Faram East Africa Limited v County Secretary, Government of Nairobi County & 5 others (Judicial Review Miscellaneous Application E132 of 2024) [2025] KEHC 6351 (KLR) (Judicial Review) (20 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6351 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E132 OF 2024

RE ABURILI, J

MAY 20, 2025

BETWEEN

FARAM EAST AFRICA LIMITED ..... APPLICANT

AND

COUNTY SECRETARY, GOVERNMENT OF NAIROBI COUNTY .... 1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE, GOVERNMENT OF NAIROBI COUNTY ..... 2ND RESPONDENT

CHIEF OFFICER FINANCE, GOVERNMENT OF NAIROBI COUNTY ..... 3RD RESPONDENT

THE GOVERNOR, GOVERNMENT OF NAIROBI CITY COUNTY ..... 4TH RESPONDENT

GOVERNMENT OF NAIROBI CITY COUNTY ..... 5TH RESPONDENT

THE CHIEF OFFICER, DEPARTMENT OF HEALTH AND EMERGENCY SERVICES ..... 6TH RESPONDENT

RULING

1. On 10/7.2024, Ngaah J granted leave to the applicant herein to apply for judicial review orders of mandamus to compel the respondents to settle decree and certificate of order against the government dated 21st January, 2022 as was issued in Nairobi Milimani Chief Magistrate's Court Commercial case No. 2026 of 2018 between Faram East Africa Limited versus Nairobi City Country Government.

2. The decree is for Kshs 15,076,885.52 inclusive of interest from 5/12/2014 to 23/1/2024 at the rate of 12% per annum and costs of the suit, arising from the claim by the exparte applicant herein supplying to the respondent City County, of hospital and laboratory equipment, consumables and reagents, among other services valued at Kshs 7,055,119.00 as at 5/12/2024.

3. The leave to apply was pursuant to the chamber summons dated 11th June, 2024 supported by the statutory statement and the verifying affidavit sworn by the applicant's managing director, Mr. Erastus Momani Moruri on the even date.

4. The Decree was following the ruling delivered on 21/1/2022 by Hon Kagoni, Principal Magistrate, wherein he struck out the defence filed by the defendant/ respondents herein and entered judgment in favour of the exparte applicant.

5. Upon the leave to apply being granted on 10th July 2024, the applicant extracted the order for leave which was issued on 30th July 2024. The substantive notice of motion was filed on 11/7/2024 and served upon the respondents. It is dated 11/7/2024 seeking judicial review orders of mandamus to compel the respondents to settle the decree and certificate of order against the County Government of Nairobi as stated above. They also seek for costs and further interest as well as orders summons to issue to the respondents to appear before court and explain non-payment of the decretal sum as stated hereinabove.

6. No sooner had the respondents been served with the substantive notice of motion than they immediately filed a notice of preliminary objection dated 7th August 2024 and a replying affidavit sworn by W.S.Ogola on 20th August, 2024 challenging the jurisdiction of the court on account that the judicial review application was statute barred as it was filed after six months, contrary to the statutory provisions of section 9(2) of the *Law Reform Act* and that the time stipulated in the statute cannot be extended as was held in the case of Osolo v John Ojiambo Ochola & Another [1995]e KLR. The respondents urged the court to strike out the application for being incompetent, fatally defective and an abuse of the court process.

7. On 26th February 2025, the parties' advocates argued the preliminary objection, with the Respondent's counsel maintaining that the application for mandamus was statute barred as stipulated in section 9(2) of the *Law Reform Act*. They also filed and relied on several decisions which this court will consider in this determination.

8. On the part of the exparte applicant, it was argued that the time limitation under section 9(2) of the *Law Reform Act* does not apply to Mandamus to compel settlement of decree. That a decree has a lifespan of 12 years as contemplated in section 4 of the *Limitation of Actions Act* and not section 9(2) of the *Law Reform Act*. Counsel for the applicant cited several authorities in support of its position and which are under consideration in this decision.

9. In a rejoinder, the respondents' counsel maintained their position and submitted that in any event, there is no amendment to the *Law Reform Act* hence the prayer for mandamus was stale.

Analysis and determination.

10. I have considered the preliminary objection as argued by the respondents' counsel that the judicial review orders of mandamus were filed outside the statutory limitation of time of six months. Further, that the period of six months cannot be extended by the court. That the applicant having brought the application under the *Law Reform Act* and Order 53 Rule (2) of the Civil Procedure Rules, cannot rely on the *Limitation of Actions Act* for the stipulation that execution of decree can take up to twelve years and that therefore the time for such execution had not lapsed.

