 2023**

**BETWEEN**

**CHARLES KIPCHANGI M'NGONDU ..... EXPARTE APPLICANT**

**AND**

**DEPUTY COUNTY COMMISSIONER – IGEMBE NORTH ... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER –**

**IGEMBE ..... 2<sup>ND</sup> RESPONDENT**

**SUB COUNTY SURVEYOR – MERU NORTH ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JOSEPH KARUTI M'ATHERU ..... INTERESTED PARTY**

**RULING**

1. By an application dated 18.5.2023, the court is asked to grant the applicant under Sections 8 & 9 of the *Law Reform Act* Order 53 Rule 1 (1) 2 and (4) Civil Procedure Rules, Sections 4, 7, 10 & 14 of the Fair Administrative Actions Act 2015, leave to institute judicial review proceedings of certiorari and prohibition against the Minister's decision dated 12.9.2017.
2. Once leave is granted, the court is asked to order that the same operates a stay of the decision relating to the Minister's Appeals No. 66/2008 and 179 of 2010, relating to subdivision into two positions of Parcel No Naathu/Naathu/101 now titled land.
3. The application is based on the ground on its face, the statutory statement of facts dated 18.5.2023, the verifying affidavit by Charles Kipchangi M'Ngondu sworn on 18.5.2022, and its annexures thereto marked as C.K. 1, 2, 3, 4(a) (b), 5, 6, 7 namely; the grant, official search, photographs, objections proceedings, proceedings and judgment in the Minister's appeal, land surveyors letter dated 16.7.2018, pleadings and decree in Maua CMCC No.120/2018.



4. The interested party opposes the application through an affidavit sworn on 29.5.2023 by Joseph Karuti M'Atheru. His grounds are that the application was filed beyond six months from the date of the decision contrary to the law; there was a similar suit in Maua Law Courts; a delay of 6 years has not been explained; the appellant was not on the suit land but has only violently prevented the interested party from farming on the land yet his homestead was elsewhere and that this court should not rubber-stamp an illegal entry. Further, the interested party avers that the Minister considered all the evidence over the circumstances that the applicants possessed the land and that several routes of justice have been taken, but litigation should come to an end by allowing him to enjoy the fruits of his judgment.
5. By written submissions dated 29.8.2023, the *exparte* applicant submitted that Ministers Appeal No.'s 66/2008 and 179/2010, which were heard irregularly and in sub-judice, while the land had become registered land as per the title deed issued to the deceased on 28.11.2014, with a restriction on it. The applicant submitted that the appeals were determined on 12.9.2019, and he, out of advice by counsel, filed the Maua suit seeking to overturn the Minister's decision. The applicant also submitted that there was a delay in obtaining the proceedings and judgment; he was sickly and illiterate and that the lower court suit also took over five years for the court to down its tools on 30.5.2023. The applicant submitted that a delay of 5 years was out of all advice by his erstwhile lawyers, yet he trusted his lawyer's professional advice, and this court should grant him audience under Articles 47 and 159 of *the Constitution*.
6. Additionally, the applicant submitted that the Minister's decision was unreasonable, relied on irrelevant evidence, and admitted the appeals irregularly. Reliance was placed on *Belinda Murai & others vs Amoi Wainaina (1978) LLR 2782 & Richard Leiyagu Ncharpi vs Independent Electoral & Boundaries Commission & 2 others (2013) eKLR*, on mistakes of counsel, which should not be visited on innocent litigants, *Aviation & Allied Workers Union vs. Kenya Airways Ltd & 3 others (2013)*, *Nicholas Kiptoo Arap salat vs. IEBC & 7 others (2014) eKLR* on the need to extend time since under the *Fair Administrative Action Act* 2015 and Order 50 Rule 6 of the Civil Procedure Rules, there were no provisions to apply for leave and that under Sections 9 (1) & 13 of the *Fair Administrative Action Act* the Hon. Chief Justice was yet to enact the Rules to Operationalize the Act.
7. Further, the applicant relied on *Republic vs. Public Procurement Administrative Review Board exparte Syner Chemie Ltd (2018)* that this court has jurisdiction and discretion to allow the application since there was no demonstrable prejudice to be caused to the adverse party because of the delay, otherwise he will suffer hardship and injustice.
8. Additionally, the applicant relied on *Bremer Vulcan Schiffbar & Muschinen Fabric vs South Indian Shipping Corporation Ltd (1981) AC 909*, that the constitutional role of the court as a court of justice should not be abused or diminished as to seek to arrive at a just decision of the dispute. Again, the appellant invoked the decisions of *Ivita vs Kyumbu (1984) KLR 441* and *Edith Gichungu Koine vs Stephen Njagi Thoithi (2014) eKLR* on the proposition that the test on whether their delay was prolonged or inexcusable was whether justice could still be done despite the delay, while at the same time, looking at the period of the delay, reasons thereof, degree of prejudice to the opposite party and whether the matter raises the issues of public importance.
9. The applicant submitted that as held in *Republic vs. Kenya Revenue Authority exparte Stanley Mombo Amuti (2018) ekLR*, all laws must conform to *the Constitution* with such adaptation, alteration, and modification. Therefore, the court must consider the need to do real and substantial justice to the parties by exercising its discretion governed by rules of law and equity as held in *Bookey's case*. Reliance was also placed on *Republic vs. Nairobi City County Assembly and another exparte Evans Kidero (2017) eKLR*, where the court enlarged time under Order 5 Civil Procedure Rules.



