REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC JUDICIAL REVIEW CAUSE NO. 4 OF 2018

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012

IN THE MATTER OF THE FAIR ADMINISTRATION ACTION ACT, NO. 4 OF 2015

IN THE MATTER OF LAND PARCEL NO KIINE/THIRIGICHI/527 REGISTERD IN THE NAME OF MARGARET WAMBUI MWANGI

MARGARET WAMBUI MWANGI..APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION................................1ST RESPONDENT

THE COUNTY GOVERNMENT OF KIRINYAGA..............2ND RESPONDENT

THE LAND REGISTRAR KIRINYAGA COUNTY...............3RD RESPONDENT

RULING

1. By a Notice of Motion application dated 13th December 2018 and supported by an affidavit of even date, the Applicant herein approached the court seeking the following orders:

> *i.* That an order of certiorari do issue to remove and quash the 1st Respondent's decision dated 28th April 2017 in respect of the property known as L.R No. Kiine/Thigirichi/527;
>
> *ii.* That the court issue any other order under the Constitution of Kenya, 2010 and the Fair Administrative Action Act, 2015;
>
> *iii.* That the costs of the application be provided for.

2. The Applicant's prayers are grounded on the following premises:

> a. That she is the registered owner of Land Parcel Kiine/Thigirichi/527;
>
> b. That she was not aware of any proceedings by the 1st Respondent in relation to the suit property, despite being the registered owner. That she was never involved in the proceedings despite her writing to the Commission severally, seeking to be enjoined in any proceedings relating to the suit property. That she only came to learn through political pronouncements that she was required to hand over the suit land to the 2nd Respondent;
>
> c. That there have been several cases involving the suit property, including: Civil Suit No. 208 of 2005; Miscellaneous Suit No.178 of 2007; HCCC No. 35 of 2005; Miscellaneous Application No. 49 of 2011, all of which have been ruled in her favour;
>
> d. That the decision issued by the 1st Respondent is only meant to harass and curtail her enjoyment of her Constitutional right to own

property in the Republic of Kenya despite the decisions of the High Court, for no valid reason;

e. That the matter having been canvassed in the Magistrate and High Courts, bars other quasi-judicial bodies from dealing with the same, making the 1st Respondent's decision an illegality;

f. That the 1st Respondent acted unfairly and in contravention of Article 47 of the Constitution and against the provisions of the Fair Administrative Action Act, 2015;

g. That the 1st Respondent acted in excess of jurisdiction and with bias in failing to notify her.

On 3rd December 2019, the Applicant filed another application seeking extension of time to file the judicial review application and for the filed application to be deemed to have been properly filed.

3. The applications are opposed. Vide a replying affidavit filed on 02nd October 2019, the 1st Respondent averred that it is mandated in law to review all grants and dispositions of public land either on its own motion or upon the receipt of a complaint. That it had received a complaint from the 2nd Respondent requiring it to review the legality of the suit property situated within Kirinyaga County. That by way of public notice, it invited all interested parties to its office for a hearing on 13th February 2015 with a view to establishing the authenticity of the title documents over the suit property. That despite adequate prior notice, the Applicant failed to attend the hearing or to furnish it with any documents. That the Commission proceeded to evaluate the legality of the grant over the suit property and found that the property was illegally acquired public land. That it published its determination on 18th April 2017. It is on this basis that the 1st Respondent denies any wrong doing and prays for the application to be dismissed.

