



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC CASE NO. 8 OF 2021**

**OSMAN BATUR DEDGLU.....APPLICANT**

**-VERSUS-**

**NAIROBI WATER AND SEWARGE COMPANY LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant herein filed a Notice of Motion Application dated 19<sup>th</sup> October 2021, whereby the Applicants’ herein have sought for the following Reliefs;

i. ....(Spent)

ii. *Leave be granted to the applicant to apply for judicial review by way of an order of prohibition restraining the Respondent whether by themselves, agents, servants or employees from disconnecting and interfering with the Applicant’s enjoyment of water supply meter number 1998875.*

iii. *Leave be granted to the applicant to apply for judicial review by way of an order of certiorari quashing the decision of the Respondent demanding payment of the disputed sum of kes.2,392,263.25/=*

2. The subject chamber summons application is based and/or anchored on the grounds contained on the statement of facts dated the 22<sup>nd</sup> July 2020 as well as the verifying affidavit sworn by the applicant (though prematurely referred to as the ex-parte applicant) sworn on the 22<sup>nd</sup> July 2020, and to which the applicant has attached various documents in support of the claim for leave to file and/or takeout judicial Review proceedings, in the nature of certiorari and prohibition.

3. Suffice it to note, that the application for leave to take out a judicial proceedings is ex-parte by law and in this regard the Application has not been served on the Respondent.

**DEPOSITIONS BY THE PARTIES**

**DEPOSITION BY THE APPLICANT**

4. Vide the verifying affidavit, the applicant herein has averred that same incorporated a company known as Yeren Management Company Limited, whose sole purpose was/is to manage the property known as Life City Residence, situate on L.R No. 209/21801, [hereafter referred to as the suit property].

5. It is further averred that whilst in the process of constructing 20 apartment and 2 penthouses, the Applicant herein maintained a water meter number 1998875, through which the Applicant accessed and used water being supplied by the Respondent company.

6. It is further averred that the Applicant herein promptly paid the monthly supplied bill which were issued by the Respondent.

7. Be that as it may, the applicant has further averred that between the period of 2013 to 2016, being the period when the apartment were being constructed, same outsourced supply of water and in this regard the Applicant, was supplied by private entity and not the Respondent.

8. Come the year 2017, the Applicant has averred that same approached and/or applied to the Respondent herein to reconnect the water supply to the Applicant's premises, namely, the apartments situated on the suit property and even paid the requisite reconnection charges.
9. The Applicant further avers that upon the repayment of the re connection charges, same was duly reconnected by the respondent, who continued to supply water to the Applicants premises.
10. However, the Applicant herein has averred that on the 17<sup>th</sup> June 2019, the Respondent herein issued to and in favor of the applicant a water bill amounting to kes.2,392,263.25/= only, covering the period between October 2013 and July 2018.
11. It is the said bill, which was issued to the Applicant on the 17<sup>th</sup> June 2019, and which the Applicant is aggrieved with, that has necessitated the filing of the subject Application.
12. According to the Applicant same outsourced water between the period of 2013 to 2016 and therefore the water bill that was issued was convoluted and/or exaggerated. Consequently, the Applicant herein contest the quantum of the water bill and the merits thereof.
13. In the premises, the Applicant herein now avers that the manner in which the Respondent arrived at and/or computed the water bill is erroneous and owing to the foregoing, the amount of money demanded at the foot of water bill issued on the 17<sup>th</sup> June 2019, is neither due nor payable.
14. Based on the foregoing, the Applicant has therefore approached the honourable court to be granted leave to file and/or commence judicial Review proceedings for purposes of accruing the orders of certiorari and prohibition.
15. On the other hand, the Applicant has also sought for an order of temporary injunction to be granted to restrain the Respondent, whether by itself, agents and/or employees from disconnecting and/or interfering with water supply to the Applicants premises through meter number 1998875.

