



**Doune Farm Limited v Commissioner for Co-operative Development & another;
Borop Multipurpose Co-operative Society (Interested Party) (Judicial Review
Application E018 of 2023) [2024] KEHC 7041 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW APPLICATION E018 OF 2023**

HM NYAGA, J

JUNE 12, 2024

**IN THE MATTER OF AN APPLICATION BY DOUNE FARM
LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF MANDAMUS**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW
REFORMS ACT CAP 26 LAWS OF KENYA**

AND

**IN THE MATTER OF SECTIONS 58,59,60,61,62,63,64 OF
THE CO-OPERATIVE SOCIETIES ACT NO.12 OF 1997**

AND

**IN THE MATTER OF ORDER 53 OF THE CIVIL
PROCEDURE RULES 2010**

BETWEEN

DOUNE FARM LIMITED EXPARTE APPLICANT

AND

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT ... 1ST RESPONDENT

CO-OPERATIVE COMMISSIONER NAKURU COUNTY 2ND RESPONDENT

AND

BOROP MULTIPURPOSE CO-OPERATIVE SOCIETY INTERESTED PARTY



RULING

1. The ex-parte Applicant herein Doune Farm Limited filed judicial review proceedings herein by way of a Notice of Motion application dated 21st September,2023, seeking the following orders:

I. That the Honourable Court be and is hereby pleased to issue an ORDER OF MANDAMUS directed at the Respondents to compel them to take up their mandated functions/roles under the Co-operative Societies Act and Rules thereunder, and to act within the laws as provided under the Cooperatives Societies Act and in particular perform the following:-

- a. Act on and/or implement the recommendations of its report dated 17th June,2022 and or:
- b. Dissolve the Interested Party herein, Borop Multipurpose Co-operative Society within 30 days of delivery of the Court's decision herein.

II. Costs of these proceedings be borne by the Respondents.

2. The grounds for the application were set out in a statutory statement by the ex parte Applicant dated 21st September, 2023, and a verifying affidavit sworn on the same date by the ex parte Applicant's director one Richard Kay Muir.
3. It is the Ex parte Applicant's case that it obtained judgement against the Interested party and was issued with a certificate of taxation on 8th November, 2019 arising from a decree issued on 17th May 2012 in Nairobi Milimani Civil Suit No. 1561 of 2002, and additionally it was issued with a certificate of costs on 24th August, 2021 emanating from a court order issued on 20th February 2020 in Nakuru Civil Appeal No.189 of 2012. That furthermore , it was issued with a certificate of costs against the interested party emanating from a court decree issued on 30th October,2021 in Molo SPMCC No. 80 of 2005 in the sum of Ksh. 754,914/=, inclusive of interests as at 25th July,2014 , awarded costs against the Interested Party, emanating from a court decree in MOLO SPMCC No. 194 of 2005 in the sum of Ksh.95,755/= inclusive of interests as at 23rd September,2010 and costs against the interested party emanating from a court decree in Molo SPMCC No. 63 of 2004 in the sum of Ksh. 329,261/= inclusive of interests as at 4th July,2012
4. The Exparte Applicant contends that the interested party is indebted to it in terms of the aggregate sum of Ksh. two million three hundred and six thousand, seven hundred and twenty seven (Ksh.2, 306,727/-) exclusive of interest accruing, and that the interested party has failed to satisfy the decree of the court despite several reminders.
5. The Ex parte Applicant asserts that upon making an inquiry into the operations of the Interested party from the Respondents, the respondents drafted a report dated 17th June, 2022 whereby they found that the interested party was non-compliant with Section 25 of the Cooperatives Societies Act Cap 490 as their books of account was last registered by the Commissioner for Cooperatives in the year 2005. Consequently, the Respondents gave the interested party 3 months grace period within which to settle the debts owed to it failing which the respondents would proceed to appoint a Liquidator who may declare it insolvent.



6. The Ex parte Applicant avers that it is now over one year and despite several reminders the Respondent has neglected to dissolve the interested party and cancel its registration as stipulated under Section 62 and 62 of the Cooperative [Societies Act](#) and as such it has continued to suffer financial loss.
7. The Ex parte applicant is apprehensive that the Respondent's laxity in implementing the said report and appointing a liquidator will encourage the interested party to continue defaulting in its debts to its detriment.
8. The Interested Party appeared and filed a Notice of Preliminary Objection 1st December, 2023 in response to the application. The Interested Party's objection is based on four major grounds namely ;-
 - a. That the ex parte Applicant's application is statute barred by limitation, having been filed outside the prescribed time limit of six months.
 - b. That the Application offends the doctrine of exhaustion as the exparte applicant has not exhausted the internal dispute resolution.
 - c. That the application is sub judice in view of six live litigations pending in court between the parties. Namely; ELC No. 142 of 2019(Formerly Civil Suit No.86 of 2002 Doune Farm Ltd vs. Richard Soi & others and Borop Multipurpose Co-operatives Society LTD; ELC No. E13 OF 2023 Doune Farm Limited Vs Philip Kirui &Others; Nakuru Civil Appeal No. E083 of 2021 Borop Multipurpose Co-operative Society LTD Vs. Doune Farm Limited & 6 Others; Nakuru Civil Appeal No. E024 of 2023 [Borop Multipurpose Co-operative Society LTD Vs. Sonaiya Arap Serser & 3 others; ELC Petition No.22 of 2019](#) Joshua K. Tanui & Others Vs. Borop Multipurpose Co-operative Society Ltd & 2 others & In the Co-operative Tribunal at Nairobi Case No. 06/2010 Borop Multipurpose Co-operative Society Ltd Vs. Sonaiya Serser & Others.
 - d. That the application is fatally defective based on its Intitulement and citing of inapplicable provisions of Civil Procedure Rules on the amendment of pleadings.
9. The Respondents did not file any response and/or participate in this matter.
10. On 6th December, 2023, this Court directed that the Interested Party's Preliminary Objection would be heard first, by way of written submissions. The parties duly complied.