10. The court has carefully reviewed the application, the replying affidavit, and the elucidated submissions by counsel for the exparte applicant. The exparte applicant has raised several issues calling for my determination, namely:-
- i. If a party may lodge a judicial review application under both the common law regime of pre-2010 and the new regime post-2010.
  - ii. If the court can grant leave under both regimes outside the statutory period of 6 months, notwithstanding a clear directive.
  - iii. Whether the court under the new regime can grant leave to file judicial review outside the six months under its inherent powers.
  - iv. What are the parameters to consider in extending time and granting leave to institute judicial review?
  - v. If, in the absence of Rules by the Hon. Chief Justice to operationalize the Fair Administrative Action Act, parties can still fall back to the old regime and use the two regimes concurrently.
  - vi. Whether the applicant, in this instance, is entitled to leave.
11. The undisputed facts of this matter are that Minister's appeal cases were determined on 12.9.2017, where the Land Adjudication Officer Objection Proceedings No. 761 of 2007 was partially overturned and substituted with a directive to subdivide the land in dispute at a time when the land had become titled and a title deed issued on 28.11.2014.
12. The exparte applicant averred that out of ill-advice by erstwhile lawyers, he filed a suit at the lower court to quash the Minister's decision, which took long until May 2023, when the lower court declined jurisdiction. The applicant now urges this court to find that it has jurisdiction to grant him leave outside the statutory six months provided under Order 53 of the Civil Procedure Rules and Sections 8 & 9 of the *Law Reform Act*, since he has a constitutional right to fair administrative action under Articles 47 and 159 of *the Constitution*, which the strictures of procedure should not impede under a statute law and subsidiary legislation.
13. The exparte applicant, the way I understand him, is saying that the constitutional role of this court should not be diminished at the alter of procedural requirements since the mistake of going to the wrong forum was not his; he should not suffer prejudice out of errors of his former lawyers and that of the Hon. Chief Justice who was yet to promulgate the rules to operationalize the *Fair Administrative Action Act* 2015. The applicant urges the court to find that the case raises fundamental issues that should be heard on merits, given that the Minister unprocedurally admitted the two appeals, considered irrelevant evidence and made an unreasonable decision.
14. On the other hand, the respondents have not opposed the application. However, the interested party takes the view that the application is statute-barred, the court lacks jurisdiction, there has been an inordinate delay of over 6 years, the cause of action was determined in the lower court; litigation has to come to an end and that the applicant wants to rubber stamp an illegal use of the land, yet he has partially prevented him from utilizing the land without justification.
15. The law relating to judicial review prior to 2010 and up to present is partly governed by Order 53 of the Civil Procedure Rules as read together with Sections 8 & 9 of the *Law Reform Act*. Order 53 Rule 1 of the Civil Procedure Rules requires that a party seeking for prerogative writs of mandamus, prohibition and certiorari to seek leave exparte by chamber summons. As regards the writ of certiorari, such leave



must be sought and obtained not later than 6 months after the proceedings or such a shorter time as may be prescribed by any Act. The purpose of the leave is to enable the court to sieve any frivolous, abusive or vexatious applications, whose sole purpose is to clog the process of the implementation of administrative decisions or orders by administrative bodies.