The 2nd Respondent on the other hand filed a Notice of Preliminary Objection on 09th October 2019 on the following grounds:

a. That the Notice of Motion application dated 13th December 2018 is statute barred as it offends the mandatory provisions *of Section 9(3) of the Law Reforms Act and Order 53 Rule 2 of the Civil Procedure Rules*;

b. That the judicial review proceedings instituted by way of the Notice of Motion application dated 13th December 2018 are a nullity as they are predicated on the leave of the court granted in brazen violation of *Section 9(3) of the Law Reforms Act and Order 53 Rule 2 of the Civil Procedure Rules;*

c. That proceeding with the hearing and determination of the Notice of Motion application dated 13th December 2018 will precipitate the protraction of an illegality;

d. That the Court is divested of the requisite jurisdiction to hear and determine the Notice of Motion application dated 13th December 2018, as the same was filed pursuant to the leave of the Court granted outside the mandatory statutory limitation period;

e. That the Notice of Motion application dated 13th December 2018 is incompetent, fatally defective and an abuse of court process and ought to be struck out with costs.

In response to the application for extension of time to file judicial review proceedings, the 2nd Respondent contended that the court had no jurisdiction to extend the timelines provided by *Section 9(3) of the Law Reform Act* outside of the mandatory six-month provision following the decision to be challenged.

4. By consent, the parties agreed to canvass the Notice of Motion application dated 13th December 2018, the 2nd Respondents Notice of Preliminary Objection filed on 09th October 2019 and the Notice of Motion dated 3rd December 2019 seeking extension of time, by way of written submissions. The Applicant filed her submissions on 06th March 2020. She reiterated the contents of her Notice of Motion Application and supporting affidavit. She also framed two questions for determination by the court, that is:

i. Whether the Judicial Review proceedings instituted by way of Notice of Motion application dated 13th December 2018 are a nullity;

ii. Whether the court has jurisdiction to extend time to which the Judicial Review proceedings dated 13th December 2018 ought to have been filed.

She submitted that the application was filed without undue delay and cited *Section 9 (1) of the Law Reform Act* in support. It is her contention that the 2nd Respondent's preliminary objection is based on the purported assumption that she did not obtain leave to file out of time, which she insists she did on 13th of December 2018. On the issue of whether or not the court had jurisdiction to extend time to enable her filing of the judicial review application, she insists that the delay was not occasioned by her fault but by the failure of the 1st Respondent to enjoin her in the proceedings precipitating the decision. She cited the decision in *Republic Vs Public Procurement Administrative Review Board ex parte Syner-Chemie* to the effect that *Article 47 of the Constitution h*ad elevated fair administrative action from a common law action to a Constitutional command and that the provisions of the Law Reform Act and Order 53 of the Civil Procedure Rules were not to be interpreted strictly to exclude a party seeking enlargement of time. She also cited *Republic Vs Mwangi Nguyai & 3 Others ex-parte Haru Nguyai, High Court at Nairobi Constitutional and Judicial Review Division, Miscellaneous Application No. 89 of 2008 i*n which the judge called for amendments to *Section 9 of the Law Reform Act* and *Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others and Republic Vs Kenya Revenue Authority ex-parte Stanley Mombo Amuti [2018] e KLR* in which the matters to be

taken into consideration in extending time were captured. She further cited *Articles 48 and 159 (2) (d) of the Constitution* to the effect that access to justice ought not to be hampered by undue regard to technicalities.

