Republic v Senior Resident Magistrate Wang'uru & another; Kariuki (Exparte Applicant) (Judicial Review E003 of 2023) [2025] KEELC 4039 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4039 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

JUDICIAL REVIEW E003 OF 2023

JM MUTUNGI, J

MAY 22, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

SENIOR RESIDENT MAGISTRATE WANG'URU ..... 1ST RESPONDENT

THE MANAGER MWEA IRRIGATION SCHEME ..... 2ND RESPONDENT

AND

JONA KARIUKI ..... EXPARTE APPLICANT

RULING

1. This Ruling is in respect of the Ex parte Applicant's Notice of Motion application dated 26th June 2023. The application is expressed to be brought under Order 53 of the Civil Procedure Rules and Section 8 and 9 of the Law Reforms Act, Cap 26 Laws of Kenya. The Applicant prays for the following substantive orders:

    1. That the Honourable Court be pleased to grant leave to apply for writ of mandamus, prohibition and certiorari orders to remove into the High Court and quash the proceedings of Misc. Succession 19 of 2010 and/or any other incidental orders arising out of the said proceedings.

    2. That the grant of the orders for leave to operate as a stay of the proceedings of Misc. Succession 19 of 2010 that issued Rice Holding No. 2649 to Kabuku Ikua.

    3. The cost of the application be provided for.

2. The application is premised on the grounds outlined on the body of the application and the Supporting Affidavit of the Ex parte Applicant, sworn on 26th June 2023. The Applicant asserts that he is the

beneficial owner of Rice Holding No. 2649, having inherited it from his father. He claims that no succession process has been conducted to determine the true beneficiaries of the suit plot. The applicant states that the 2nd Respondent initiated a miscellaneous succession case, naming the late Joseph Kibara as the successor. He points out that Joseph passed away while this matter was still pending. The Applicant stated he believes that the 1st Respondent should have closed the file to enable a fresh succession case to be initiated. However, the 1st Respondent failed to do so, allowing the case to continue as if Josephat Kibara was still alive. The Applicant contends that the lack of a new succession process to identify the legitimate beneficiaries has resulted in an injustice. The Applicant claims that due to this improper procedure, the true beneficiaries were never identified by the Court. He argues that in the interest of Justice, the proceedings of Miscellaneous Succession Cause No. 19/2020 and any related orders issued from it should be quashed.

3. While considering the application at the exparte stage for grant of leave to initiate Judicial Review proceedings the Court noted the cause of action accrued in 2010 and in view of the time limitation imposed under Order 53 Rule 2 and Section 9(3) of the *Law Reform Act*, the Court declined to grant leave exparte and directed service of the application on the Respondents.

4. In response, the 1st Respondent filed a Notice of Preliminary Objection dated 25th July 2023, opposing the Applicant's Notice of Motion on the grounds that the application violated the provisions of Order 53, Rule 2 of the Civil Procedure Rules 2010. The 2nd Respondent also filed a Notice of Preliminary Objection dated 30th June, 2024, challenging the entire suit on several grounds; namely,

    1. The Honourable Court lacks the requisite jurisdiction to hear and determine this matter.
    2. The suit contravenes the mandatory provisions of Sections 8, 25, and 26 of the *Irrigation Act*, 2019.
    3. The suit fails to disclose a reasonable cause of action against the 2nd Respondent.
    4. The suit is fatally and incurably defective.
    5. The suit is frivolous and vexatious.
    6. The suit constitutes an abuse of the Court process.

5. The Court at this stage is not hearing the application for Judicial Review on merits but rather considering whether the exparte Applicant should be granted leave to commence Judicial Review proceedings whereupon the application for Judicial Review can be heard on merit. That is what the exparte Applicant's instant application seeks. The parties argued the application by way of Written Submissions.

6. I have perused and considered the submissions by the parties. The singular issue for determination is whether the exparte Applicant's application for leave is statute barred. The exparte Applicant in his submissions sought to take refuge under Article 47 of *the Constitution* and the *Fair Administrative Action Act*, 2015 where no leave is required to file Judicial Review proceedings. The Applicant in support of his submissions relied on the Case of James Gacheru Kariuki & 22 Others –vs- Kiambu County Assembly & 3 others (2017)eKLR where Joel Ngugi, J (as he then was) held that there was no requirement for leave for a party to commence a suit under the Fair Administrative Actions Act.

7. I agree with the exparte Applicant's submission that a Judicial Review suit anchored under the provisions of the *Fair Administrative Action Act*, 2015 no leave was required. However where a party predicates their action under the provisions of Order 53 of the Civil Procedure Rules and Section 8 and 9 of the *Law Reform Act*, Cap 26 Laws of Kenya, grant of leave is a pre requisite before commencing

Judicial Review proceedings. In the instant case, the exparte Applicant has predicated his action under the provisions of Order 53 of the Civil Procedure Rules and Section 8 and 9 of the *Law Reform Act*.