16. The rationale behind restricting the leave regarding the writ of certiorari has been subject to court's decision. In Misc Civil App No. JR 8/14 Kenya Bureau of Standards vs Kenya Maritime Authority Exparte Car Importers Association (2014) eKLR, Mureithi J held, inter alia that whereas the provisions relating to the 6 months period for the commencement of proceedings of certiorari was statutory as per Section 9 of the [Law Reform Act](#), the requirement to file a notice of motion upon grant of leave was by subsidiary legislation under the Civil Procedure Rules, hence enlargement of time under Order 50 Rule 6 of the said rules was applicable. The same position obtained in Republic vs Public Procurement Administrative Review Board exparte Syner Chemie Ltd (supra) and Aviation & Allied Workers Union vs Kenya Airways (supra).
17. In Commissioner of Lands vs Hotel Kunste (2002) eKLR the court emphasized that judicial review was a special jurisdiction which was neither civil nor criminal, hence Order 50 Rule (6) of the Civil Procedure Rules was inapplicable. See also M.M Ole Keiwua & another vs Yash Pal Ghai (2002), Republic vs Kuhindi Nyafula & another exparte Kilifi South East Farmers' Co-operative (2014) eKLR. In Republic vs Speakers Nairobi County Assembly & another exparte Evans Kidero (supra), one of the questions raised was whether judicial review with its origin in common law could override the spirit and the letter of the 2010 Constitution. The court cited with approval Prof. Louis Jafee on Judicial Control of Administrative Action 329 (1965) that where there were specific statutory and constitutional provisions, then those enactments must slowly replace the traditional common law doctrines, though the change to embrace the new thinking had to be slow and halting because of the doctrine of stare decisis, as it was held in City Chemist NRB & another vs Oriental Commercial Bank Ltd Civil Application No. Nrb 302 of 2008, (unreported 192/2008) the application of clear and unambiguous principles and precedent, assists litigants and legal practitioners on the certainty and validity of claims, maintaining stability in law and its application, while at the same time guiding the lower court.
18. In the case of Republic vs Council of Legal Education and another exparte Sabiha Kassamia & another (2018) eKLR, at issue was whether the court could entertain the applications for leave outside the 6 months as provided under Order 53 Rule 2 of the Civil Procedure Rules and Section 9 (3) of the [Law Reform Act](#) which was in absolute terms. The court cited with approval Ako vs Special District Commissioner, Kisumu & another Civil Appeal No. 27 of 1989 that Section 9 (3) of the [Law Reform Act](#) was plain, leave shall not be granted after the six-months expiry and in Wilson Osolo vs John Ojiambo Ochola and another (1996) eKLR, that Order 53 (2) of the Civil Procedure Rules was verbatimly derived from Section 9 (3) of the [Law Reform Act](#), which could not be subject to subsidiary legislation under the Civil Procedure Rules on the enlargement of time or under the [Limitation of Actions Act](#) (Cap 22) on the extension of time. The court held that the word "shall" was a command leaving no discretion. Therefore, the court held that the time for certiorari starts running from the date of the challenged decision. As regards Section 2 of the [Fair Administrative Action Act](#) 2015, the court held that the discretion of the court could not be invoked where a statute was clear especially where delay had not been accounted for and that Order 50 Rule 6 of the Civil Procedure Rules could not be used to override an express provision of the law as held in Raila Odinga & others vs Nairobi City Council Nairobi HCCC No. 899 of 1993 (1990 – 1994) E.A 482. The court proceeded to dismiss the application for leave and upheld the preliminary objection.



