



Chepyegon v Deputy County Commissioner Koibatek & 3 others (Miscellaneous Cause E003 of 2022) [2022] KEELC 13488 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
MISCELLANEOUS CAUSE E003 OF 2022
L WAITHAKA, J
OCTOBER 4, 2022
IN THE MATTER OF AN APPLICATION FOR LEAVE TO
COMMENCE PROCEEDINGS IN THE NATURE OF
JUDICIAL REVIEW
AND
IN THE MATTER OF ARTICLES 23(3)(F), 25(C), 27, 40,
47(1)(2), 48, 50(1) OF THE CONSTITUTION OF KENYA
2010
AND
IN THE MATTER OF FAIR ADMINISTRATIVE ACTION
ACT, 2015
AND
IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW
REFORM ACT CAP 26 LAWS OF KENYA**

BETWEEN

KIPKEBUT WILSON CHEPYEGON APPLICANT

AND

DEPUTY COUNTY COMMISSIONER KOIBATEK 1ST RESPONDENT

LAND DISPUTE TRIBUNAL ELDAMA RAVINE 2ND RESPONDENT

KIPROTICH CHEMAKISH 3RD RESPONDENT

LAND REGISTRAR BARINGO COUNTY 4TH RESPONDENT



RULING

Introduction

1. Kipkebut Wilson Chepyegon, the applicant herein, filed the chamber summons dated April 19, 2022 seeking leave to commence Judicial Review Proceedings (to apply for Judicial review orders of Certiorari, Prohibition and Mandamus) against the decision of the Land Disputes Tribunal Eldama Ravine made on July 3, 2008 awarding Kiprotich Chemakish (3rd Respondent) 3 ½ acres from Land Reference No Lembus/Metipso/2 (suit property) registered in the name of the applicant.
2. The application is premised on the grounds that the decision of the 1st and 2nd respondents to dismiss the applicant's Appeal to the Rift Valley Provincial Disputes Tribunal in land Appeal No 54 of 2010 was arrived at erroneously; that the 1st and 2nd respondents acted without jurisdiction, were biased, considered irrelevant factors in arriving at their decision, acted in bad faith and in conflict of interest.
3. The 3rd respondent filed a preliminary objection dated July 15, 2022 through which he contends that the application is time barred and that it is an abuse of the process of the court. He also filed a replying affidavit sworn on August 12, 2022.
4. In his replying affidavit, Isaac Cheruiyot Chemogisich an Administrator of the estate of the late Kiprotich Cemogisich gave a history of the dispute and deposed that the 3rd respondent filed a complaint before the Eldama Ravine District Land Tribunal which awarded him 3.5 acres out of 12 acres comprised in Land parcel Lembus/Metipso 2; that the decision was upheld by the Rift Valley Provincial Lands Dispute Tribunal and adopted by the Senior Resident Magistrate Eldama Ravine as an order of the court on October 14, 2010; that the applicant's attempt to appeal the decision of the Tribunal vide the instant application is brought more than 10 years after the 2nd respondent made its decision contrary to the provisions of the Civil Procedure and *Fair Administrative Actions Act*, which delay has not been explained. He urges the court to dismiss the application with costs.
5. Pursuant to orders given on June 22, 2022, the application and preliminary objection were disposed of by way of written submissions. The applicant and 3rd respondents filed submissions. Counsel for the 1st, 2nd and 4th respondents stated they were not opposed to the orders sought been granted.

The Applicant's Submissions.

6. In his submissions, the applicant has *inter alia* submitted that the application raises a question of law to wit, in making the impugned decision, the 1st and 2nd respondents acted without jurisdiction; that the 2nd respondent was unfair in its decision; that the claim by the 3rd respondent which led to the impugned decision was made belatedly (was time barred). The applicant also submits that the Tribunal did not give reasons why it decided to strip off the applicant his 3.5 acres of land. The alleged failure of the 2nd respondent to give reasons for its decision is said to have been in violation of Section 3(8) of the *Land Disputes Tribunal's Act*, which provides as follows:-

“The Tribunal shall give reasons for decision, which shall contain a summary of the issues and the determination thereof, and which shall be dated and signed by each member of the Tribunal.”



7. Regarding the contention that the application is time barred, it is submitted that the application is anchored on Article 47 of the [Constitution of Kenya](#) which guarantees an administrative decision that is lawful and reasonable hence not time barred.
8. Maintaining that the impugned decision was unfair and unlawful and is still subsisting, the applicant urges the court to grant him the orders sought pointing out that the impugned decision has not been acted upon (enforced).

The 3rd Respondent's Submissions.

