



**Republic v Deputy County Commissioner Meru & 2 others; M’Kinyill
& another (Exparte); Mungathia (Interested Party) (Judicial Review
Application E001 of 2022) [2022] KEELC 2646 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2646 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW APPLICATION E001 OF 2022

CK NZILI, J

JULY 6, 2022

**IN THE MATTER OF APPLICATION FOR ENLARGEMENT OF
TIME TO FILE A JUDICIAL REVIEW WRIT OF CERTIORARI**

AND

**IN THE MATTER OF JUDICIAL REVIEW APPLICATION
BY NTONJIRA M’IKINYILI & SILAS MWENDA**

AND

**IN THE MATTER OF ARTICLES 2(1), 22, 23, 47, 48 &
159 (2) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

**IN THE MATTER OF ORDER 50 RULE 6, ORDER 51 RULE 1(1),
(2) & (4), RULE 2 & 3 OF THE CIVIL PROCEDURE RULES, 2010**

AND

IN THE MATTER OF LAND CONSOLIDATION ACT, CAP 283 LAWS OF KENYA

AND

**IN THE MATTER OF FINDINGS OF, PROCEEDINGS AND ORDER MADE BY THE
MINISTER IN CASE NO. 421 OF 2015 DELIVERED ON 20TH NOVEMBER 2020
OVER LAND PARCELS NO’S ATHIRU RUUJINE/NDOLELI/1817. 1371 & 1372**

AND

IN THE MATTER OF PETER KINYUA (DECEASED)

BETWEEN



REPUBLIC APPELLANT

AND

DEPUTY COUNTY COMMISSIONER MERU 1ST RESPONDENT

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

NTONJIRA M’KINYILI EXPARTE

SILAS MWENDA EXPARTE

AND

STANLEY MUNGATHIA INTERESTED PARTY

RULING

1. By an application dated February 7, 2022 the court is asked to enlarge time for the applicant to institute judicial review orders of certiorari outside the prescribed time lines given the decision sought to be quashed was made by the minister in case No. 421 of 2015 on November 20, 2020. The second prayer sought is that once leave is granted, the same to act as stay of the implementation of the said decision as to the ownership and occupation of land parcel No. Athiru Ruujine Ndoleli No’s 1817, 1371, and 1372.
2. The application is supported by a verifying affidavit of Ntonjira M’Kinyili of the even date.
3. The grounds of the application are that the applicant bought and developed the suit parcels from Peter Kinyua deceased following which a dispute arose leading to a minister’s appeal, which appeal came after the seller had passed on, proceeded in his absence, and the applicants were not involved at all or any of his relatives hence were condemned unheard. Further it was averred the respondents deprived the exparte applicants copies of the proceedings and decision till September 16, 2021 hence occasioning the delay to lodge the instant application.
4. Additionally, the exparte applicants aver that they have been unwell in and out of hospital hence the delay and unless the court intervenes they are likely to be dispossessed of their parcels of land contrary to their constitutional rights hence bring the application in good faith. In support of the application the applicants have attached a copy of the authority to plead, sale agreement, intervention letter, arbitration board proceedings and ruling, objection proceedings and ruling; copies of letters requesting for ministers proceedings, medical treatment notes and receipts as annexures marked NM1, NM 2(a), 2(b), NM “3”, NM “4”, NM “5”, NM 6 (a) & (b), and NM 7 (a) & (b) respectively.
5. The 1st & 2nd respondents have opposed the application on the basis that the law does not provide for an extension of time; there has been inordinate delay which has not been explained, there is no justification for an extension or exercise of discretion in favor of the applicants; there has been non disclosure of the status of the adjudication process after the ministers appeal; the applicants lack locus standi and the application was an attempt to re-open a proper appeal which was determined in line with the law.



