



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW APPLICATION NO. 11 OF 2019

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS

BETWEEN

IGEMBE NORTH SUB-COUNTY

LAND ADJUCIATION & SETTLEMENT OFFICER.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

EZEKIAK M'ITHA.....INTERESTED PARTY

JUDGMENT

1. Before the court is a notice of motion dated 9.7.2019 in which the ex parte applicant seeks an order of mandamus be issued compelling the 1st respondent to rehear A/R objection No. 2285 of 2010 in compliance with the law through involvement of the relevant section's land committee members over his claim against the interested party **Ezekiel M'Ithia** over **Plot No. 325**.

2. The application is supported by a sworn affidavit of **Samson M'Mbugu Mwenda**, statutory statement of facts and an affidavit verifying facts dated 19.6.2019.

3. The ex parte applicant's case is that he is the recorded owner of **Parcel No. 1544 Antubetwe –e- Kiongoro area in Igembe North Sub-County** measuring approximately 1.20 acres.

It is averred the interested party as an elder brother of the ex parte applicant had sued him in Meru ELC No. 24 of 2012 on account of determination of A/R objection without the aid of a land committee. The court quashed the decision on 14.6.2018 and ordered the A/R objection to be heard afresh. To date the 1st respondent has declined hence these proceedings.

4. By grounds of opposition dated 2.10.2020, the respondents state the application does not disclose with sufficient clarity any cause of action against them; the applicant has not exhausted all available mechanisms and remedies under the law; no consent to sue was issued and lastly the court lacks jurisdiction to hear and determine this matter.

5. The interested party filed a replying affidavit sworn on 13.9.2019 inter alia stating the application is improper, is an afterthought, lacks merit and the court lacks jurisdiction to entertain it for it is resjudicata.

6. In supplementary affidavit sworn on 7.10.2019 and 20.5.2021 respectively, the ex parte applicant reiterates A/R objection remains unresolved out of inaction by the 1st respondent contrary to court orders and legal requirements hence he is properly before the court, a performance of a public duty as per the law.

7. Further, the ex parte applicant avers, he has done all what was humanly possible to seek audience with the 1st respondent who has unreasonably and without any explanation failed to exercise his statutory duty.

8. In written submissions filed on **20.5.2021** the ex parte applicant reiterates that for orders of mandamus, there are no time limits, the proceedings herein do not seek to re-open the previous judgement and that given the Court of Appeal decision in ***Peter Kimandiu –vs- Land Adjudication Officer Tigania Wes District & 4 Others [2016] eKLR***, once the A/R objection No. 2285 of 2010 was quashed on 14.8.2018

the 1st respondent ought to have constituted the land committee afresh to rehear the dispute within a reasonable time which he has failed to do.

9. The respondents' written submissions dated 19.3.2021, reiterate that Judicial Review orders are discretionary in nature and that inaction by a public body does not automatically entitle a party to invoke Judicial Review as the port of first call as held in *Peris Wambogo Nyaga –vs- Kenyatta University [2014] eKLR.*

10. The interested party by written submissions dated 15.1.2021, maintains seeking to quash decision made on 8.5.2012 7 years down the line is against **Section 9 (2)** of the **Law Reform Act**. Secondly he relies on *Laban Macharia –vs- Commissioner of Insurance & Another [2005] eKLR, Republic –vs- Attorney General Cabinet Secretary Ministry of Agriculture & Another [2018] eKLR, Republic –vs- Cabinet Secretary Lands; Elijah Muema Kitavi & Another Ex Parte Raphael Kakene Muloki & Another [2019] eKLR, Raila Odinga & 6 Others –s- Nairobi City Council [1990-94] E.A 482* on the proposition that six months rule applies to all Judicial Review orders.

11. Given the rival submissions in my considered view, the issues for determination are:-

a) Whether the application is in line with the law.

b) If the exparte applicant is entitled to the orders sought.

12. The Court of Appeal in *Wilson Osolo –vs- John Ojiambo Ochola & Another [1996] eKLR* had occasion to determine the issue as to the implications of **Section 9 (3)** of the **Law Reform Act**. In that case **Mr. Ochola Niare** had sought for leave to apply for an order of certiorari to quash an order of Minister and also mandamus directing the Minister to register him as the proprietor of the suit land. The application had been filed outside six months. The court declined to grant leave leading to the applicant filing another suit in which he sought and was granted an extension of time to file the application for leave. Upon appeal to the Court of Appeal it was held that the order for extension of time was a nullity.

13. The second reason the court allowed the appeal was the application was being brought to court 12 years after the event.

14. In *Ako –vs- Special District Commissioner, Kisumu & Another*, the Court of Appeal held it is plain that under **Section 9 (3)** of the **Law Reform Act**, leave shall not be granted unless the application for leave is made inside six months after the date of the event.

15. In *Republic –vs- Public Procurement Administrative Review Board & Another, Mer Security & Communications System Ltd/Megason Electronics & Control, ExParte Magal Security Systems Ltd/Firefox Kenya Limited (JV) [2019] eKLR* the court was faced with a preliminary objection inter alia that the case was frivolous, vexatious and an abuse of the court process and with an application for the enlargement of time to file a substantive motion.

16. While considering the implications of Article 48 on access to justice, implication of Section 9 (3) Order 50 rule 6, Order 53 and Sections 9 (2) & 9 (3) of the Law Reform Act, vis a vis Article 47 and the Fair Administrative Actions Act 2015, the court held Section 9 (3) is couched in mandatory terms and hence Order 50 Rule being a subsidiary legislation cannot override the provisions of Section 8 & 9 of the Law Reform Act. Further it was held and that Article 159 (2) (d) cannot therefore help a party who had filed a claim outside timeframes.

17. Further and just like in the instant case, the court found that multiplicity of cases related to the same subject matter amounted to an abuse of the court process. It therefore preceded to strike out the suit.

18. In the instant matter, there is no dispute the previous judicial review involved the same parties, was determined to finality and has not been appealed against. This court has not been told if a decree was extracted and served upon the 1st respondent for action and he declined to act or comply with it.

19. In similar circumstances, the court in *Republic –vs- Attorney General Cabinet Secretary Ministry of Agriculture & Another [2018] eKLR*, the decree sought to be enforced had been made on 22.7.1983 and the application filed on 14.9.2014 without leave to file the same out of time.

20. The court held applications under Order 53 ought to be made promptly and in any event within 6 months. It declared that an issue of time limitation in a Judicial Review is not a procedural technicality since it goes to the root of the matter of jurisdiction of court as provided under the Law Reform Act.

21. The decision herein was made on 14.6.2018. The exparte applicant had up to 14.1.2019. The delay has not been explained at all. Further as noted above, there is no indication if the decree was extracted and served. The court had determined this matter to finality. The exparte applicant had also an opportunity to include the prayer for mandamus in the application dated 30.7.2012. Failure to do so cannot be cured through the same application based on same facts between the same parties but seeking a different prayer. To my mind that would amount to re-opening issues already determined and which is resjudicata.

22. Since the decree is still not time barred, what the exparte applicant ought to have done is to enforce the decree in a normal manner instead of filing another similar application which is contrary to Section 7 of the Civil Procedure Act.

23. In the circumstances the application herein lacks merit. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

Mutisya for applicant

Mr. Kieti for respondent

Miss Masamba for interested party

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE