



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 121 OF 2016**

**IN THE MATTER OF: ORDER 53 RULE 3 OF THE CIVIL PROCEDURES RULES;**

**AND**

**IN THE MATTER OF: AN APPLICATION BY ATLAS COPCO EASTERN AFRICA LIMITED FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: CONSTITUTION OF KENYA 2010 AND THE KENYA ROADS ACT 2007;**

**IN THE MATTER OF : AN APPLICATION BY ATLAS COPCO EASTERN AFRICA LIMITED FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI TO QUASH THE DECISION DATED 15<sup>TH</sup> SEPTEMBER 2015 BY KENYA URBAN ROADS AUTHORITY REFUSING GRANT OF AUTHORITY TO ATLAS COPCO EASTERN AFRICA TO CONSTRUCT A STANDARD EXIT TO LINK ITS PREMISES TO THE SERVICE ROAD FOR ACCESS TO AIRPORT NORTH ROAD;**

**IN THE MATTER OF : AN APPLICATION BY ATLAS COPCO EASTERN AFRICA LIMITED FOR JUDICIAL REVIEW TO APPLY FOR ORDERS OF MANDAMUS TO COMPEL KENYA URBAN ROADS AUTHORITY(KURA) TO GRANT THE APPLICANT AUTHORITY TO CONSTRUCT A STANDARD EXIT TO THE SERVICE ROAD TO LINK TO AIRPORT NORTH ROAD FOR ACCESS SAFETY AND REMOVE TEMPORARY RAMP PLACED AT THE EXIT;**

**IN THE MATTER OF: AN APPLICATION BY ATLAS COPCO EASTERN AFRICA LIMITED FOR JUDICIAL REVIEW TO APPLY FOR ORDERS OF PROHIBITION AGAINST KENYA URBAN ROADS AUTHORITY (KURA) FROM ERECTING RAMPS ON ITS EXIT GATE.**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**KENYA URBAN ROAD AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**CHINA ROADS AND BRIDGE CORPORATION.....2<sup>ND</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY LIMITED.....INTERESTED PARTY**

## **RULING**

1. This ruling determines the 1<sup>st</sup> Respondent's preliminary objection dated 12<sup>th</sup> April 2016 and filed in court on 17<sup>th</sup> May 2016. It challenges the Exparte applicant's substantive motion filed with the leave of court given on 17<sup>th</sup> March 2016, seeking for Judicial Review Order of certiorari, Mandamus and prohibition.

2. The preliminary objection was urged by Mr Munene counsel for the respondents. According to Mr Munene, the Exparte applicant's application filed in court on 5<sup>th</sup> April 2016, was outside the 6 months statutory period stipulated by Order 53 Rule 2 of the Civil Procedure Rules and Section 9(3) of the Law Reform Act. In his view, the letter seeking to be quashed as a decision of the administrative/statutory body is annexure JM 11 dated 15<sup>th</sup> September, 2015 and yet the applicants came to court on 5<sup>th</sup> April 2016 close to 7 months after the impugned decision therefore the application is statute barred and hence, leave ought not to have been granted in the first instance. He relied on the case of **APCO V Special District Commissioners Kisumu [1997] e KLR** (not supplied to court) where the Court of Appeal held that leave shall not be granted unless it is made within 6 months and that the court also stated that the prohibition under Section 9(3) of the Law Reform Act is mandatory. Further reliance was placed on **Kimanzi vs David Mulwa Muthusi [1997] e KLR (not supplied)** where the same position as in the APCO case was advanced by the court. Mr Munene therefore prayed for the Preliminary Objection to be upheld and the entire suit be dismissed.

3. In opposing the Preliminary Objection, Mr Njagi counsel for the exparte applicant submitted that the Preliminary Objection does not lie in the circumstances of this suit. First, that the objection as raised touching on Order 53 of the Civil Procedure Rules is too general and therefore hopelessly defective as it cites the wrong provisions of the law. Secondly, Section 9(3) of the Law Reform Act is not mentioned in the preliminary Objection filed hence, the oral citation was an ambush.