The Interested Party's Submissions

11. Citing Section 9(2) of the [Law Reform Act](#) and Order 53 Rule 1(1) of the Civil Procedure Rules, the interested party submitted that the instant application has been brought outside the stipulated time frame as the Report the ex parte Applicant seeks to enforce is dated 17th June, 2023 and therefore the entire case herein ought to be struck out suo moto and pronto.
12. In buttressing its submissions, the interested party relied on the cases of [Raila Odinga & 6 Others vs Nairobi City Council](#) Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482 for the proposition that the 6 months period within which to seek leave to commence judicial review matters was imposed by the parliament in its wisdom and it is only the parliament which can amend it; [Republic vs Council of Legal Education & another Ex parte Sabiha Kassamia & another](#) [2018] eKLR where court in allowing a preliminary objection opined that Section 9(3) of the [Law Reform Act](#) and Oder 53 Rule 2 of the [Civil Procedure Rules](#),2010 are couched in mandatory terms ; Milka Nyambura Wanderi & another vs Principal Magistrate's Court Murang'a & 4 others [2014] eKLR where the court dismissed an application for leave which was filed six months after the decision sought to be enforced & [Speaker of the National Assembly vs James Njenga Karume](#) [1992] eKLR where the court opined that where



there is clear procedure for redress of any particular grievance prescribed by the constitution or an act of parliament, that procedure should be followed strictly.

13. The Interested party further submitted that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules is a special Jurisdiction in law which is neither criminal nor civil and therefore the provisions of the Civil Procedure Rules on the amendment of pleadings are inapplicable in the event a party desires to amend the Judicial Review or seek enlargement of time under Order 50 Rule 6 of the Civil Procedure Rules, and as such the instant judicial review is fatally defective and no life can be breathed and or injected into it. In support of this position, reliance was placed on the case of Commissioner of Lands vs Kunste Hotel Ltd. (1995-1998) EA.
14. The Interested party urged this court to strike out and/or dismiss this matter with costs to it.
15. The Interested party also asked this court to deem the other grounds of preliminary objection not highlighted as abandoned.

Ex-parte Applicant's Submissions

16. Citing the cases of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696 & Oraro vs. Mbaja [2005] 1 KLR 141, the Ex-parte Applicant submitted that the Interested Party's P.O. is not merited as there are contentious facts between the parties which needs to be ascertained through hearing of the application on merits.
17. The Ex-parte applicant submitted that the orders sought in its application are twofold and it is clear the interested party has no contention in regards to prayer 1(b) as its P.O. only pertains to prayer 1(a).
18. The Ex-parte applicant posited that the interested party's P.O. has been brought under the wrong provisions of the law as it relates specifically to orders for certiorari and as such it ought to fail.
19. It argued that the Commissioner can dissolve or wind up the society in accordance with Section 61(1) of the Society Act after holding an inquiry as provided under Sections 58 and 59 of the Act and as such the Interested Party's contention that prayer for mandamus sought is statute barred is misplaced since the same does not expire.
20. The Ex-parte Applicant posited that the application has been brought within a reasonable time and without prejudice this court can still order dissolution of the interested party even without the Report dated 17th June, 2022 after another inquiry is carried out by the Respondents as required under Section 58(b) of the Societies Act.
21. The ex-parte applicant urged this court to dismiss the P.O with costs to it.

Analysis and Determination

22. I have considered the notice of preliminary objection herein and the parties' rival submissions.
23. As to what constitutes a preliminary objection, in the celebrated case of Mukisa Biscuit Company Ltd v West End Distributors Limited (1969) EA 696 it was held as follows:

‘So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption



that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase the costs and occasions confusion of the issues. This improper practice should stop’.

24. It is thus well settled law that a Preliminary Objection consists of pure points of law and if successfully raised it is capable of bringing the matter to an end at that preliminary point. This was so affirmed in the case of *Quick Enterprises Ltd. vs. Kenya Railways Corporation*, Kisumu HCCC No. 22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

25. The nature of a preliminary objection was also described in the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004, the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

26. In the instant case, the preliminary objection is based on limitation of the period within which an application for leave to apply for Judicial Review Orders ought to have been brought.

27. It is interested party’s position that the Ex parte Applicant’s Application is statute barred as it has been brought outside the 6 months from the date the report sought to be enforced was issued.

