



**Republic v Senior Resident Magistrate Kiambu Law Courts & 2 others;
Kamau (Exparte); Gachoka & 2 others (Interested Parties) (Judicial
Review 1 of 2022) [2022] KEELC 3192 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
JUDICIAL REVIEW 1 OF 2022**

**JG KEMEL, J
JUNE 2, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**SENIOR RESIDENT MAGISTRATE KIAMBU LAW COURTS 1ST
RESPONDENT**

**LAND REGISTRAR, KIAMBU THRO' HON ATTORNEY
GENERAL 2ND RESPONDENT**

JOSEPH GITAU KABATI 3RD RESPONDENT

AND

MARY THAMI KAMAU EXPARTE

AND

KAMAU GACHOKA INTERESTED PARTY

MONICAH WAMBUI KAMAU INTERESTED PARTY

LUCY WANJIKU MUCIRI INTERESTED PARTY

RULING

1. The application is brought pursuant to order 53 rule 1 and 2 of the *Civil Procedure Rules*, 2000. The Ex-parte applicant chamber summons dated 19/1/2022 seeks leave to issue for;
 - a. An order of Certiorari to remove into this Honorable Court and quash the ruling and orders of Hon. Rading in the 3rd respondent's Application dated 3rd July 2020 in the Chief's Magistrates



Court, in the case of Joseph Gitau Kabati vs Mary Thami Kamau & 4 Others MCE&L No. 41 of 2021 made on 3rd July 2021.

- b. An order of Certiorari to remove into this Honorable Court and quash the ruling and orders of Hon. Rading in the case of Joseph Gitau Kabati vs Mary Thami Kamau & 4 Others MCE&L No. 41 of 2021 against the ex-parte Applicant's Application dated 27th September 2021.
 - c. An order of Mandamus directed to the Land Registrar Kiambu cancelling all the entries made in respect of Land Parcels Ndumberi/Ndumberi 3942, 3943 and 3944 through an order dated 3/7/2020 of Hon. W. Rading Senior Resident Magistrate in Misc. Application 21 of 2020 and rectify the record into the position it was before the offending entries.
 - d. An order of Mandamus directed to the Land Registry to cancel all green cards issued in Land Parcels Number Ndumberi/Ndumberi 4852,4853,4854, 4855, 4856, 4857, 4858, 4859, 4860, 4861, 4862, 4863, 4864, 4865, 4866, 4867, 4868, 4869 and 4872 (herein 'suit property') which were as a result of sub-divisions of Land Parcels Ndumberi/ndumberi 3942, 3943 and 3944.
 - e. That leave to institute these proceedings to operate as a stay against the proceedings in the case No M.C.E&L No. 41 of 2020 Kiambu Law Courts.
 - f. Costs of the Application.
2. The Application is supported by the grounds annexed to the application, the statutory statement and the verifying affidavit of Mary Thami Kamau, the ex-parte Applicant of even date. She averred that she is the sole widow of the late Kamau Gachoka, the 1st Interested Party who died on 18/9/2021. That the 2nd and 3rd Interested Parties are alleged to be his wives (?).
 3. That upon her marriage, she settled on land parcels no. Ndumberi/Ndumberi 3942, 3943 and 3944 (formerly Ndumberi/Ndumberi 2420) alongside her children and extended family members before her husband deserted their matrimonial home. That the three properties have graves belonging to her parents in law and other relatives.
 4. That her late husband made numerous attempts to evict her and other family members from the suit land to no avail by filing several cases in Nairobi and Kiambu Courts prompting her to lodge cautions over the suit lands. That the 2nd and 3rd Interested Parties are strange women in her husband's life who posed as his spouses for purposes of obtaining land control board consents to facilitate the sales.
 5. That undeterred, the 3rd respondent filed Misc. App No. 21 of 2020 and fraudulently obtained adverse orders through misrepresentation and concealment of material facts. That the said Application was placed before Hon. Rading, SRM on 3/7/2020 despite having a hearing date of 9/7/2020 and served on 2/7/2020 at 3.32pm. That the Honorable Court proceeded to grant ex parte orders which were final in nature necessitating the Applicant to file a Notice of Appointment and Preliminary Objection but the file was not available in the registry. That upon persistent inquiry, her advocates learnt that adverse orders had been issued on 8/7/2020 forcing them to write a protest letter to the Chief Magistrate. The trial Court directed that a formal application for setting the impugned orders be filed and the orders were ultimately set aside but to the Applicant's chagrin that forged transfer documents had already been registered. Before the decision to set aside the orders, the Applicant avers that the said offending orders had been used to remove the caution placed on the three parcels 3942, 3943 and 3944 and subdivisions emanating therefrom registered as parcel Nos. 4852-4870. That the registration of the subdivisions were irregular, fraudulent and illegal.