4. Nonetheless, Mr Njagi submitted that assuming that the Preliminary Objection was predicated on Order 53 Rule 2 of the Civil Procedure Rules which talks of time for filing of the application for leave, then the decision that is sought to be quashed is at page 67 JM II of the exparte applicant's bundle(application) and that it is dated 15<sup>th</sup> September 2015. In Mr Njagi's view, the application for leave was made on 15<sup>th</sup> March 2016 which is one day less than six months hence the application was made within the statutory period.

5. Further, it was submitted that it is not clear when that letter or decision which is not a formal order under Order 53 Rule (2) of the Civil Procedure Rules was communicated to the exparte applicants. In addition, Mr Njagi argued that besides the Judicial Review Orders of Certiorari, the applicant also seeks for Judicial Review Orders of mandamus and prohibition hence the preliminary objection as raised cannot fully determine the suit herein.

6. Mr Njagi further submitted that the Judicial Review orders sought are challenging jurisdiction of the administrative body to pronounce itself on whether the land in issue was acquired illegally hence, time cannot begin to run where issues of jurisdiction are raised. He urged the court not to strike out pleadings as the power to strike out pleadings is a draconian one which should be exercised cautiously since it drives a party from the process of justice. Counsel urged the court not to uphold the preliminary objection since the suit was not frivolous. He relied on the cases filed on record.

7. In his brief rejoinder, Mr Munene submitted that he inadvertently omitted to cite Order 53 Rule (2) of the Civil Procedure Rules.

8. I have carefully considered the preliminary objection dated 12th April 2016 as argued in court. I have also considered the opposition by the Exparte applicant, and the decisions relied on by both parties advocates.

9. In deciding whether to uphold the preliminary objection, the court is guided by the land mark case of **Mukisa Biscuits Manufacturing Ltd Vs West End Distributors Ltd [1969] EA 696** where the court held that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the entire suit. The court further held that a preliminary objection would normally be argued on the assumption that all facts pleaded by the other side are correct and cannot be raised if any facts have to be ascertained or if what is sought is judicial discretion.

10. In the instant case, the preliminary objection is on limitation of the period within which the application for leave to apply for Judicial Review Orders of certiorari ought to have been brought. Order 53 Rule 2 of the Civil Procedure Rules 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 it 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 an appeal and time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until he appeal is determined or the time for appealing has expired.”**

11. From the above provision, it is clear that to challenge any order, decision, or proceeding by way of Judicial Review orders of certiorari leave must be obtained within 6 months from the date of such decision. According to the respondent’s counsel, the application for certiorari cannot stand because it was brought after 6 months from 15<sup>th</sup> September 2015. On the other hand, the exparte applicant maintains that the application for leave was brought before expiry of 6 months on 15<sup>th</sup> March 2016. The law is clear that leave for certiorari must be sought before the end of 6 months from the date of the decision which is brought to be quashed, since, that leave is sine quo non the lodging of the substantive motion. It is that leave that confers on this court the jurisdiction to hear the substantive motion seeking for Judicial Review Orders of certiorari. That being the case, although there are other prayers for mandamus and prohibition which are not limited by the 6 months period within which leave should be brought, where the court finds that application for leave for orders of certiorari was not brought or filed within 6 months from the date of the impugned decision, then the court would not have the jurisdiction to hear and determine the Judicial Review prayers for certiorari and it would proceed to strike out that prayer and leave the other prayers which are properly brought. In other words, the issue of limitation of time is a point of law which goes to the root of the matter. Leave to apply for Certiorari is so fundamental that without it, this court cannot hear and determine the prayer for certiorari. As was held in **Owners of Motion Vessel ‘Lilian ‘S’ V Caltex Oil (K) Ltd [1989] KLR 1**

***“..... jurisdiction is everything, without which a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

12. Having found that the preliminary objection as raised touching on the Judicial Review orders of certiorari is a pure point of law and goes to the jurisdiction of the court as donated by Order 53 Rule 2 of the Civil Procedure Rules and Section 9(3) of the Law Reform Act, no discretion of this court can be invoked in deciding that issue of jurisdiction of the court. The issue, therefore for determination is whether the application for leave to apply for Judicial Review orders was brought after expiry of 6 months from the date of the impugned decision.