11. I have also considered the argument by the applicant's counsel that the mandamus sought in this context being for execution of decree is governed by the provisions of the *Limitation of Actions Act* on the lifespan of decrees and not section 9(2) of the *Law Reform Act* hence, the application was not statute barred.

12. The issue is whether the application for mandamus as filed is statute barred.

13. It is true that the application subject of these proceedings was brought under the *law Reform Act*, sections 8 and 9 as well as Order 53 of the Civil Procedure Rules, and all other enabling laws which are not disclosed, apart from sections 1B and 3A of the *Civil Procedure Act*.

14. Sections 8 and 9 of the *Law reform Act* as cited by the respondents' counsel provides as follows:

> " 8. Orders of mandamus, prohibition and certiorari substituted for writs
>
> (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.
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> (2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.
>
> (3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.
>
> (4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.
>
> (5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.
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> 9. Rules of court
>
> (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—
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> (a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;
>
> (b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;
>
> (c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court,

other than the relief and grounds specified when the application for leave was made.

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe those applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(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.

15. On the other hand, Order 53 Rule 2 of the Civil procedure Rules provides that:

2. Time for applying for certiorari in certain cases [Order 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 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.

16. In all the decisions that the respondents relied on, the courts pronounced themselves clearly that leave to apply for judicial review orders of mandamus, certiorari and prohibition shall not lie unless the application is made within six months from the date when the act or omission to which the application relates. This is exactly what section 9(2) of the *Law reform Act* provides as reproduced above. See Republic vs. Kiambu Land Disputes Tribunal & 2 Others [2016] eKLR and Raila Odinga & 6 Others vs. Nairobi City Council HCC 899/1993 EA 482.

17. On the other hand, in the decision relied on by the exparte applicant's counsel, it relates to mandamus to compel settlement of decrees. See Republic vs. Chief Executive Officer, IEBC exparte Patrick Mweu Musimamba [2018] eKLR where Nyamweya J (as she then was) stated:

"

" 20. In addition, the time limit of 6 months within which to bring an application for judicial review orders only applies where the order sought is one of certiorari, which is not the case in the present application which is seeking an order of mandamus. The limitation period with respect to an order of mandamus to enforce a sum due on a judgment is provided for by section 4(4) of the *Limitation of Actions Act*, which provides as follows:

...."

18. The applicant's counsel argued that in terms of execution of decrees against the government, the *Limitation of Actions Act* is what is applicable and not the *Law Reform Act*. The respondents' counsel then submitted that the applicant had brought the application under the *Law Reform Act* and not the *Limitation of Actions Act*.

19. In my view, settling this latter question first, it is important to note that citing wrong provisions of the law or failure to cite any provisions of the law in an application is not a fatal defect. The Court of Appeal in Mohamed Aden Abdi v Abdi Nuru Omar & 2 others [2007] eKLR when dealing with an application to strike out an appeal where the Applicant cited wrong provisions held that:

> " We have looked at the application and in an appropriate case, this not being one, the Court may strike out an application in which appropriate provisions are not cited. In the instant application however, the prayers in the motion and the affidavit in support leave no doubt that the applicant was seeking an order pursuant to rule 80 of the Court Rules."

20. In the matter of Libyan Arab African Investments Company Kenya Limited [2021] eKLR the court stated that:

> " Striking out the Applicant's application for the reason that it has not cited the correct anchoring provision of the law will be against the principle of substantive justice as provided for by Article 159(2)(d)of *the Constitution*."

21. Inone of the earliest cases, in the case of Gatu V. Muriuki [1986] KLR 211 at 212, Apaloo J.A. held as follows:

> " This application could only properly be brought under Order 9 (8) of the High Court Civil Procedure Rules. However, when the applicant brought the application, he erroneously put down as the authority on which he sought his relief Order XLIV Rule 122 and Order VI Rule 3. They were quite wrong. The learned judge seems to have laid great stress on the fact that although it was a competent application, the wrong procedural warrant was cited for it".

22. When passing his verdict on the judge's decision to dismiss the application, Apaloo J.A. made the following pertinent conclusion;

> " Although I am not now concerned with the merits, I cannot shut my eyes to the fact that the main ground on which the learned judge declined to exercise his discretion to set aside the judgment of dismissal was that in bringing the motion to relist, the applicant, in error, quoted the wrong order. That seems to me hardly a sound basis for dismissing the motion".

23. In re Estate of the Late Francis Kimitei Samoei (Deceased) [2023] eKLR, Wananda J emphasized that minor procedural errors do not invalidate proceedings if they do not affect the substance of the case. He reiterated that justice should be administered without undue regard to procedural technicalities, as per Article 159(2)(d) of *the Constitution*.