19. In *Peter Orenge Migiro vs Samuel Omagwa James & another* (2022) eKLR, the question was whether the court could enlarge time and grant leave for a writ of certiorari to quash a decision by Kenya Land Dispute Tribunal and a ruling by the lower court made on 16.6.2010 which was being sought 10 years after it had been adopted. The court cited with approval *Republic vs Kenya Revenue Authority exparte Stanley Mumbu Amuti* (2018) eKLR, that the entrenchment of J.R. in *the Constitution* was to expand the scope of the remedy right to access the court, unless there was a compelling reason under Article 22 of *the Constitution* a party who applied for extension of time should not be denied a chance and that a right to judicial review was one of the reliefs for violation of the Bill of rights and freedoms. The court further cited with approval *National Social Security Fund vs Sokomanja Ltd* (2021) eKLR, that no leave was required to institute judicial review under Section 7 of the *Fair Administrative Action Act* as read together with Article 23 (3) of *the Constitution* and the Environment & Land Court Act before seeking such a leave save that where an applicant moves the court under the *Law Reform Act* and Order 53 of the Civil Procedure Rules, leave was still a requirement for.
20. In this application, the applicant has invoked both avenues to seek for judicial review. Can this court grant leave and allow for the substantive notice of motion to be filed? Will such leave be regular? On the other hand, if the court declines to grant the leave due to Section 9 (3) of the *Law Reform Act*, will that not infringe on the rights of the applicant as to access to justice and fair hearing?
21. In this application, there is no dispute that the applicant knew of the Minister's decision dated 12.9.2017. The exparte applicant filed the lower court suit on 17.8.2018, which was five days short of one year after the Minister's decision had been made. The relief sought was inter alia a declaration that the Minister's decision was null and void, that he was the sole and rightful owner of L.R. No. Naathu/Naathu/101; the removal of the restrictions and a permanent injunction and the restriction of the interested party and his agents from interfering with the suit land. It was the deceased who swore the verifying affidavit on 17.8.2018, the witness statement filed a list of documents among them were the proceedings, findings and judgment by the Minister and the letter dated 16.7.2018, from the Sub-County Land Surveyor going by the list of documents dated 17.8.2018.
22. In a certificate of urgency dated 17.8.2018, the exparte applicant averred that the decision was brought to his knowledge on 7.8.2018, through the letter by the Sub-County Land Surveyor. All these documents were attached as C.K 1-7 respectively
23. In paragraph 8 of the verifying affidavit, the exparte applicant did not state which ruling date was issued after the appeals were heard. He did not complain that the decision was delivered exparte and or he was not notified on time or at all. In paragraph 11 thereof, he admitted that after the decision, post-judgment negotiations took place, but were in vain. He did not state for how long this took place. In paragraphs 12-14, the exparte applicant while admitting seeking and obtaining legal advice did not state or attach any letters seeking for the proceedings and the exact time that he eventually obtained the same. In paragraph 15 thereof, the applicant admitted that even at the time, the Maua suit was filed the six-month period had lapsed.
24. So, therefore, the exparte applicant knew that the six months were over yet he wants to blame his erstwhile lawyers for their misadvice. It cannot therefore be true that the exparte applicant only came to realize that he was at the wrong court on 30.5.2023, when the suit was struck out.
25. The exparte applicant averred in paragraphs 20-28 that he was a layman, lacked knowledge of procedures, he had an honest intention to pursue a legal recourse but was misled, the delay of 5 years was not inordinate, the delay was explained, he shall suffer prejudice, the Minister's decision was wrong and in the interest of justice and fairness, the court should allow his judicial review out of time.