6. That the 3rd Respondent thereafter withdrew the Misc. Application on the 17/8/2020 when the matter was scheduled for directions before the Chief Magistrate for the hearing of the preliminary objection filed by the applicant.
7. The applicant further questions the conduct of the trial court for the manner it handled the matters before it albeit without pecuniary jurisdiction because the value of land is approximately Kshs. 30M. That despite her numerous objections, the trial court rendered its Ruling dated 27/9/2021 signed as Deputy Registrar which is irregular and unconstitutional and assails the court's conduct over the matter. She urged this Court to allow her application as prayed.
8. The 1st and 2nd Respondents filed their grounds of opposition dated 9/2/2022. They termed the Application as fatally defective and offensive to the law and procedure of Judicial Review. That the available recourse for the ex parte Applicant is to apply for Review or Appeal against the trial Court's decision. That the application offends the mandatory provisions of Section 9(3) of the Law Report Act and order 53 rule 2 of Civil Procedure Rules that require the applicant to seek leave of the Court first and file within six months of the disputed order.
9. The 3rd respondent Joseph Gitau Kabati filed his detailed replying affidavit sworn on 16/3/2022. Terming the application as incompetent, he swore that prior to the 1st respondent's demise, he conducted several business transactions with him and his two other wives, the 2nd and 3rd IPs including the sale of land parcel no Ndumberi/Ndumberi/3944 which was later subdivided into various parcels as listed under Para. 5 of the RA. Copy of the sale agreement was annexed as JGK-1 and ensuing title deeds, JGK-2. That after the said transfers, on 23/5/2019 the Applicant maliciously lodged restrictions on the suit land prompting him to file Kiambu Misc App No. 21 of 2020 seeking to remove the restrictions which the Court allowed on 3rd July 2020. He avowed that the new sub-divisions were not facilitated by the Court order issued on 3/7/2020 as the date of issuance of his title deeds (29/4/2020) precede the Court order date (3/7/2020). Notably the orders of 3/7/2020 were later discharged on 10/8/2020 and this Court cannot therefore be moved to quash nonexistent orders.
10. The 3rd respondent conceded filing another application MCE&L No. 41 of 2021 seeking an injunction against the applicant to which she responded by filing a preliminary objection. That the preliminary objection was dismissed on 8/12/2021. The 1st respondent also deposed that he had filed an earlier application dated 27/9/2021 stopping the ex parte Applicant from interring the remains of the 1st IP on the suit property. That instead of responding to that application, the ex parte Applicant filed her application dated 6/10/2021 seeking the Court's recusal from hearing the matter. The trial Court allowed her Application in 28/10/2021 and the matter was re-allocated to Court 3 at Kiambu Law Courts and was last in Court on 24/1/2022. He added that the available recourse for the Applicant was to challenge the decisions by way of review and/or appeal and in any event the application offends the relevant Judicial Review laws.
11. The Application was canvassed by way of written submissions.
12. The Applicant filed her submissions dated 24/2/2022 through the firm of Gitonga Muriuki & Co. Advocates. It was submitted that there are three discernible issues for determination. Firstly she challenged the trial Court's Ruling dated 8/10/2021 in Kiambu CMCC No. 41 of 2020 stopping the Applicant from burying her late husband on the suit land. That the Judicial Review jurisdiction is a special jurisdiction to regulate the abuse of power as it was espoused in the case of *Pastoli vs Kabale District Local Government Council and others* [2008] 2 EA 300. That this Court's focus is not meant to replace the trial Court's decision but to establish the process of arriving at the impugned decision and whether the Applicant was accorded a fair hearing thereto.