9. In his submissions, the 3rd respondent has *inter alia* submitted that the courts mandate in Judicial Review is merely concerned with ensuring that due process was complied with in making that decision and not to investigate the merits of the dispute as held in the case of [Municipal Council of Mombasa Vs Republic Umoja Consultants Ltd](#) [2002]eKLR.
10. Concerning Article 47 of the [Constitution](#), on which the applicant's application for leave is premised, he submits that Article 47 is concerned with a person's right to administrative action(s) that is expeditious, efficient, lawful, reasonable and procedurally fair. According to him, the 2nd respondent in conducting the hearing, heard all the witnesses of both the applicant and the 3rd respondent; parties were given an opportunity to cross examine witnesses and at no time during the hearing did the applicant raise the issue that the elders and chairperson of the Tribunal were friends of the 3rd respondent hence their role in resolving the dispute amounted to conflict of interest
11. On whether the application is time barred, it is submitted that Sections 8 and 9 of the [Law Reform Act](#) Cap 26, Order 53 Rules 1 and 2 of the [Civil Procedure Rules 2010](#) and [Fair Administrative Actions Act, 2015](#), give a statutory time limit of 6 months from the date of the decision for which proceedings seeking an order of certiorari can be instituted. He submits that the decision seeking to be quashed was issued by the 2nd respondent on July 3, 2007 and adopted as an order of the court on October 14, 2008 from which the applicant had a right of Appeal within 30 days; that an Appeal was instituted to the Rift Valley Provincial Land Disputes Tribunal, Appeal No 54 of 2010, which Tribunal upheld the reasoning and decision of the 2nd respondent.
12. He submits that the applicant in his application did not seek for extension of time to lodge his request for leave to institute Judicial Review Proceedings dispute the fact that more than 10 years had lapsed from the time the 2nd respondent gave its decision. Based on the decisions in the cases of [Republic Vs Mwangi Nguyai & 3 others ex parte applicant Haru Nguyai](#) (2013) eKLR and of [Rosaline Tubei & 8 others Vs Patrick K Cheruiyot & 3 others](#) (2014)Eklr, it is submitted that this court has no jurisdiction to enlarge time in the application at hand.
13. Finally, it is his submission that the inordinate delay by the applicant in seeking leave is unexplained and inexcusable and even Article 159(2)(d) of the [Constitution](#) cannot salvage the applicant's case.

Analysis and Determination

14. The instant application being one for leave to apply for Judicial Review out of time, the sole issue for determination is whether the applicant has made up a case for being granted the orders sought.



15. The question as to whether a court has jurisdiction to grant leave to commence judicial review out of time was considered in the case of *Peter Oregio Migiro (Suing on behalf of the late Christopher Orenge Makori) v Samuel Omagwa James & 2 Others* (2022)eKLR where it was stated:-

“The question as to whether the court has the discretion to extend time for filing of an application for Judicial Review has been the subject of litigation and the Courts have held divergent views on the matter.”

16. In that case, the court referred to the case of *Republic v Kenya Revenue Authority Ex-parte Stanley Mombo Amuti* (2018) eKLR where it was stated:-

“The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of the court to in such cases guided by the purposes, values and principles of the Constitution and the constitutional dictate to develop the law on that front. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. It would require a compelling reason that would pass an article 24 analysis test to deny a litigant the right to approach the court. Where a party applies for extension of time as in this case, the court should exercise its discretion and examine the period of the delay and the reasons offered for the delay. Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). Fourth, section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8 or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the Act provides for grounds for applying for Judicial Review. Fifth, Article 159 commands courts to administer justice without undue regard to procedural technicalities.”

17. In the case of *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another* (2014) eKLR it was stated that court decisions should boldly recognize the *Constitution* as the basis for Judicial Review; and that court decisions should boldly recognize access to courts as a fundamental right guaranteed under the *Constitution* which can only be limited in a manner that can pass constitutional muster; that it is a constitutional dictate that in applying the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Concerning developing the law, the court stated: -

“Judicial Review is now a constitutional supervision of public authorities involving a challenge to the legal validity of decisions. Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution. It is therefore my conclusion that in an application for extension of time such



as the one before me, all that an applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay. It will also be a consideration that the impugned decision seeking to be challenged violates or threatens to violate the Bill of Rights or violation of the Constitution”.

18. In the case of *National Social Security Limited v Sokomanja Limited* (2021 eKLR it was stated: -

“Judicial review as a relief is provided for in among others; Article 23 (3) of the Constitution of Kenya 2010, section 8 of the Law Reform Act Chapter 26 Laws of Kenya, section 13(7) of the Environment and Land Court Act 2011, section 7 of the Fair Administrative Action Act 2015 and the Common law. In my view, no leave is required to seek judicial review as a relief under Article 23(3) of the Constitution where proceedings are instituted to enforce the Bill of Rights under Article 22 of the Constitution or where proceedings have been brought under section 7 of the Fair Administrative Action Act, 2015 for the review of an administrative action. Such leave is also not required under the Environment and Land Court Act 2011 before such relief is sought. 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.”