#### **SUBMISSIONS**

16. The subject matter came up for hearing of the chamber summons application on the 30<sup>th</sup> September 2021, on which date the honourable court directed that the application be canvassed and or disposed of by way of written submissions, owing to the fact that the decision of the respondent which sought to be challenged vide the judicial review proceedings herein was made and/or issued on the 17<sup>th</sup> June 2019.
17. Pursuant to and in line with the direction of the court, the applicant herein filed his set of written submission on the 19<sup>th</sup> October 2021, which submissions are on record.
18. It is worthy to note, that vide the submissions under reference the Applicant have conceded that the application herein that seeks to file judicial Review proceedings, in the nature of certiorari and mandamus, was filed out of the required timelines. Besides, the applicant has further contended that the filing of the application outside the statutory timeline was caused by circumstances beyond the applicant's control. See paragraph 5 of the applicant's submissions.
19. On the other hand, whilst appreciating that the suit namely (the application for leave to file judicial review) has been filed outside the required timeline, the applicant nonetheless contends that the Constitution, 2010, demands that any aggrieved person has a right to fair administrative action and a right to access to justice.
20. Further, it is the applicant's contention that if leave is declined and/or denied then such a decision will be contrary to and in contravention of the Rules of natural justice and thus shall occasion a miscarriage of justice.
21. Finally, the applicant has submitted that this court has duty to ensure that the purpose, principles and values of the Constitution, 2010, are not only protected but also promoted.
22. Essentially, the applicant is alive to the fact that the subject application has been made outside the statutory timeline, but nonetheless has chosen to soldier on against the storm.

#### **ISSUES FOR DETERMINATION**

23. Having evaluated and/or appraised the chamber summons application brought pursuant to the provision of Order 53 Rule 1 of the Civil Procedure Rules, the statement of facts as well as the verifying affidavit and having also taken into account the written submissions filed on behalf of the applicant, I am of the opinion that the following issues do arise for determination;

- i. Whether leave to commence judicial review proceedings in the nature of certiorari and prohibition can be granted outside the 6-month statutory duration.*
- ii. Whether the 6-month statutory duration provided for vide section 9(3) of the law reforms Act, Chapter 26 Laws of Kenya is a fetter to right of access to justice.*

#### **ANALYSIS AND DETERMINATION**

## **Issue number 1**

24. The starting point in resolving the first issue herein, requires examination and appreciation of the provisions of **Order 53 Rule 2 of the Civil Procedure Rules** which provides as hereunder;

*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.*

25. On the other hand, it is important to appreciate that the provisions of order 53 of the civil procedure rules, though contained in the body of the civil procedure rules, same however, are not birthed pursuant to the provisions of section 81 of the civil procedure Act, which confers the mandate on the rules committee to make rules under the Civil Procedure Act, Chapter 21, Las of Kenya.

26. To the contrary, the provisions of Order 53 of the Civil Procedure Rules are birthed by the Law Reforms Act, Chapter 26 laws of Kenya and in particular Sections 8 and 9 thereof, which provides as hereunder;

8. (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.*

(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, 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 Application of this Part.*

9. (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—*

*(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 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.*

*(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.*

27. From the foregoing position, it is evident that the 6-month statutory period and/or duration, within which to seek leave to file the judicial review proceedings, in the nature of certiorari and prohibition is not only found in the provisions of **Order 53 Rule 2 of the Civil Procedure Rules**, but same emanates and traces its origin to the provisions of **Section 9(3) of the Law Reforms Act**.

28. In the premises, the limitation as to time is anchored and/or founded on a statute, which has circumscribed and/or delineated, the duration within which to approach the court for the relevant reliefs.

29. Given that the timeline and/or duration, has been prescribed by statute, namely the Law Reforms Act, chapter 26 laws of Kenya, it thus

behooves any and every applicant, who is desirous to approach the court, to ensure that same falls within the stipulated timeline and not otherwise. It must be remembered that every cause of action, has limitations and in this case the limitation is provided for under the parent act.

30. In the premises, the Applicant herein, just like other citizens of the Republic of Kenya, was obliged to file his claim and to ensure that the application for leave to take out judicial review, in the nature of certiorari and mandamus, is made within the statutory duration.

31. However, in this case, it is admitted that the impugned decision was issued and/or communicated on the 17<sup>th</sup> June 2019, yet the Application for leave was not filed until the 22<sup>nd</sup> July 2020. For clarity, the Application was filed after a period and/or duration of one year, one month and five days.

32. In any event, the Applicant herein has admitted and acknowledged that by the time of filing the application for leave, the 6 months duration provided under the law had long lapsed.

33. To the extent that the Application under reference has been filed outside the statutory period, the question is whether the court can proceed to grant leave outside the statutory timeline.