28. It is not in doubt that the issue of limitation goes to the jurisdiction of the Court and the same does not require ascertainment of facts. The Court is only required to determine what the law says and whether indeed the suit is barred by Limitation of Action. The objection therefore raises a pure point of law.

29. The report in issue that the Ex parte Applicant seeks to enforce is dated 17th June, 2022. According to the interested party this report cannot be enforced as it statutorily barred.

30. The Ex parte Applicant on his part argued that the Preliminary Objection is unmerited as it has been brought under Section 9(3) of the *Law Reform Act* that relate specifically to the prerogative orders of certiorari. The ex parte’s position is that the prayer for mandamus sought in their application does not expire.

31. I have perused the Interested party’s submissions and I note that it relies on Section 9(2) of the *Law of Reform Act* in support of its P.O.

32. Section 9(2) provides that subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that 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.

33. Section 9(3) which I consider crucial to this case provides that:-

“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.”

34. It is therefore clear from the above provisions that the only instance Section 9 specifically limits the time in issue is where an applicant seeks for orders of certiorari.

35. The interest party also relied on Order 53 Rule 1(1) of the Civil Procedure Rules. Order 53 Rule 1(1) of the Civil Procedure Rules which provides that:

“(1) No application for an order of Mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

36. The question of whether an order for mandamus is restricted by limitation of time was discussed by the Court of Appeal in Lucy Mirigo & 550 others vs Minister for Lands & 4 others [2014] eKLR. The Court held as follows;

‘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 for filing suit.’

37. Similarly, in Joseph Muriithi Nyaga v Embu County Government [2021] eKLR it was held that;

“What is clear from Section 9(2) is that the rules made under subsection (1) may prescribe that 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. My understanding of this section is that it is the rules which are made to govern court proceedings which can (discretionally) provide for the time limit within which an application for mandamus (as the case herein) can be made. The only instance when section 9 limits such time is where an applicant seeks for orders of certiorari.

The power to make rules as contemplated under section 9(1) is actually actualized by the provisions of Order 53 of the Civil Procedure Rules 2010. Indeed, there are no other rules besides Order 53 of the Civil Procedure Rules 2010.

I have clearly looked at the said Order 53 of the CPA and there is 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.

Further, from the reading of the said section 9(2), the prescription as to the time within which applications for an order of mandamus, prohibition or certiorari ought to be made is in regards to specified proceedings. There are no other rules which have been made in regards to execution against the government taking the same as specific proceedings as contemplated by the said section.

It is my view therefore, that the respondent herein misconstrued the law in raising the preliminary objection. It is clear that section 9(2) does not limit the time for filing an application for mandamus to six months but provides that rules made to provide for the procedure of the courts may limit such time. The procedural rules (CPR 2010) which are the only applicable rules do not provide for such a limitation on time in relation to an application for orders of mandamus but only when seeking for orders of certiorari.

38. Lastly in *Republic vs Land Registrar Busia & 2 others; Nyabola (Ex parte Applicant) (Environment and Land Judicial Review Case E003 of 2023)* [2024] KEELC 1319 (KLR) the court held that;

“My reading of the provisions of Section 9(1), (2) and (3) of the *Law Reform Act* and Order 53 Rule (2) of the *Civil Procedure Rules* is that it is the rules which are made under the *Civil Procedure Rules* which will govern the time limit for an Applicant to file any application seeking for orders of Certiorari, Mandamus and Prohibition. And in respect to an application for orders of certiorari, it is clear from Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the *Civil Procedure Rules* that the time limit is 6 months. No time limit has been prescribed under the rules within which an application for orders of mandamus or prohibition must be filed. In other words the time limit for seeking orders of mandamus or prohibition is therefore not circumscribed by the provisions of Section 9(3) of the *Law Reform Act* or Order 53 Rule 2 of the *Civil Procedure Rules*. In any case, it would be impracticable and not in the interest of justice to limit the time for seeking an order of mandamus, which is a writ issued by the Court to compel the performance of any act by a particular agency, or an order of prohibition, which is a writ that forbids a certain act, to the time limit of 6 months. For instance, when a party approaches the Court seeking an order of prohibition, it means that the action being complained about is continuing. And when an order of mandamus is sought, it means that the body against whom it is sought has refused to perform a public duty imposed upon it by the law. It is obvious now, therefore, why the orders of mandamus and prohibition are not mentioned in Section 9(3) of the *Law Reform Act* or Order 53 Rule 2 of the *Civil Procedure Rules*.”

39. I am in total agreement with the above findings that the limitation period set out in under the Act is only in respect to orders of certiorari and cannot extend the orders sought herein, those of mandamus. It is apparent the above order does not provide for the timeline within which to apply for an order of mandamus.
40. The Interested party, in my view, misunderstood the cited legal provisions in raising the objection, based on limitation of time.
41. In view of the foregoing, I find that the Preliminary Objection raised is unmeritorious and it is hereby dismissed with costs to the Ex parte Applicant.



42. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 12TH DAY OF JUNE, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Langat for Administrator/Respondent

No appearance for Applicant