13. Both parties are in agreement that the letter dated 15<sup>th</sup> September 2015 is the subject of these proceedings. That letter was in response to the letter of 28<sup>th</sup> July 2015 by the applicant seeking for

authority to construct a standard exit from Atlas Copco EA Limited along Airport North Road. In the letter of 15th September 2015, the respondent Kenya Urban Roads Authority stated as follows:

***“According to PDP No. 13 of 1985, the area allegedly allocated as original LR No. 24809 after change of use, was reserved as a power way leave. We therefore maintain our position that the said land is a public utility and any allocation and subsequent survey of the same for private use is irregular.***

***Consequently, we are unable to grant you authority to construct your access on the said land. Please be informed that our earlier approval vide the letter Ref KURA/TECH/9/6/VOL 5(89) of 23rd July 2012 is hereby revoked with immediate effect. We attach copies of the PDP showing the said area for your ease of reference.***

***Yours faithfully***

***Signed***

***Eng. S.M. Kinoti***

***Ag Director General***

***Copy to: The chairman***

***The National Lands Commission***

***P.O. BOX 44417***

***NAIROBI.”***

14. Although Mr Njagi attempted to argue that it is not clear when the above letter was communicated to the applicant and that it is not a formal order or decision or proceeding contemplated in Order 53 Rule 2 of the Civil Procedure Rules, he did not indicate whether, besides that letter which indeed communicates the decision of the respondent Kenya Urban Roads Authority rejecting to grant authority to construct a standard exit from Atlas COPCO EA Ltd along Airport North Road, there was any other decision. That being the case, in my humble view, that letter clearly communicates the decision of Kenya Urban Roads Authority which is the statutory body vested with the mandate to grant or refuse to grant authority that was being sought by the exparte applicant in its letters of 28<sup>th</sup> July 2015. And in seeking to challenge that decision of 15<sup>th</sup> September 2015, the exparte applicant did, on 15<sup>th</sup> March 2016, under certificate of urgency, file a Chamber Summons dated the same day, seeking in prayers Nos 2,3, and 4, leave to be granted to apply for Judicial Review orders of certiorari, mandamus; and prohibition .

15. In prayer No.2 for leave to apply for Judicial Review Order of certiorari, the applicant clearly seeks to have the decision of Kenya Urban Roads Authority, the 1<sup>st</sup> respondent made on 15<sup>th</sup> September 2015, refusing/declining the application by the applicant to construct a standard exit from its premises on LR 24809 for access to Airport North Road for the applicant’s heavy vehicles and equipments in safety and convenience quashed.

16. The respondents contended that the application for leave was filed on 5<sup>th</sup> April 2016 which was long after six months and nearly 7 months of the impugned decision. I do not agree. The court record is very clear that the application for leave to apply for Judicial Review Order of certiorari, among other Judicial Review Orders was made on 15<sup>th</sup> March 2016, which was before expiry of 6 months from 15<sup>th</sup> September, 2015. To be precise, and as was correctly pointed out by Mr Njagi counsel for the exparte applicant, the application for leave was filed within 6 months, and one day to expiry of the said period. That application for leave to apply was considered by Honourable Odunga J on 16<sup>th</sup>

March 2016 and he granted leave to apply within 21 days from 16<sup>th</sup> March 2016. Twenty one days lapsed on 6<sup>th</sup> April 2016. However, the substantive motion was filed on 5<sup>th</sup> April 2016 which was within the 21 days of the date when leave was granted.

17. In calculating time between two events, the day on which the first event occurs is excluded and the day by the last event may occur is included ( See Order 50 Rule 8 of the Civil Procedure Rules and Article 259 (5) of the Constitution.

18. I must emphasize that what order 53 Rule 2 of the Civil Procedure Rules requires to be done within 6 months is to apply for leave of court to apply for the substantive Judicial Review Orders of Certiorari. Once the application for leave is lodged within 6 months, and the substantive motion is filed within the time frame given by the court granting leave, the court is properly seized of the substantive motion and vested with the necessary jurisdiction to hear and determine the Judicial Review matter.

19. For the above reasons, I find that the preliminary objection herein filed and argued by the Respondent's counsel is unwarranted, unmerited and misplaced. I dismiss it with costs to the exparte applicant.

**Dated, signed and delivered in open court at Nairobi this 19th day of July, 2016.**

**R.E. ABURILI**

**JUDGE**

In the presence of :

Mr Munene for the 1<sup>st</sup> Respondent

Miss Gatwiri h/b for Charles Njagi for the Exparte Applicant

Court Assistant: Adline