The 2nd Respondent filed its submissions in relation to the Notice of Preliminary Objection on 10th December 2019 and a second set of submissions in response to the Applicant's application for extension of time on 25th February 2021. In relation to its preliminary objection, it evaluated whether the application dated 13th December 2019 was competent. The submissions began by *citing Section 9(1) of the Law Reform Act as well as Order 53 Rule 1(1) of the Civil Procedure Rules.* Insistence was placed on the fact that even though the Applicant alleges to have obtained leave to file the Notice of Motion Application dated 13th December 2018, no evidence of the grant of leave has been filed. That notwithstanding, it is the 2nd Respondent's submission that in any case, grant of leave to institute judicial review proceedings must be done in accordance with the provisions of the law. Several decisions including *Redcliff Holdings Limited Vs Registrar of Titles & 2 Others (2017) e KLR* and *Nakumatt Holdings Ltd v Commissioner of Value Added Tax (2011) e KLR* are cited in support. It is the 2nd Respondent's contention that the provisions of the Fair Administrative Action Act do not oust the applicability of the Law Reform Act and Civil Procedure Rules. The case of *Republic Vs County Government of Kiambu & Another Ex-parte Isfandiar Sohaili [2017] e KLR* is cited in support. It is the 2nd Respondents further submission that *Sections 9(3) of the Law Reforms Act and Order 53 Rule 2 of the Civil Procedure Rules* are couched in mandatory terms and that the six-month period for bringing applications akin to the one brought by the Applicant starts running on the date the decision is made, not the date when the Applicant comes to learn of the decision. Several decisions are cited in support, including: *Gilbert Hezekiah Miya Vs Advocates Disciplinary Committee (2015) e KLR; Republic Vs Public Procurement Administrative Review Board Ex Parte Wajir County Government (2016) e KLR; and Republic Vs Kiambu Land Dispute Tribunal & 2 Others Ex Parte Wambui Chege Macharia & 2 Others [2016] e KLR*. It is the 2nd Respondents conclusion that the court lacks jurisdiction to entertain the application and that the same ought to be struck out. In relation to the application for extension of time, the 2nd Respondent submitted that the court lacks jurisdiction to extend time as sought by the Applicant. The decision in *The owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1 Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 Others [2012] e KLR; Republic Vs Chairman Amagoro Land Tribunal & Another ex-parte Paul Mafwabi Wanyama [2014] e KLR; Republic Vs Chief Magistrate Court, Busia & 3 Others [2013] e KLR* among others are cited in support.

5. The court has anxiously considered the Notice of Motion applications and the Parties' rival affidavits and submissions.

Section 9(3) of the Law Reform Act, Cap 26 is the relevant starting point on the stipulated timelines for the application for an order of certiorari. The Section provides as follows:

> '*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*.' (*underline, mine*).

The wording in ***Order 53 Rule 2 of the Civil Procedure Rules, 2010*** mirrors the provisions of the ***Law Reform Act. Rule 2*** provides as follows:

> '*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.'* (*underline, mine*).

The provisions are clear, that upon the lapse of six months from the date of any judgment, order, decree, conviction or other proceeding, the court will be disabled from granting leave to apply for an order of certiorari aimed at quashing the relevant judgment, order, decree, conviction or other proceeding.

The impugned decision was made on 28th April 2017 by the 1st Respondent. The law thus required any application for leave to quash the decision to be made at the very latest by 28th October 2017. This was not to be. The Applicant sought leave vide chamber summons on 4th December 2018 and mounted the judicial review proceedings on 13th December 2018, more than 1½ years after the decision was made. Now, the Applicant contends that the delay was not her fault stating that she only came to know of the decision on 13th May 2018.

The issue for determination then, is whether the Applicant's circumstances can find any accommodation within the law, and more importantly, whether the court is empowered to enlarge the strict timelines provided under *Section 9(3) of the Law Reform Act, Cap 26 and Order 53 Rule 2 of the Civil Procedure Rules, 2010.*

First, the case of *Republic Vs Mwangi Nguyai & 3 Others ex-parte Haru Nguyai, High Court at Nairobi, Constitutional & Judicial Review Division, Miscellaneous Application No. 89 of 2008* rationalizes the 6- month limit prescribed in the Law Reform Act and in the Civil Procedure Rules in the following words:

> "*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 recognized 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."

In ***Republic Vs Council of Legal Education & another Ex parte Sabiha Kassamia & another [2018] e KLR*** the absoluteness of the wording used under ***Section 9 (3) of the Law Reform Act*** was emphasized thus:

> "*Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines:- Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction…[25] - Standard Bank Ltd Vs Van Rhyn (1925 AD 266)… The above being the clear prescriptions of the meaning of the word shall, Parliament in its wisdom prescribed a period of six months within which applications for Certiorari, may be brought. Time starts running from the date of the challenged decision. <u>I find and hold that the above provisions are couched in mandatory terms and must be complied with</u>." (emphasis mine)*

The Court of Appeal decision in ***Wilson Osolo Vs John Ojiambo Ochola & Another [1995] e KLR*** rendered itself thus on the possibility for extension under ***Section 9(3) of the Law Reform Act, Cap 26:***

> "*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 the 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, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.''*

The decisions of the Court of Appeal being binding on the present court, it is apparent that the wording in ***Section 9(3) of the Law Reform Act, Cap 26*** *and* ***Order 53 Rule 2 of the Civil Procedure Rules, 2010*** provides absolutely no wiggle room for the court to extend the timelines provided, irrespective of the cause of delay.