13. On the issue of six months period to institute Judicial Review claims, the applicant submitted that the bar is inapplicable to judgements and rulings and court orders as it was held by Odunga J in the case of *Republic v Chief Land Registrar & 3 others ex-parte Sidian Bank* [2016] eKLR.
14. Regarding the prayer for mandamus, the applicant urged that the Land Registrar cancels the subdivision entries on the suit land that were allegedly informed by the trial Court orders made on 3/7/2020. That since the trial court set aside the dispute orders, there is no need to have the new subdivision entries that emanated from the said orders.
15. The 1st and 2nd respondents did not file any submissions but opted to rely on their grounds of opposition.
16. The firm of Ngari & Kaburu Advocates filed submissions dated 16/3/2022 on behalf of the 3rd respondent and 2nd IP. They reiterated that there is no trial court order issued on 3/7/2020 as the same was discharged thus a nonexistent order is incapable of being quashed by this court. That the application for leave flouts the express provisions of section 9(3) of the *Law Reform Act* and order 53 rule 2 Civil Procedure Rules. The case of *Republic vs Chief Magistrate Busia Law Courts & another Ex parte Albert Gerald Lusimba Rague & others* [2021] eKLR was cited in support of the proposition on six months' time bar.
17. Moreover it was submitted that the 3rd respondent purchased, sub-divided and transferred the suit properties before the issuance of the orders of 3/7/2020 and even then the orders had no effect on his rightful proprietorship. It was also pointed out that the applicant is clearly dissatisfied with the orders of 27/9/2020 and instead of appealing or reviewing, she has elected to pursue JR proceedings instead.
18. Concerning the delay in delivering the ruling on the applicant's preliminary objection, they averred that the trial court adequately explained the reasons occasioning the delay and the signing off as Deputy Registrar instead was an honest mistake on the court's part. That in any case the court file was now before a different court and thus the applicant has not demonstrated why she should be granted leave to commence Judicial Review. The court was urged to dismiss the application for want of proof with costs.
19. The main issue for determination is whether the application is merited.
20. This case has a chequered history going by the number of cases filed by the parties as early as 2012. In the ELC NO 295 /2012 Kamau Gachoka sued his wife Mary Thami Kamau, the Applicant alongside her children herein seeking removal of a caution on the suit lands. The court agreed with him as the absolute owner of the suit lands and granted his plea on the 6/12/2013.
21. In ELC 916/2016, Kamau Gachoka sought to evict the Applicant and her children but the Court declined to grant the orders sought vide a ruling delivered on the 20/6/2017.
22. In yet another case ELC 3/2019, Kamau Gachoka sued the Applicant, his wife seeking eviction among other orders. On application by the Applicant the case was adjudged to be res judicata on account of several prior cases and the suit was struck out.
23. The Misc. Application No 21 of 2020 - The 3rd Respondent sued Gitonga Muriuki & Co Advocates alongside the Land Registrar. In this case the Hon Rading discharged the orders of 3/7/2020 which were granted exparte in favour of the 3rd Respondent, then the Applicant in the instant case. The Hon Magistrate likewise recused himself from the matter. These are the orders of 10/8/2020.
24. ELC 41 of 2020 - In this case the 3rd Respondent sued the Applicant, the AG, and the interested parties. In a Preliminary Objection dated the 18/12/2020 the 3rd Respondent among others prayers



impugned the jurisdiction of the Court in handling the matter. The issue of the suit being resjudicata was also raised. On the issue of jurisdiction, the Court held that it was seized with the jurisdiction to hear and determine the matter given that the value of the property was disclosed at Kshs 500,000/- . On resjudicata, the Court declined to hold as such.

25. In this application, the Applicant is seeking leave to challenge the proceedings before the trial Court and inter alia averred that the trial Court lacked the requisite pecuniary jurisdiction to entertain the suit before him because the value of land exceeds Kshs 30M. This contention is indeed confirmed by the 3rd Respondent's sale agreement between him and the late 1st Interested Party for purchase of the suit land for Kshs. 24 Million. Whilst it is trite that Judicial Review is concerned with the decision-making process of as opposed to the merits of such decisions, it is not practical in my view, for this Court to look at a process in which the trial Court was bereft of jurisdiction, if at all. Section 7(1)(a) of the *Magistrates Court Act* No 26 of 2015 provides the highest pecuniary jurisdiction of a subject matter not exceeding Kshs. 20 million to be handled by a Chief Magistrate. It is not clear whether an objection on this ground was raised before the Learned Magistrate. I say no more.
26. Notably, the applicant went into great length to argue the substantive Judicial Review prayers in the motion yet at this stage, the relevant prayer is the one seeking leave to bring Judicial Review proceedings.
27. The Applicant contends that the time bar of six months in filing Judicial Review proceedings is not applicable in challenging Court Judgment and Rulings. She cited the persuasive authority of Sidian Bank supra. The submission by the applicant that six month time bar does not apply to proceedings challenging court decisions is unfounded because the learned judge was dealing with Judicial Review proceedings contesting the Land Registrar's registration of a restriction on a parcel of land in favor of the Interested Party to the detriment of the Applicant. In dismissing a preliminary objection that complained of the filing of Judicial Review beyond six months period, the Court held that such a limitation indeed applied to Court decisions and not to Land Registrar's decisions and stated;

“ 19. The issue of the six months limitation was dealt with by a three judge bench in the case of R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR. The same issue was also the subject of Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998. In these cases it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned therein and to nothing else. A decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision. The court therefore held that the question of attacking it under order 53 rule 7 would not arise since there is nothing capable of being exhibited thereunder.