6. The interested party opposes the application through a replying affidavit sworn on February 24, 2022 for being incompetent, lacking merits, filed after 14 months, brought to a court lacking jurisdiction, the delay remains unexplained especially between November 2020 and April 2021 and that the same is based on falsehoods since the proceedings indicate the applicants participated fully in the minister's appeal and the decision was determined on merits.
7. Further the interested party states the applicants lacks locus standi to represent a deceased party.
8. By written submissions dated March 17, 2022 the exparte applicant invokes Articles 40, 48, 59, 2(d) of *the Constitution* and the oxygen rule of the Civil Procedure Act for this court to uphold the substance over procedural technicalities considering the circumstances of this matter, the subject matter and the conduct of the respondents prior to, during and after the decision was made.
9. Reliance was also placed on *Belinda Murai and others vs Amos Wainaina* (1978) KLR 278, *Richard Ncharpi Leiyangu vs IEBC & 2 others*, Covid pandemic, *Aviation and Allied workers Union vs Kenya Airways Ltd* and *Nicholas Arap Korir Salat vs IEBC & 7 others* (2014) eKLR, *Fair Administrative Action Act* 2015 section 9 (1) 13 & 14 thereof. *Republic vs Public Procurement Administrative Review Board Exparte Syner -Chemic Ltd Bremer Vulcan Shiftbar and Madchinen Fabrick vs South Indian Shipping Corporation Ltd* (1981) AC 909, *Ivita vs Kyumbu* (1984) KLR 441, *Edith Gichungu Kione vs Stephen Njagi Thoithi* (2014) eKLR, *Rep vs KRA, Exparte Stanley Mumbu Amuti* (2018) eKLR, *Republic vs Speaker of Nairobi City Council Assembly & another Exparte Evans Kidero* (2017) eKLR.
10. The issues commending themselves for my determination are:-
 - (i) If the court has jurisdiction under *the Constitution*, the *Fair Administrative Action Act* and the *Law Reform Act* to extend time to file judicial review orders beyond six months.
 - (ii) If the applicant has satisfied the grounds for an extension of time if the court were to find it has jurisdiction in (a) above.
 - (iii) If the applicant is entitled to stay of the decision and its implementation.
11. It is not in dispute that after 2010, *the Constitution* granted Kenyans the right to *fair administrative action act* under Article 47 whose operationalization was made through the enactment of the *Fair Administrative Action Act* 2015 and which Act requires any application made under it to be lodged within a reasonable time.
12. Further it is not in dispute that the *Fair Administrative Action Act* did not amend or oust the *Law Reform Act* which ideally invokes the common law reliefs of certiorari, prohibition and mandamus. Additionally, it is also clear that *the Constitution* of Kenya 2010 elevated the judicial review orders as some of the reliefs which a constitutional court can grant in any petition filed based on threats, infringement and or breach of constitutional rights and freedoms. Judicial Review is no longer a common law prerogative but a constitutional principle to safeguard the constitutional principles, values and purposes especially over those who exercise public power such as the respondents herein. The 1st respondent while his action has been called to question is obligated to respond and explain out whether it reasonably accorded the exparte applicant the statutory and constitutional rights as to fair hearing. See *Republic vs Firearms Licensing Board & another Exparte Boniface Mwaura* (2019) eKLR.
13. In this application the applicants have elected to move the court through a judicial review and not a constitutional petition.
14. Once in party elects to approach the court though the judicial review route it follows that there must be adherence to that process.



15. The ex parte applicants seek for the extension of time beyond the six months stipulated for a prayer of certiorari. That stipulation is governed by Order 53(3) Civil Procedure Rules as read together with Section 9 (3) of the Law Reform Act.
16. The two provisions are in mandatory terms and not in discretionary terms. In Republic vs Council of legal education and another ex parte Sabiha Kassamia & another (2018) eKLR the court based on the Court of Appeal decision in Wilson Osoto vs John Ojiambo Ochola & another (1995) eKLR held that there was no power to extend time to file a judicial review under the above two provisions and stated that Order 49 Civil Procedure Rules and the Limitation of Actions Act could not be invoked by a party in seeking for the enlargement of time.
17. The similar position was taken by the court in Republic vs Director of Land Adjudication and Settlement and 2 others (2017) eKLR and Republic vs Karatina university Ex parte Munyua Mangaret Nyambura and 3 others Registrar Academic Research and Students Affairs Karatina University (interested party) (2022) eKLR.
18. In this application the ex parte applicants submit that the court should be guided by Article 40, 48 and 159 2 (d) of the Constitution and the oxygen rule to breathe life to their application given the emotive nature of the land dispute, sickness and the deliberate delay by the respondents in supplying the proceedings and the decisions well outside the time frames stipulated by law.
19. Further the ex parte applicants urged the court to find that the proceedings were conducted without notice to and participation of the deceased Peter Kinyua hence were against the rules of natural justice.
20. On the other hand, the respondents and the interested parties take the view the ex parte applicants lack locus standi to represent a deceased person, there has been inordinate delay which is not explained and that there was participation in the impugned proceedings and decisions hence the application lacks merits.
21. The authority to swear these proceedings dated February 7, 2022 is signed by Silas Mwenda. This is the same person appearing in the minister's appeal proceedings on August 18, 2020. It is not indicated if he ever challenged the proceedings on account of the death of Peter Kinyua and non-availability of 1st applicant. There is no indication if he ever sought to call the said 1st applicant and the family of the deceased as his witnesses.
22. The decision was made on November 20, 2020 whereas his admission to hospital was on April 27, 2021. There is no explanation why the 1st applicant did not take up the matter on time or at all since the alleged medical reports do not belong to him but one Jadiel Ntonjira.
23. In Republic vs Maseno University, Staff Disciplinary Committee and another (2009) eKLR the Court of Appeal took the view that a decision which is a nullity remains a nullity even if challenged after six months period because it does not exist in law. See ex parte Peter Mwika M'omaingi and another vs A.G; Silas Mugambi & another (interested parties) (2022) eKLR.
24. In this application the decision herein cannot be said to be a nullity and or made without jurisdiction. The ex parte applicants have demonstrated that the said decision was a nullity and or was made by 1st respondent without jurisdiction.
25. Again, the ex parte applicants have not explained the delay. As much the court has discretion to do substantive justice to parties, non-compliance with clear timelines cannot be said to be a procedural technicality. There exists a good reason why administrative decisions must be challenged within 6 months and or within reasonable time.



26. In this instance, the exparte applicants other than saying they are in occupation have not disclosed the adjudication status of the suit land and more so if after the decision was made the suit land still fall under both the *Land Consolidation Act* and the *Land Adjudication Act* or are now governed by the *Land Registration Act*.
27. For the above reasons I find the application lacking merits. The same is dismissed with costs to the respondents and the interested party.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 6TH DAY OF JULY, 2022

In presence of:

C/A: Kananu

Miss Karimi for Exparte Applicant

Mukamburu holding brief for Kariuki for interested party

HON. C.K. NZILI

ELC JUDGE