34. In my humble view, the law as pertains to timelines is well stipulated and/or delineated and therefore an application that is filed outside the statutory timeline cannot be dignified with leave. Consequently, my answer to the applicant's application is that no leave can issue to commence and takeout the judicial review proceedings either as sought or at all.

35. In support of the foregoing position, I invoke and adopt the decision in the case of **REPUBLIC V MWANGI NGUYAI & 3 OTHERS EX PARTE HARU NGUYAI**[2013]eKLR, where the honourable court observed as hereunder;

*“Having considered the foregoing, the first issue for determination is whether this application was brought within the period stipulated under the **Law Reform Act**, Cap 26 Laws of Kenya. Section 9(3) thereof provides:*

**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.”**

36. Other than the foregoing decision, the stipulation that no leave can issue if the application for such leave to commence the judicial proceedings is made after six month from the date of a decision, proceedings and/or order sought to be impugned was also deliberated upon vide the decision in the case of **Osolo v John Ojiambo Ochola & Another (1995) eKLR**, where the honourable court held as hereunder;

*Mr. Niare then in a separate suit (H. C. Miscellaneous Civil Case No. 35 of 1983) applied for extension of time to file the application for such leave. That application was heard ex-parte by Platt J. (as he then was) and was granted. There was quite clearly a fundamental error on the part of the Superior Court in granting such extension of time as Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed.*

37. In view of the foregoing decisions, I feel obliged to add my voice to the position of the law, that where the provision of the law is explicit and/or express, judges and all judicial officers, have no discretion. For clarity, in such situations the judge and/or judicial officer concerned, is obliged to follow the well discerned path of the law.

38. I also hastened to state that in such a scenario that the law is explicit, the judge and/or such other judicial officer, is divested of discretion, insofar as discretion is meant to help discern the law and the cause of justice, but in my humble view, discretion cannot override express and/or explicit provisions of the law.

39. Speaking for myself, I am compelled to state that the Provisions of Section 9(3) of the Law Reforms Act, Chapter 26 laws of Kenya, remain alive and has never been declared unconstitutional.

40. In the premises, the subject Application which has been filed well beyond the six month statutory period, is misconceived and thus legally untenable.

## **Issue number 2**

41. The Applicant herein has contended that even though the Application has been filed well out of time, the honourable court is still enjoined to grant same, because if same declines to do so, such a denial would amount to restricting and/or defeating the applicant's rights to access to justice.

42. Suffice it to say, that the applicant has a right to justice which is provided for and elucidated vide Article 48 of the Constitution 2010.

43. However, it must be remembered that the right of access to justice does not exist in vacuum. For clarity, the appropriation of the right to justice must be actualized and/or achieved through the various statutory provisions that provides for and/or prescribed the mechanism for

approaching the courts and the statutory timelines in doing so.

44. If the right of access to justice was limitless and/or bottomless, then same would become an unruly horse incapable of being tamed and thus the entire edifice of the law, as well as the Doctrine of the Rule of law, would come to naught.

45. Suffice it to say, that all the statutes that prescribed and or limit durations for various causes of actions, including breach of contract, tort and many other causes of actions under the Limitation of Actions Act, Chapter 22, Laws of Kenya, still remain valid to date.

46. In the premises, the stipulation of the timeline in approaching the court for purposes of applying for leave to commence judicial proceedings vide section 9(3) of the Law Reforms Act, can therefore not be said to fetter, limit and/or deprive the Applicant herein of his right of access to justice.

47. In view of the foregoing, I am not persuaded that a refusal to grant leave to the Applicant herein, in respect of an Application filed way out of time, shall compromise the Applicant's Right of access to justice.

48. For clarity, the Applicant if so advised, can very well be able to discern and make use of other alternative court process and/ or mechanisms, towards vindicating his rights and/or interests.

#### **FINAL DISPOSITION**

49. Having found and held, that the Application for Leave to file Judicial Review Proceedings was filed outside the statutory six months period, the said Application is therefore a nullity.

50. In the premises, the Chamber Summons Application dated 22<sup>nd</sup> July 2020, be and is hereby Dismissed.

51. There shall be no orders as to costs.

52. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

In the Presence of;

**June Nafula Court Assistant**