



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MISCELLANEOUS JUDICIAL REVIEW NO. E001 OF 2021**

**JOSEPH MURIITHI NYAGA.....APPLICANT**

**VERSUS**

**EMBU COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

1. The applicant herein filed ex-parte chamber summons dated 14.01.2021 brought under Order 53 Rules 1 and 2 of the Civil Procedure Rules 2010 and wherein he seeks leave to file an application for orders of mandamus to compel the respondent to comply with the judgment and decree issued on 20.04.2018 by Chief Magistrate's Court in Civil Case No. 136 of 2014. The applicant further prayed for the costs of the application to be in the cause.

2. The application is premised on the grounds on the face of the application and the statement filed contemporaneously with the summons. In a nutshell, the applicant's case is that he is a decree-holder in Embu Chief Magistrate's Court Civil Case No. 136 of 2014 vide the decree and certificate of costs dated 20.04.2018, 24.04.2018 and 8.08.2019 respectively but which the respondent has refused to satisfy and costs despite many demands by the applicant to do so and which is in breach of the duty placed on the respondent under section 21 of the Government Proceedings Act Cap 40 Laws of Kenya. That the respondent having failed, refused and/ or neglected to satisfy the said decree, the applicant has been left with no other option other than to seek the judicial review orders of mandamus to compel the respondent to comply and hence the instant application.

3. The respondent herein raised a preliminary objection vide a notice of preliminary objection dated 29.06.2021 on the basis that the same was filed outside the mandatory statutory period of six (6) months and thus offends section 9(2) of the Law Reforms Act. Further that while the time limited for doing something under the Civil Procedure Rules can be extended, that procedure is not available for the extension of time limited by statute. The respondent relied on the case of **Osolo -vs- John Ojiambo Ochola & Another (1995) eKLR**. That consequently, the court lacks jurisdiction to handle the application herein in view of the inordinate delay. The application is opposed on a further ground that the applicant is guilty of abuse of the court process of the lower court as he squandered his time by initiating sham execution processes rather than being diligent and applying for orders of mandamus within time and that the application is misconceived, incompetent, fatally defective and an abuse of the court process, not merited and the same should be dismissed with costs.

4. Parties filed submissions in support of their rival positions.

5. The respondent in its written submissions reiterated the grounds as contained on the notice of preliminary objection to the effect that the application is statutorily time barred as the decree was issued on 20.04.2018 and the leave to apply for mandamus being sought on 14.01.2021 and which period is more than two years and nine months. That the application ought to have been brought within six months from the date of the said decree as provided under section 9(2) of the Law Reforms Act. Further that the applicant did not bother to seek for an extension of time before seeking leave and in any event, time limited by statutes such as Law Reforms Act cannot be extended. The respondent relied on the case of **Republic -vs- Attorney General Cabinet Secretary Ministry of Agriculture & Another (2018) eKLR** to buttress the point that the application cannot be cured by Article 159(2)(d) of the Constitution of Kenya 2010. That consequently the court lacks jurisdiction over the same. Further that this court ought not to allow the applicant to file the application outside the statutory timeframe as the same is not available in the circumstances and it was not prayed for in the application.

6. The applicant filed submissions in opposition to the preliminary objection and wherein he submitted that the delay in filing the application was not inordinate but the same was caused by the respondent's continuous efforts in frustrating the execution of the said decree. He relied on the case of **Aviation & Allied Workers' Union (K) -vs- KQ & 3 others (2015) eKLR** and submitted that this court has jurisdiction to enlarge time stipulated under section 9(2) of the Law Reforms Act and article 159(2)(d) of the Constitution. Reliance was also made on the case of **Republic -vs- Public Procurement Administrative Review Board ex-parte Syner- Chemie Limited (2016) eKLR** to the effect that the court has jurisdiction to enlarge time within which to file a judicial review application and that the applicant would suffer injustice if he was denied leave to apply for an order of mandamus as he would be denied opportunity to execute the decree of the court and enjoy the fruits of his judgment and the court ought to invoke its inherent powers. Further, Order 50 Rule 6 provides for the powers to enlarge time for

any proceedings under the Rules and Order 53 does not exclude the application of the said Rule. Further that under Order 53 Rule 1, the application for leave ought to be made ex-parte unless the judge directs that the same be served and which directions were never given in this case. As such the application ought to be allowed.

7. I have considered the notice of preliminary objection herein and the parties' rival submissions. It is my view that the main issue for determination is whether the applicant's application is properly before this court.

8. It is not in dispute that the applicant sued the respondent in Embu Chief Magistrate's Court in Civil Case No. 136 of 2014 and the application before this court is to enable him execute the said decree.

9. It is trite law that execution against the government must be in accordance with section 21 of the Government Proceedings Act. The long title of the said Act states that the said Act is:-

***“An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters.”***

10. As such, the said Act was enacted to regulate civil proceedings against the government. Section 21 is contained in Part IV of the Act and which part is titled “judgment and execution.” The said section provides for the procedure which a person/ decree holder can employ if such a person would wish to execute as against the government. Section 21(5) extends the application of the said procedure in relation to executions against County Governments. It is in compliance with this section that the applicant herein has moved this court. However, I will not determine as to the substance of the application as the parties only canvassed the notice of preliminary objection.

11. As I have already noted, the respondent's bone of contention is that the application was brought after the expiry of the 6 months as provided under Section 9 of the Law Reforms Act.

12. Section 9(1) extends the power to make rules of the court to provide for any matters relating to the procedure of civil courts to making rules of the 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.

13. Section 9(2) proceeds to provide 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.** It is this section which the respondent relies on in support of the preliminary objection.

14. Section 9(3) which I consider important 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.”***

15. 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.

16. 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.

17. 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.***

18. 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.

19. 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.

20. The respondent raised another ground to the effect that while the time limited for doing something under the Civil Procedure Rules can be extended, that procedure is not available for the extension of time limited by statute. The respondent relied on the case of **Osolo –vs- John Ojiambo Ochola & Another (1995) eKLR**. I have indeed looked at the said Court of Appeal decision I find it distinguishable with the circumstances herein. I say so because the Court of Appeal in that matter was dealing with an appeal emanating from the High Court’s decision (Porter Ag. J. -as he then was) wherein he denied the applicant before the High Court leave to file for orders of **certiorari** and as I have already said, for orders of certiorari, there is a mandatory time limit within which one needs to file. However, what the applicant seeks is not an order of certiorari and thus the authority relied upon by the respondent **Osolo –vs- John Ojiambo Ochola & Another** cannot apply in the circumstances.

21. It is my view that in the circumstances as above, the respondent’s preliminary objection dated 29.06.2021 fails. The costs are awarded to the applicant. The applicant can proceed to fix the application dated 14.01.2021 for *interparties* hearing.

22. It’s so ordered.

**Delivered, dated and signed at Embu this 3<sup>rd</sup> day of November, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent