



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

JUDICIAL REVIEW NO.3 OF 2020

REPUBLIC.....APPLICANT

VERSUS

CHIEF MAGISTRATE BUSIA LAW COURTS.....1ST RESPONDENT

JOSEPH WANDERA OMONDI2ND RESPONDENT

THROUGH

ALBERT GERALD LUSIMBA RAGUEEXPARTE/APPLICANT

AND

WAFULA OGEMA ODUNGA1ST INTERESTED PARTY

ISAAC NAMBWAYA OKUKU.....2ND INTERESTED PARTY

RULING

[1] Vide the chamber summons dated 15th June 2020, the ex-parte applicant sought leave to apply for an order of certiorari to remove into this court and quash the decision and orders of the first respondent issued on the 22nd June 1997 at Busia Senior Resident Magistrate's Court civil case No.80 of 1994 and that grant of leave do operate as a stay of the orders/award in question until the determination of the substantive application or until further orders of this court.

[2] On 16th June 2020, the court considered the application ex-parte and granted the orders sought. It was then directed that the main application be filed and served within twenty one (21) days from that date.

Indeed, the main application dated 25th June 2020 was filed herein on 26th June 2020. However, it was brought under a chamber summons instead of a notice of motion. Nonetheless, on the 7th August 2020, the second respondent filed a notice of preliminary objection based on the following grounds:-

(1) That, the application offends the mandatory provisions of section 9 (3) of the Law Report Act (Cap 26) and Order 53 Rule (2) of the Civil Procedure Rules 2010, as the applicant did not seek for leave of the court before filing for leave to include proceedings for the relief of certiorari, six (6) months having lapsed since 22nd January 1997 being the date of the infringed order/decree.

(2) That the application offends the mandatory provisions of sections 4 (4), 7 and 17 of the Limitation of Actions Act (Cap 22) as the application/action arises out of an order/decree issued more than twenty three (23) years ago.

The second respondent therefore prays that the application vide the chamber summons dated 25th June 2020, be dismissed with costs.

[3] The objection was canvassed by way of written submissions. In that regard, the first respondent's submissions were filed herein on 10th February 2021 by the office of the **Attorney General**. The second respondent's submissions dated 3rd February 2021 were filed herein on 5th February 2021 by **Maloba & Co. Advocates**.

The second interested party's submission dated 15th December 2020, were filed on the same date by the second interested party. The applicants' submissions dated 9th March 2021, were filed herein on 15th November 2021 by **J.B Otsula & Associates**.

[4] This court has given due consideration to the preliminary objection in the light of the submissions filed herein by the applicant, the respondents and the 2nd interested party and is of the view that the basic issue for determination is whether the application dated 25th June 2020 is improper before the court for want of necessary leave and if leave was granted, whether the grant thereof was proper and lawful. A periphery issue is whether the application was filed outside the period prescribed by the Limitation of Action Act.

[5] With regard to leave to institute judicial review proceedings or to apply for an order of certiorari, the same was sought by the applicant and granted by the court on 16th June 2020. Subsequently on 26th June 2020, the present application dated 25th June 2020 was filed within the prescribed twenty one (21) days after grant of leave.

Therefore, to that extent, the present application is proper before the court.

However, the order/award or decision for which an order of certiorari was sought was made on 22nd June 1997 in Busia SRM No.80 of 1994 to the effect that Title Deeds number **Bukhayo/Bugengi/4679** and **Bukhayo/Bugengi/2408** be cancelled and be registered in the name of **Juliana Nekesa**, the applicant; who is the second respondent herein through Joseph Wandera Omondi.

[6] Basically, the impugned application was brought under s.53 (1) (1), (2) and (4) of the Civil Procedure Rules and the **Law Reform Act (cap 126 LOK)**

Whereas, the Civil Procedure Rules provides the procedural Law for judicial review proceedings, the Law Reform Act provides the substantive Law in respect thereof. However, the Constitution of Kenya, 2010 also provides for judicial review proceedings and actions. The present application is essentially under the Law Reform Act and must herein be dealt with accordingly.

[7] Be that as it may, s.9 (3) of the **Law Reform Act**, provides that:-

“In the case of an application for an order of certiorari to remove any judgement, 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.....”

And, Order 53 Rule 2 of the **CPR** provides that:-

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 periods as may be prescribed by any Act.

[8] So, six (6) months is the “magic” period for bringing an application for leave to institute judicial review proceedings i.e within six months from the date of the infringed order or decision.

Clearly, the present application was brought way past the prescribed time in as much as the leave in respect thereof was sought way past that period contrary to the aforementioned provisions of the **Law Reform Act** and the **Civil Procedure Rules**.

It would therefore follow that the leave granted by the court on 16th June 2020 was granted erroneously and ought not have been granted as the same was sought past the prescribed period of six (6) months there being no lawful order for extension of time.

[9] Therefore, on this ground alone the preliminary objection is sustainable and is hereby sustained.

It is worth of note that **Article 23** of the Constitution provides for an order of judicial review as an appropriate relief that may be granted in the enforcement of the Bill of Rights. The applicant herein had the option of bringing this application under **Article 22** and **23** of the Constitution but opted for judicial review proceedings under order 53 of the **Civil Procedure Rules**. Having done so, the court would have no business tampering with the application by turning it into an application under the Constitution and by extension under the **Fair Administration Action Act, 2015**, as was expected by the applicant.

[10] It is also worth of note that in judicial review proceedings, the High Court has special jurisdiction which is neither civil nor criminal and under which it may issue orders of mandamus, prohibition and certiorari as the remedies against acts or omissions by public entities (see, **Biren Amritlal Shah & Another vs Rep (others) (2013) e KLR**).

In essence, judicial review is not concerned with reviewing the merits or otherwise of a decision by a public entity in respect of which the application for judicial review is made, but the decision making process itself. Thus, the purpose of judicial review is to determine whether an applicant was accorded fair treatment by the concerned public body. It is not within the remit of the court to substitute its own opinion with that of the public body charged by Law to decide the matter in question (see, **Rep Vs. Judicial Service Commission Misc. Civil Application No.1025 of 2003**). It is therefore doubtful whether the Limitations of Actions Act (**Cap 22 LOK**) applies to judicial review.

[11] In sum, the preliminary objection by the second respondent is merited and is hereby allowed on the basis of ground one.

Consequently, the application by the ex-parte applicant dated 25th June 2020 is dismissed with costs to the first and second respondents as well as the second interested party.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[Read and signed this 16TH day of JUNE 2021]