26. Section 5 of the *Fair Administrative Action Act* grants an aggrieved party, to an administrative decision, the right to apply for its review by a court of competent jurisdiction in the exercise of his right under *the Constitution* or any other written law. Further, Section 9 of the *Fair Administrative Action Act* provides that the application be made without unreasonable delay to a High Court or to a Subordinate Court, upon which original jurisdiction is conferred under Article 22 (3) of *the Constitution*, by an Act of Parliament.
27. In this application, the applicant blames the delay on the 1<sup>st</sup> respondent, yet there is no evidence that he was impeded from accessing the copy of proceedings and judgment. In fact, under Order 53 of the Civil Procedure Rules, the requirement to furnish the court with a certified copy of the decision is not one of the conditions precedent for seeking leave. The same is only required before the hearing of the substantive motion under Order 53 of Civil Procedure Rules.
28. What amounts to unreasonable delay has been subject to a plethora court decisions. In Jaber Mohsen Ali & another vs Priscillah Boit & another (2014) eKLR, the court observed that unreasonable delay was dependent on the surrounding circumstances of each case since even a delay of one day could be unreasonable. In Athuman Nusura Juma vs Afwa Mohamed Ramadhan (2016) eKLR, the court observed that it was an excusable delay if all the parties were confused or not aware of the judgment date. In Charo vs Mwashetani & others (2014) KLR, the Supreme Court of Kenya held that timelines were vital ingredients in the quest for efficient and effective governance under *the Constitution* as was the case with the dictates compelling the court to expeditiously dispense justice.
29. In Nicholas Kiptoo Arap Salat vs IEBC (supra), the Supreme Court of Kenya held that the extension of time was not a matter of right but a discretionary power, where there were extenuating circumstances based on laid out reasons or basis by a party with cogent reasons for the delay in filing the applications, the public interest in the matter and must be undertaken on a case to case basis.
30. The applicant blames his lawyers for misadvice, which advice led him to the wrong forum. In Mutuku Kyuli vs Grace Kasele Kithokoo & another (2021) eKLR, the court cited with approval Savings and Loans Ltd vs Susan Wanjiru Muritu NRB Milimani HCCS No.397 of 2002, that a case belongs to a litigant and not to her advocate and that a litigant has a duty to pursue the prosecution of the case by being diligent.
31. In Stephen Ngethe Mungai vs Salim Abeid Shush Civil Application No. NRB 270 of 2005, the court observed that to simply lay all the blame on the previous lawyers was untenable since there was evidence of negotiation going on.
32. In this matter, there is evidence that the exparte applicant took inordinately long to move the court until the 6 months expired. The blame cannot be attributable to his former lawyers. Similarly, to blame the 1<sup>st</sup> respondent for a whole year without evidence of any letters seeking for the proceedings and decision cannot stand. Thirdly, the applicant has not given any evidence that he has lodged any complaint for professional negligence against his erstwhile lawyers who allegedly misled him. Fourthly, the applicant has not demonstrated the merits or arguability, of his case and its public interest nature. Again, a delay of 6 years by any stretch of the imagination is unreasonable in the circumstances.
33. Had the applicant been diligent, he would not have fallen into the delay and or moved to the wrong forum. Similarly, the suit at the lower court was recklessly filed and sought prayers or reliefs which the trial court could not competently grant in view of the Minister's decision.
34. The applicant has also merged the application in using both the old regime and the new regime while aware of the emerging clear jurisprudence. The case of Exparte Amuti (supra) is distinguishable to the instant case since leave had been granted but there was a default in filing the notice of motion.



Similarly, in *Exparte Kidero* (supra), the mistake was the non-filing of the notice of motion after leave had been granted. In *Richard Leiyagu* (supra) the petition had been dismissed for non-attendance and non-compliance with timelines.

35. In this, application there has been no specific prayer for an extension of time or for the court to dispense with the grant of leave since the *Fair Administrative Action Act* has been invoked.
36. Be that as it may the court finds that it would be an act in futility to grant leave to commence the judicial review proceedings when there is no such discretion under Section 9 (3) of the *Law Reform Act* and Section 9 (1) of the *Fair Administrative Action Act*, due to the unreasonable delay of 6 years. The application is hereby dismissed with no orders as to costs. File closed.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 4<sup>TH</sup> DAY OF OCTOBER 2023.**

**HON. CK NZILI**

**ELC JUDGE**