19. It is clear from the above decisions that the scope of Judicial Review is no longer confined to the legal framework under the *Law Reform Act* and Order 53 of the *Civil Procedure Act* but is now entrenched in the *Constitution* and the *Fair Administrative Action Act*. Be that as it may, if one opts to file an application for Judicial Review under the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*, he must apply for leave within six months of the decision as the court has no discretion to enlarge time within which to file the application for leave. In that regard see the case *Wilson Osolo v John Ojiambo Ochola & Another* 1995 eKLR where the Court of Appeal stated: -

“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 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 of the Laws of Kenya which gives some limited right for extension of time to the suits after expiry of a limitation period. But this Act also has no relevance here”.

20. In the cases relied on by the 3rd respondent *Republic Vs Mwangi Nguyai & 3 Others ex-parte Haru Nguyai*, supra it was stated: -

“Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes



billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes.”

And *Rosaline Tubei & 8 others vs Patrick K Cheruiyot & 3 others* (supra), the court held: -

“....applications for prerogative orders, have a limitation period. The Law Reform Act, CAP 26, Laws of Kenya, provides as follows at Section 9 (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. The above provision is echoed the Civil Procedure Rules, 2010, which in Order 53 Rule 2 provides as follows :-

“O 53 Rule 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 no later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and the 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”



21. In the same case of *Rosaline Tubei*, it was further stated:-

“It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of the decision. The decision of the tribunal which is sought to be quashed was made in the year 2010 and the decision of the Magistrate's court, sought to be quashed, was made on 1st March 2011. This application was filed on 31st March 2014, about 3 years after the adoption of the award by the Magistrate's Court. The application is therefore clearly out of time. There is nevertheless a prayer within this application, for time to be extended, so that the ex-parte applicants can proceed to apply for the order of certiorari, out of time. No law nor authority was cited by counsel for the applicant to support this prayer. I am aware that by dint of the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the Rules. Following this provision, it may be arguable that time may be enlarged to make an application for judicial review outside the 6-month limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provision set out in Section 9(3) of the Law Reform Act (above), and it is trite law that Rules made under statute, cannot override a statutory provision. The Law Reform Act, itself, has no provision for extension of time. I have therefore seen no law, which can entitle me to enlarge time for the filing of an application for certiorari, outside the 6-month limitation period..... 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.”

22. In applying the principles enunciated in the cases cited herein above to the circumstances of this case; the applicant seeks leave to file Judicial Review Proceedings against a decision made on July 3, 2008 by the Tribunals established under the Land Dispute Tribunals Act. Under that Act, a person aggrieved by the decision of the Tribunal had right of Appeal to the Provincial Appeals Tribunal and a further right of Appeal to the High Court, on questions of Law.
23. A person aggrieved by the decision of the Tribunals also had an option of filing Judicial Review Proceedings, within the time provided by law for doing so.
24. The ex parte applicant, who had the two options cited above, has moved this court for leave to commence Judicial Review Proceedings against a decision made more than 13 years ago on grounds, which in my view would be good in support of the main motion, if leave is granted. I say this because, in an application for leave to file Judicial Review Proceedings, assuming court has power to extend time, the applicant would be required to explain why he/she did not apply for judicial review within the time stipulated in Law.
25. In the instant application, the ex parte applicant has not offered any explanation why he did not apply for Judicial Review Proceedings within the time stipulated in Law.
26. While it is true that leave to commence Judicial Review Proceedings is not required under the *Constitution of Kenya, 2010*, the instant application cannot reasonably be said to have been brought under the *Constitution*. All what the ex parte applicant has done is to cite some articles of the *Constitution*.
27. The ex parte applicant having chosen to move the court under inter alia Sections 8 and 9 of the *Law Reform Act* and Order 53 Rule 1 of the *Civil Procedure Rules*, which were the applicable law when



the impugned decision was made, cannot be heard to claim that the application is made under the Constitution for which no leave is required.

28. On the strength of the persuasive decision in the case of *Rosaline Tubei & 8 Others* supra, I find and hold that this court has no jurisdiction to extend time to grant the orders sought by the applicant.
29. Even assuming that this court had discretionary power to extend time to apply for leave, this court would still have refused to exercise the discretion in favour of the applicant on the ground that the delay of over 13 years before moving the court for leave is inordinate and unexplained.
30. The upshot of the foregoing is that the application is found to be lacking in merits and is dismissed with costs to the 3rd respondent.
31. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 4TH DAY OF OCTOBER, 2022.

L. N. WAITHAKA

JUDGE

Ruling read virtually in the presence of:

Mr. Nyagaka for the applicant

Ms. Cheruiyot for the 1st, 2nd and 4th respondents

Ms. A. C. Ngala for the 3rd respondent

Christine Towett: Court Assistant