20. It therefore follows, firstly that the six months limitation applies to a “judgment, order, decree or conviction”. In my view the decision of a lands registrar, or the Chief Lands Registrar for that matter in registering a restriction cannot amount to a judgement, order decree or conviction. Such an action is merely a decision.....”[Emphasis added]



28. The parameters of Judicial Review are settled. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of *Pastoli vs Kabale District Local Government Council & Others* [2008] 2 EA 300 at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

29. The Court of Appeal in the case of *Kenya National Examination Council vs Republic, Ex parte Geoffrey Gatbenji & 9 others*, Nairobi Civil Appeal No. 266 of 1996 held that an order of certiorari issues to quash a decision already made and if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with.
30. The instant Chamber Summons is brought under order 53 rule 2 of the *Civil Procedure Rules* which provides that; 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 periods as may be prescribed by any Act.
31. Whereas, the *Civil Procedure Rules* provides the procedural Law for Judicial Review proceedings, the *Law Reform Act* provides the substantive Law in respect thereof. However, *the Constitution* of Kenya, 2010 also provides for Judicial Review proceedings and actions under article 23(3) (f) and further amplified by section 7 Fair Administrative Actions Act, 2015. It is trite that an application for leave is not necessary when an Applicant moves the court under the latter provisions.
32. However section 9 (3) of the *Law Reform Act* provides that:-

“In the case of an application for an order of certiorari to remove any judgement, 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 ...”

33. Accordingly it is mandatory for an Applicant to seek leave to assail a court decision within six months of its making. There are two orders that are impugned in the present Chamber Summons. The first order was made on July 3, 2021 and the second order on September 27, 2021. The 1st order was discharged in August 2021. The order of 27/9/2021 was never annexed.

34. In the case of *JK Patel vs. Spear Motors Ltd* SCCA No. 4 of 1991 [1993] VI KALR 85:

“As applied to judicial proceedings the phrase “burden of proof” has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence..... The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced.” See *Constantine Steamship Line Ltd vs. Imperial Smelting Corp* [1914] 2 All ER 165 (H.L); *Trevor Price vs. Kelsall* [1975] EA 752 at 761; Phipps on Evidence 12th Ed Para 91; Phipps on At Para 95.”

35. The applicant has sought orders to cancel all entries in respect to parcels 3942-3944 and rectify the records. The applicant has failed to show what entries have been registered pursuant to the orders of the Court dated the 3/7/2020. Equally the order for mandamus fails because the titles for the subdivisions Nos 4852-4870 were registered in 2019 before the orders of 3/7/2020 by Hon Rading.

36. What I understand from the 3rd respondent and which i think is the core complaint of the applicant is that though the orders of Hon Rading ordered the removal of the restrictions on titles Nos 3942-3944, the said orders were set aside. However the restrictions were not reverted back to the titles. This I agree with the applicant is a genuine concern. However the case in the lower court is still pending and it is open to the applicant to pursue the same by way of a judicial action in the same court. It is my finding that the applicant has not established a prima facie case to warrant the issuance of leave in this application.

37. I agree with Justice Okongo in *Nub Abdille Hassan v Principal Magistrate’s Court at Milimani & another; Halima Mahmood Ali (Interested Party)* [2021] eKLR where the court stated that the need to exhaust alternative remedies before judicial review is sought is now statutorily underpinned in the *Fair Administrative Action Act*, 2015 which the applicant has called into his aid in the present application. The Act was enacted to give effect to article 47 of *the Constitution* of Kenya, 2010. Section 9(1) of the *Fair Administrative Action Act*, 2015 provides that:

“Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to articles 22(3) of *the Constitution*.”

Section 9(2) of the said Act provides that:

“The High Court or subordinate court under subsection 1 shall not review an administrative action or decision under this Act unless the mechanisms including



internal mechanisms for appeal or review and all remedies available under other written law are first exhausted (emphasis mine).”

38. Although the impugned decision is not an administrative action under the *Fair Administrative Action Act*, 2015, it is clear from the foregoing that where there are internal mechanisms such as review or appeal or where a written law provides for a remedy for an administrative action or decision, this court is barred from entertaining any application for Judicial Review of such action or decision unless it is satisfied that such remedies have been exhausted.
39. In the case of *Speaker of the National Assembly v Karume* [1992] eKLR, the court stated that:
- “In our view there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the *Civil Procedure Rules* cannot oust clear constitutional and statutory provisions.”
40. I am not satisfied that a prima facie case has been established to warrant the grant of the leave sought. The applicant’s application therefore fails for having been brought prematurely before exhaustion of the alternative remedies and for not disclosing a prima facie case.
41. In view of those findings, it is not necessary for me to consider whether or not leave if granted should operate as a stay.
42. The application is unmerited. It is dismissed with costs.

DELIVERED, DATED AND SIGNED AT THIKA THIS 2ND DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muriuki for the Applicant

Njagi for 1st and 2nd Respondent

Kaburu for 3rd Respondent

Kaburu for 2nd and 3rd Interested Parties

Court Assistant - Phyllis

