



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC. CIVIL APPLICATION NO. 22 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS AND CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SANDE BAYA THOYA

HAMISI GUNGA BAYA.....APPLICANTS

VERSUS

1. ARBITRATION BOARD

2. LAND DISPUTE TRIBUNAL

3. THE LAND REGISTRAR KILIFI

4. ATTORNEY GENERAL.....RESPONDENTS

AND

ALI SUNDAY CHEA.....INTERESTED PARTY

RULING

This ruling is in respect of a preliminary objection dated 23rd June 2021 by the Interested Party and a Notice of Motion dated 25th May 2021 by the applicants seeking for the following orders:

- a. That leave be granted to the applicants to institute Judicial Review proceedings herein.**
- b. That the costs of this application be in the cause.**

Before the hearing of the Notice of Motion, the Interested Party filed a notice of Preliminary Objection dated 23rd June 2021 seeking to have the Notice of Motion struck out on the following grounds:

- a. That the suit herein is incurably defective for want of jurisdiction having been instituted in express contravention of the mandatory provisions Section 29 and 30 of the Land Adjudication Act Cap 284.**
- b. That the parties herein have prematurely approached the court before exhausting the option of appealing the Arbitration Board's decision.**
- c. That the suit herein is frivolous and an outright abuse of the court process.**

d. That the orders sought herein are not available to the Applicant.

Counsel agreed to canvas the preliminary objection and the application by way of written submissions which were duly filed.

APPLICANTS' SUBMISSIONS

Counsel submitted that the application has been necessitated by contradictory and erroneous decisions arrived at by the Arbitration Board which decisions were against natural justice

Counsel further submitted that Articles 23(3) (d) and 159 (2) (d) of the Constitution of Kenya, 2010, section 3 (2) of the Judicature Act and Order 51 of the Civil Procedure Rules obliges courts from paying regard to any unreasonable procedural technicalities in the administration of justice.

Counsel relied on the case of **Jamnada V Gorhandaj Hemraj Civil Appeal No. 57 of 1952 vol. 7 ULR** where the court held that procedural rules are intended to serve as the hand maiden of justice.

Counsel also submitted that the primary objective of the courts is to do justice and that courts should not be too far bound and tied by rules which are intended as general rules of procedure as to be compelled to do that which will cause injustice.

Counsel relied on the case of the cases of **Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR, Deepak Chamanlal Kamani & another v Kenya Anti-Corruption Commission & 3 others [2010] eKLR** and **Samuel Mbugua Githere v Kimungu [1984] eKLR** and urged this court be guided by the oxygen rule and allow the application as prayed.

INTERESTED PARTY'S SUBMISSIONS

Counsel submitted that the suit herein was instituted in express contravention of section 29 of the Land Adjudication Act as the impugned award being a decision of the Land Adjudication Board hence the Applicants ought to have exhausted the appeal channels prescribed under that section 29 which provides as follows:

1. Any person who is aggrieved by the determination of the objection under Section 26 of the Act may within 60 day after the determination, Appeal against the determination to the minister by: -

a. Delivering to the minister an appeal in writing specifying the grounds of appeal and

b. Sending a copy of the appeal to the Director Land Adjudication and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

It was counsel's submission that the applicant lost the objection case and was given 60 days to appeal to the Minister but opted not to appeal and no evidence has been adduced to that effect hence this court has no jurisdiction to entertain this matter.

Further that the Land Adjudication Act provides that once the adjudication register has been completed it becomes final and the aggrieved party can only appeal to the High Court on points of law and not facts therefore this court is *functus officio* and ought to down its tools.

Counsel also relied on Section 30 (1) of the Land Adjudication Act, Cap 284 which provides as follows; -

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section becomes final in all respects under section 29(3) of this Act”

Counsel urged the court to uphold the preliminary objection and dismiss the application with costs.

On the Notice of Motion counsel submitted that the same is time barred having been filed way long after the 6 months prescribed under Order 53 rule 2 of the Civil Procedure Rules and section 9 (2) of the Law Reform Act.

Counsel relied on Order 53 Rule 2 of the Civil Procedure Rules which provides that:

“ Leave shall not be granted to apply for an order of certiorari to remove any judgement, 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”

Counsel further cited the case of **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**; where the court held that:

“Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s. 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court’s duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads “unless the High Court considers that there is good reason for extending the period within which the application shall be made” is ultra vires section 9(2) of the Act. Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose...As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred.”