8. The 1st Respondent submitted that the exparte Applicant's application for leave offended the provisions of Order 53 Rule 2 of the Civil Procedure Rules, 2010 as it was not brought within the prescribed period of 6 months. It was on that account that the 1st Respondent raised the Preliminary Objection. Order 53 Rule 2 of the Civil Procedure Rules provides as follows:-

> 2. 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.
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> Section 9(3) of the *Law Reform Act*, the substantive law from which Order 53(2) is derived provides that applications for prerogative orders must be brought within six(6) months from the date the impugned action was made. Section 9(3) of the *Law Reform Act* provides as follows:-
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> (3) 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.

9. The 1st Respondent relied on the case of Wilson Osolo –vs- John Ojiambo Ochola & Another (1996) eKLR where the Court held:-

> " 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 the extension of time limited by statute, in this case, the *Law Reform Act*.

10. The 1st Respondent further placed reliance on the Case of Roseline Tubei & 3 Others –vs- Patrick K. Cheruyot & Others (2014) eKLR where the Court stated:-

> " 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."

11. The submissions of the 2nd Respondent went to consideration of the merits of the Judicial Review application and are not relevant to the consideration of whether or not the Applicant should be granted leave to commence the Judicial Review Action.

12. Both Order 53 Rule 2 of the Civil Procedure Rules and the *Law Reform Act* Section 9(3) provide in mandatory terms that leave to institute Judicial Review shall not be granted where the order or decision

sought to be quashed is a Judgment, order/decree or conviction unless the application for leave is made not later than six months after the date of the proceeding.

13. The Applicant does not deny the lapse of time but instead has countered the 1st Respondent's argument regarding the need for leave to file a Judicial Review application by placing reliance on Article 47 of *the Constitution* of Kenya. To support this claim, the Applicant has placed reliance on the case of James Gacheru Kariuki (Supra), suggesting that common law Judicial Review Rules have evolved and should be read in light of the *Fair Administrative Action Act* (FAAA).

14. While it is correct that the FAAA's enactment introduced a more expansive framework for challenging Administrative Action, Judicial Review proceedings grounded in the *Law Reform Act* remain subject to the express statutory limitations imposed by Section 9 (3). Courts have consistently upheld the mandatory nature of the six-month rule. In the Case of National Social Security Fund v Sokomania Ltd & another [2021] eKLR Okongo J stated as follows: -

> "Leave is however still required in my view where an applicant for judicial review moves the court under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules. Following the promulgation of *the Constitution* of Kenya, 2010 and *Fair Administrative Action Act*, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under *the Constitution* of Kenya 2010 and/or the *Fair Administrative Action Act*, 2015 in which case they will not need leave of the court or go for the same relief under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the Court."

15. In the present case, the Judgment/Order that the Exparte Applicant seeks to challenge was delivered on 2nd August 2011. The Applicant's Notice of Motion dated 26th June 2023 is premised under Order 53 Rule 3 of the Civil Procedure Rules, and Section 8 and 9 of the *Law Reform Act*. This Court in the case of Peter Ndambiri Njagi v Stephen M.G Muchiri and another Judicial Review E006 of 2023 (2025) KEEL C3669 (KLR), while considering the application of Order 53 Rule (2) and Section 8 and 9 of the *Law Reform Act* as well as Article 23 and 47 of *the Constitution* stated thus:-

> " As a consequence of the above analogy, this Court notes that our jurisdiction has two Judicial Review processes that co-exists, that is the common law prerogative writs and Constitutional Judicial Review. Sections 8 and 9 of the *Law Reform Act* were not repealed upon the promulgation of *the Constitution* and hence Order 53 of the CPR exists and runs alongside Article 23 and 47 of *the Constitution* of Kenya. As a consequence, where an Applicant anchors his Judicial Review application on *the constitution*, he is not required to seek for leave."

16. The Court further in the same case stated:-

> " In conclusion, the law as it is allows a litigant to choose between the common law Judicial Review process and/or the Constitutional Judicial Review process. In the present case, the Applicant chose to rely on *the Constitution* and the *Fair Administrative Action Act* and consequently was not required to seek and obtain leave. The Applicant was entitled to make a choice regarding the process he preferred and cannot be faulted."

17. In the instant matter it is my determination that the exparte Applicant's application before this Court is misconceived and incompetent and constitutes abuse of the Court process. The application is statute barred and unsustainable. The same is hereby struck out.

18. Each party shall bear their own costs of the application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 22ND DAY OF MAY 2025.

J. M. MUTUNGI

ELC - JUDGE