



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC JUDICIAL REVIEW NO. 7 OF 2019

MUSA TAPEM (Suing as the Administrator

of the Estate of the late DANGER TABIM).....APPLICANT

VERSUS

THE DIRECTOR OF LAND

ADJUDICATION AND SETTLEMENT.....1ST RESPONDENT

SAMSON KEDIKUO RWATANYANG.....2ND RESPONDENT

JUDGMENT

1. Before me is a judicial review notice of motion application dated **11/7/2019** and filed in court on the same date. It is brought under **Order 53 Rule 1(1) (2)** of the Civil Procedure Rules. In it the applicant seeks the following orders:-

(1) That an order of certiorari be issued to remove into this court and quash the proceeding directions and decisions of the Cabinet Secretary in Case No. 164 of 1995 LR No. 328, Adj. Section Chepareria, Ariworen Ruatanyang -vs- Danger Tabim.

(2) That the costs of the application be provided for.

2. The application is premised on grounds set out in the statutory statement and is supported by a verifying affidavit of the applicant dated **12/7/2019**.

3. The grounds upon which reliefs are sought are that there was a conspiracy between the respondents to deprive the estate of Danger Tapem, deceased, of title to the suit land known as **West Pokot /Chepareria /461** on which the ex-parte applicant has been residing for 20 years; that Danger Tapem had been awarded the land twice when disputes arose during the adjudication process and the land was registered in his name; that the appeal to the Minister against the said award was filed out of time and was determined without the applicant's knowledge and participation and that the appeal was heard and determined in favour of the 2nd respondent despite the fact that Danger Tapem was deceased and the 2nd respondent had no capacity or *locus standi* in the matter. It is averred that title has already issued in the name of the 2nd respondent. The applicant avers that the Director of Land Adjudication and Settlement acted *ultra vires* in dealing with the suit land and in ordering that the 2nd respondent be issued with a title deed.

4. A preliminary objection was raised to the entire motion on the basis that it is statute barred.

5. In dealing with the motion I must address the preliminary objection first.

6. In the submissions of the 1st respondent it is averred, citing **Joram Kaberia -vs- District Land Adjudication and Settlement Officer and 2 Others 2018 eKLR and Rosaline Tubei and 8 Others -vs- Patrick K. Cheruiyot and 3 Others 2014 eKLR**, that the application is time barred for having been brought well outside the 6 month statutory period. The 1st respondent refers to the written proceedings dated **7/8/2015** and states that the application for leave was filed on **1/7/2019**.

7. It is true that the proceedings and the award annexed to the application are dated **7/5/2015**. The provisions of **Order 53 Rule 2** of the Civil Procedure Rules provide as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than 6 months after the

date of the proceedings or such shorter period as maybe described by any act; and where the proceedings 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”.

8. It is at a glance clear that the application was filed outside the statutory time limit stated in the provisions of the rule set out above.

9. The response of the applicant to the preliminary objection is that he never knew of the filing of the proceedings in the Minister’s appeal until it was disclosed during proceedings filed by the applicant against the respondent, being **Kitale ELC 100 of 2015**, that the 2nd respondent had obtained a title deed to the suit land. He also avers that the appeal was filed out of time and heard and determined while the suit was still pending.

10. It is clear that the impugned proceedings and award are dated **7/5/2015** and that the application for leave was filed on **1/7/2019**. At a glance therefore, the application offends the provisions of **order 53 rule 3** of the Civil Procedure Rules and **Section 9** of the Judicature Act. In the cited case of **Joram Kaberia certiorari** was sought in respect of a decision made on **13/12/2011**. The notice of motion challenging that decision was filed on **28/11/2012**. Leave to bring the application for **certiorari** had been granted in that case. This court observed as follows:

“19. Though leave had been granted to the ex-parte applicant to bring these proceedings, the observation of this court is that the leave stage is usually conducted ex-parte unless the court gives directions to the contrary.”

11. Later on this court stated as follows in the same case:

“20. A look at the case of Rosaline Tubei & 8 others v Patrick K. Cheruiyot & 3 others [2014] eKLR will underline the seriousness with which the issue of limitation of time in judicial review proceedings must be regarded. In that case the applicant sought for extension of time within which to apply for judicial review orders. While dismissing the application, the court observed as follows:

“16. It follows that a court cannot grant leave to a party seeking to file an application for judicial review out of time, and if such leave is granted, it can be challenged at the substantive hearing of the motion.

17. It is upon the ex-parte applicants to find other avenues to push their grievances, for the door to access the remedy of judicial review, is now firmly shut and the key to open the door is not available, for it was thrown into the proverbial sea by effluxion of time.

18. I do not see how this application can succeed. I decline to extend time for commencement of judicial review and further decline to grant leave to commence judicial review to quash the subject decision of the tribunal and subsequent decree from the Magistrate's Court. This application is hereby dismissed but I make no orders as to costs.”

21. Though this court granted leave ex-parte on the 9th November 2012 and ordered that such leave was also to operate as a stay, it is possible to revisit the grant of such leave where a good reason is provided.

22. In this case an objection has been raised that the proceedings were commenced more than six months from the date of the impugned decision. I have examined the record and from the analysis above, found that this ground has merit. I would therefore uphold the Interested Party’s objection regarding time-bar.”

12. I find no distinction between the **Joram Kaberia case** and the instant case. The application was filed out of time. There is no need therefore to consider any other issue arising out of that application.

13. The Notice of Motion application dated **12/7/2019** is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this 21st day of January, 2020.

MWANGI NJOROGÉ

JUDGE

21/1/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bororio for the Applicant

A.G. (Absent) for the 1st Respondent

Mr. Teti for the 2nd Respondent

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

21/1/2020.