Counsel therefore urged the court to dismiss the application and uphold the Preliminary objection with costs

ANALYSIS AND DETERMINATION

When a preliminary objection is raised on the court’s jurisdiction to hear and determine a matter, the same has to be dealt with first as if it is upheld then the courts need not move further to determine an application or hear a case.

The issue for determination is whether the preliminary objection has merit.

The applicant has sought for leave to file a Judicial Review as envisaged under Order 53 Rule (2) of the Civil Procedure Rules which provides that:

An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —

- a. a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and**
- b. affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.**

Even though the applicants have brought the application vide a notice of motion, the lapse in procedure might not render it defective as the respondent may not suffer any prejudice as was held in the of **Republic v County Assembly Of Nakuru & 2 others Ex parte Samuel Waituhuku Njane & 21 others Nakuru JR App. 19 of 2016** where Odero J held that

“The question then is whether the above lapses in procedure serve to render the entire application fatally defective. Article 159(d) of the Constitution of Kenya provides

“(d) Justice shall be administered without undue regard to procedural technicalities”.

Courts have a duty to determine the underlying issues between the parties and ought not give undue regard to infractions of procedure. Rules of procedure are to be regarded as the hand maidens rather than the mistresses of justice.

In any event the interested parties will not suffer any prejudice as a result of these irregularities in the pleadings. The import of the application as well as the prayers being sought by the exparte applicant are clear. The same have been responded to by the interested parties. The irregularities noted are curable and therefore this limb of the objection is dismissed.”

The Interested party challenged the jurisdiction of this court on grounds that the Applicants have not exhausted the options of appeal available to them under Section 29 and 30 of the Land Adjudication Act, Cap 284. The question of jurisdiction is a pure point of law and should be resolved first. A court with no jurisdiction has no reason to entertain a matter any further.

It is on record that the Land Adjudication Board delivered its decision on 13th November 2020 and that section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya provides that a person aggrieved by the determination of an objection under section 26 of the Act may within 60 days’ appeal against the determination to the Minister who shall determine the appeal whose order shall be final.

Section 30 of the same Act further precludes this court from entertaining any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final. The section reads:

Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil

proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under [section 29\(3\)](#) of this Act.

From the records and the applicant's pleadings, there is no proof that a consent from the Land Adjudication Officer was sought and obtained before this application was filed. Courts do not second guess on whether processes were followed but rely on the pleadings and evidence brought before it. It is either there is a consent or not.

This is an adjudication section and from the order the applicant is seeking for and from the affidavit in support, it is evident that the adjudication process has not been finalized. If it was finalized, the applicant could have said so with evidence to boot.

When there are laid down procedures in an Act of parliament then the same have to be followed and exhausted before approaching the court. The Land Adjudication Act provides for an elaborate procedures and the appeal mechanism which has to be exhausted. I find that the applicant has not exhausted the laid down appeal mechanisms to the Minister and if he wanted to circumvent that process, then he should have sought for the consent form the Land Adjudication Officer as provided for under Section 30.

In the case of **Republic V District Land Adjudication Officer, Trans-Mara District) Samson Kiserian Kilerai [2012] eKLR** as follows:

“The activities anticipated to take place during the 60 days notice period as contemplated by sections 26,26 (A), 27,28 and 29 are those relating to objections to the completed register and hearing of those objections by the adjudication officer resulting in the rectification of the register under sections 27 or appeals to the minister under section 29 of the Act where applicable. When activities under sections 27 and appeals permitted under section 29 are finalized, that is when the land Adjudication officer prepares a No Objection Register under section 26A of the Act and hands it over to the chief land Registrar under section 28, in pursuance of which the Chief Land Registrar causes the registration of the adjudicated plots which registration are to be effected in accordance with the Adjudication Register. It is only then that it can be stated that the adjudication process is complete. In the absence of satisfaction of the afore set out procedures, there is no way the appellant could have accessed the court by way of judicial review without complying with the requirements of section 30(1) of the Act.”

I therefore find that the preliminary objection has merit and is therefore upheld. The upshot is that the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF NOVEMBER, 2021

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.