24. In Sheikh v Narok County Government & another [2023] eKLR, the court observed that the power to strike out pleadings should be exercised sparingly and only in clear cases. It referenced the decision in Madison Insurance Company Ltd v Augustine Kamanda Gitau [2020] eKLR, which stated that

striking out pleadings is a drastic remedy and should only be used in the clearest of cases.in the latter case, the Court stated:

> " The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

25. Th principles from D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1, which have been echoed in may subsequent cases, emphasize that the power to strike out pleadings should be exercised after considering all facts, and the court must not embark on the merits of the case itself.

26. I therefore find that the citation of the wrong procedural rule is not by itself fatal to the applicant's application. Such wrong citation does not go to the root or substance of the case. It is a mere procedural fault which is curable under Article 159 (2) (d) of *the Constitution* which makes it clear that when called upon to administer justice, the courts shall not be blindly enslaved by procedural technicalities at the altar od substantive justice.

27. Onto the question of whether the filing of the application for leave to apply for mandamus to compel settlement of certificate of order against the government was statute barred, a similar argument arose in this Court before Ngaah J in Republic v County Government of Nairobi Ex Parte Macharia Njeru & another [2021] eKLR where Counsel for the respondent argued that according to section 9(2) of the *Law Reform Act*, Cap. 26, the applicant's application could only be made within six months from the date of refusal to pay. That since the decree was obtained in the year 2002, the application was filed outside the limitation period and without leave of the court.

28. In response to these submissions, learned counsel for the applicant argued that section 9 (2) of the *Law Reform Act* is inapplicable to the application because the respondent had not demonstrated that the applicant's application was one of the matters specified in that section. She urged that the application is for execution whose limitation period is 12 years as per the *Limitation of Actions Act*, cap.22. The decree was issued on 28 February 2008 and certified copy was served on 17 March 2008. Other copies were served in 2017 and 2018.

29. Dismissing the argument by the respondent's counsel, Ngaah J stated as follows, citing other decisions in similar circumstances:

> " Section 9(2) of the *Law Reform Act*, Cap. 26 which the learned counsel for the respondents made reference to on the argument that the applicant's motion is out of time reads as follows:
>
> 9.
>
> (2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe those applications for an order of mandamus, prohibition or certiorari shall, in specified

> proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

Subsection (3) states in express terms the time within which an application for the order of certiorari should be made; it is of little relevance to the applicant's Application which seeks the order for mandamus. Subsection (1), on the other hand, talks about the power to make rules to provide for any matters of procedure with respect to applications for judicial review orders.

Indeed, there are no other Rules besides Order 53 of the Civil Procedure Rules. Nowhere in that Rule is it stated that an application for the order of mandamus must be made within six months of the date of the act complained of. It is only in Order 53 Rule 2 that a specific timeline is given for the application for the order of certiorari. That particular Rule reads 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. (Emphasis added).

I would agree with the applicants that it has not been demonstrated that their application is one of those 'specified proceedings' contemplated in section 9(2) of the *Law Reform Act* which rules prescribe that may be made within six months of the act or omission complained of. According to Order 53 of the Civil Procedure Rules which, no doubt, are the rules envisaged in section 9(2) of the *Law Reform Act* it is only the prerogative order of certiorari that is subject to limitation period.

This does not in way suggest that the timing for the application for any of the order for judicial review does not matter; being discretionary remedies the urgency or the laxity, with which an applicant moves the court for these orders will certainly be factor that may influence whether to grant leave to make the necessary application or ultimately, whether the application ought to be allowed. But this is not the case here; the point here is that neither section 9(2) of the *Law Reform Act* nor Order 53 of the Civil Procedure Rules prescribes the limitation of time within an application for mandamus must be made."

30. In the decisions relied on by the respondents' counsel, none of the courts were dealing with judicial review orders of mandamus to compel settlement of an already existing decree. In majority of those cases, the main prayers were for certiorari to quash the administrative decisions and where mandamus was being sought, it was sought in the context of administrative decisions which were being challenged.

31. A decree not being an administrative decision, I would therefore agree with Ngaah J that the limitation period for execution of decree is 12 years as stipulate din section 4 of the *Limitation of Actions Act*.

32. I further observe that the *Law Reform Act* was assented to on 17th December 1956 and came into effect on 18th December, 1956 whereas the *Limitation of Actions Act* which provides for enforcement of decree period of 12 years from date that the decree is passed was enacted much later and came into effect on 1st of December, 1967.

33. In statutory construction, it is generally accepted, and with some exceptions that first, if statutes are in conflict, the more specific statute will prevail over the general statute unless there is legislative intent for the general statute to control. Second, if statutes are in conflict, the later statute prevails over the earlier statute, unless the earlier statute is clearer and more explicit and finally, the Legislature does not engage in unnecessary or meaningless acts. Every enactment is presumed to a have significant purpose.

34. In Martin Wanderi and 19 others v Engineers Registration Board of Kenya & 5 others [2014]eKLR, Mumbi Ngugi J (as she then was) stated-

> " Suffice to say that the effect of the enactment of the *Universities Act* after the *Engineers Act*, with the same power vested in the Commission for Universities Education to accredit courses for Universities, takes away the powers vested in the Board by section 7(1) (l). This is because of the cannons of interrelation with regard to the timing of legislation and the doctrine of implied repeal which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one."

35. In Steve Thoburn v Sanderland City Council 202 EWHC. 95, the Court referring to two conflicting provisions of statutes in that case, stated-

> " I should certainly hold.... that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions...If they are inconsistent to the extent that they cannot stand together, then the earlier Act is impliedly repealed by the later in accordance with the Maxim 'Larger Posteriores Contrias abrogant."

36. In the case of Craywan Enterprises Limited v Attorney General & Another petition No. 196 of 2011, the Court observed:

> " The petitioners claim is based on the apparent inconsistency between the two Acts in so far as they relate to purchasing. In my view, there is no conflict as it is now settled that where there are two provisions in Acts of Parliament that are in conflict, the later Act repeals the former. I agree with the dictum of Avory J, in Vauxhall Estate Limited v Liverpool Corporation (supra) that if they are inconsistent to that extent, then the earlier Act is impliedly repealed by the later."

37. In the case of David Sejjaka Nalima v Rebecca Musoke, Civil Appeal No 12 of 1985, the Court of Appeal of Uganda observed; -

> " According to principles of Construction, if the provisions of a latter Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another proposition is if the provisions are wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are exempted or their operation is excluded with respect to the cases falling within the provisions of the Act."

38. The jurisprudence arising from the decisions referred to above is that a latter provision or statute overrides the older one or is deemed to have repealed the earlier one.

39. Applying that principle to the present situation before this court, the provisions of the *Limitation of Actions Act* which are specific to the lifespan of decrees on the period for enforcement of decree override those of the *Law Reform Act* and the *Civil procedure Act* and Rules which generally provide for time within which judicial review orders should be sought from court.

40. This position is further fortified by the decision in the Supreme Court of India in the case of Commercial Tax Officer, Rajasthan v M/s Binan Cement Ltd [2014] SCR that;

> " It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origin in the latin maxim of generalia specialibus non derogant, i.e, general law yields to special law should they operate in the same field on same subject. The principle has found vast application in cases of there being two statutes; general or specific with the latter treating the common subject matter more specifically or minutely than the former."

41. The Court then went on to state that:

> " When construing a general and specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonized, if possible, with the objective of giving effect to a consistent legislative policy... Where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control. The provisions more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy."

42. Finally, back home, the Court of Appeal in Lucy Mirigo & 550 Others vs. Minister for Lands and 4 Others [2014] eKLR, determined the question of vii. When is time deemed to begin running for purposes of limitation in respect to an order of mandamus? In answering that question, albeit not in the context of enforcement of a decree, the Court of Appeal highlighted the point that there is no limitation period for purposes of the relief of Mandamus. It expressed itself thus:

> " On our part, we have examined the provisions of Order 53 of the *Civil Procedure Act* which is the juridical basis for an application for mandamus. Rule 2 of Order 53 provides a six-month limitation period for an order of Certiorari. There is no limitation period to institute an action for mandamus. Limitation for purposes of mandamus is to be determined by the reasonableness and length of time between the cause of action and time of filing suit."

43. This court is bound by the above decision of the Court of Appeal. In the instant case, it is clear that the mandamus is sought in the context of enforcement of decree against the county government and therefore specifically, section 4(4) of the *Limitation of Actions Act* comes into play. The relevant section provides as follows, as far ax execution of decrees is concerned:

> 4(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question,

and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

44. In my humble view, the *Limitation of Actions Act*'s twelve-year limitation period applies to all actions on a judgment, including those seeking mandamus to compel settlement. This means that even if a mandamus is sought, it cannot be brought more than twelve years after the judgment is delivered or the default date is reached.

45. I further hold the view that while the *Law Reform Act* provides the basis for judicial review, including mandamus, generally, it does not prescribe a specific time limit for mandamus applications to enforce decrees. The *Limitation of Actions Act*, specifically section 4(4), prescribes those actions on judgments, including those seeking mandamus, are subject to a twelve-year limitation period.

46. For the above reasons, I find that the preliminary objection raised has no merit. It is dismissed.

47. Parties to canvass the main motion dated 11th July 2024 on its merit.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 20TH DAY OF MAY 2025

R.E. ABURILI

JUDGE