The Applicant, while tacitly appreciating the import of ***Section 9(3) of the Law Reform Act, Cap 26*** *and* ***Order 53 Rule 2 of the Civil Procedure Rules, 2010*** has invoked ***Articles 47, 48 and 159 (2) of the Constitution*** with a view to submitting that the constitutional provisions, to wit: the right to fair administrative action, the right to access justice and the right to an access of justice unfettered by technical considerations override the strictures prescribed by the Law Reform Act. This court in ***Republic Vs National Irrigation Board, Mwea Irrigation Settlement Scheme & another Ex parte John Murimi Gichobi [2021] e KLR*** clearly analyzed the correct perspective with which litigants ought to approach ***Article 159 (2) of the Constitution*** as well as the Overriding Objectives governing rules of Civil Procedure; not as a magic wand to waive away rules and procedures set out in law but as provisions enriching already defined principles and allowing for a greater reality for justice between the parties. The following Court of Appeal decisions are instructive:

Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 6 others [2013] e KLR

> "*Neither Article 159 of the Constitution nor the 'oxygen principles' in Section 3A and 3B of the Appellate Jurisdiction Act could be seen as a panacea to aid a party who flagrantly violates the Rules of Court. Counsel contended that the appellant's defaults rendered his appeal incompetent and not curable by an order of costs to the applicants. Justice looks at both sides of the Highway and must be administered in accordance with the law and no court should encourage the disobedience of its rules out of sympathy for the defaulting party, for that amounts to caprice… I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."*

Kiaga J. in the above cited case, highlighted with approval the rightful effect of ***Article 159 (2)*** in ***City Chemist (Nbi) & Anor Vs Oriental Commercial Bank, Civil Appl. Nai 30-2 of 2008.***

> "*…That however is not to say that the new thinking totally uproots well-established principles or precedents in the exercise of discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."*

It is therefore evident that the position and the mandatory prescriptions of ***Sections 9(3) of the Law Reform Act, Cap 26 and Order 53 Rule***

2 of the Civil Procedure Rules, 2010 remain in force even after the promulgation of the Constitution. That said, the Applicant may still have recourse through the appellate avenue provided in law.

The upshot of the analysis above is that the court lacks jurisdiction to entertain the Applicant's application. Once barred from entertaining a matter, the court is required to down its tool and not to take another step. The *locus classicus* on jurisdiction is the celebrated case of ***Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd [1989] KLR 1*** where **Justice Nyarangi** of the Court of Appeal held as follows:

> *"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

The Supreme Court decision in ***Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others***, is also instructive:

> *"…….a court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."*

Lastly, ***Adero & Another Vs Ulinzi Sacco Society Limited [2002] 1 KLR 577***, which quite succinctly summarized the law on jurisdiction as follows;

> *"1 …………*
>
> *2. The jurisdiction either exists or does not ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.*
>
> *3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*
>
> *4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*
>
> *5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction."*

In light of the foregoing, it is my finding that the Applicant's applications fail and the 2nd Respondent's Preliminary Objection succeeds. The costs of the application shall be borne by the Applicant. It is so ordered.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 18TH DAY OF JUNE, 2021.

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E.C CHERONO

ELC JUDGE

In the presence of:-

1. Ms Githaiga holding brief for Barasa for the 2nd Respondent

2. Applicant/Advocate – absent

3. Kabuta – Court clerk.