REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 172 OF 2016

IN THE MATTER OF AN APPLICATION BY SIDIAN BANK LIMITED (FORMERLY KNOWN AS K-REP BANK LIMITED) FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF ARTICLE 2, 10, 19, 20, 21, 22, 23, 40, 47, 50, 64 (B) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE REGISTERED LAND ACT, CHAPTER 300 LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

BETWEEN

REPUBLIC…………………….……………..….................……….APPLICANT

VERSUS

CHIEF LAND REGISTRAR……………….…………...……1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION…......2ND RESPONDENT

HONORABLE ATTORNEY GENERAL………….....…….3RD RESPONDENT

MATHEW NDOGA KABAU…………………..…….......INTERESTED PARTY

EX-PARTE: SIDIAN BANK LIMITED (FORMERLY KNOWN AS K- REP BANK LTD)

RULING

1. By Motion on Notice dated 28th April. 2016, the ex parte applicant herein seeks an order of certiorari to quash the order of the 1st respondent that led to the registration of a restriction on land reference Nyeri/Municipality/Block 1/1381 on 8th February, 2012. Together with an order of certiorari, the applicant also seeks an order of mandamus to compel the said 1st respondent to discharge the charge and transfer by chargee in respect of the same property to one **Mathew Ndoga Kabau**, the interested party herein.

2. According to the applicant, it granted a loan facility to one **Evantus Gikandi** on security of the said property and following default by the said chargor, sold the same in the exercise of its statutory power of sale to the interested party herein. However when it sought to complete the sale it discovered that a restriction had been registered on the said title without the applicant's knowledge hence it was unable to complete the sale in favour of the said interested party.

3. The applicant contended that despite several requests, the second respondent which registered the said restriction has refused to lift the same hence these proceedings.

4. Before the mater could be heard, the 2nd respondent raised a preliminary objection. The aid object was two-pronged. It was based on the fact that whereas the said restriction was registered on 8th February, 2012 and that by 18th June, 2015, the applicant herein was aware of the existence of the said restriction it was not until 14th April, 2016 that these proceedings were instituted. Based on the provisions of section 9(3) of the ***Law Reform Act*** as read with Order 53 rule 2 of the ***Civil Procedure Rules***, it was contended that by the time the applicant commenced these proceedings the six months limitation for instituting these proceedings had long run its course hence this Court has no powers to entertain these proceedings.

5. In support of his submissions, **Mr Opondo** learned counsel for the 2nd respondent relied on **Rosaline Tubei & 8 Others vs. Patrick K. Cheruiyot & 3 Ors [2014] eKLR**.

6. It was submitted that the applicant having slept on his rights for a very long period of time, it was not entitled to the orders sought herein.

7. The second objection was based on Order 53 rule 7 of the ***Civil Procedure Rules***. To the 2nd respondent, in the absence of the decision sought to be quashed this court cannot entertain these proceedings.

8. **Miss Chimau** who appeared for the 1st and 3rd Respondents in these proceedings supported the objections and associated herself with the submissions by **Mr Opondo**.

9. The objections were however opposed by **Mr Ouma**, learned counsel for the ex parte applicant. According to him, the decision sought to be quashed herein cannot be termed as a "judgement, order, decree or conviction" in order for the six months limitation to be invoked. In support of this submission, he relied on **Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair & 3 others ex parte Mwalulu & 8 Others [2004] eKLR**.

10. With respect to "other proceedings" he contended based on **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199**, that the said phrase ought to be read *ejusdem generis* with the preceding phrases.

11. With respect to the failure to file the decision, it was submitted that despite requests for the same the respondent had declined to issue a copy thereof to the applicant.

12. **Mr Ouma's** position that w that the Court cannot deny the applicant access to justice based on either of the above objections.

13. I have considered the submissions. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - **Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another** this Court expressed itself, *inter alia*, as follows:

> **"Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion…In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court's task would be to determine what are the agreed facts contained therein whether expressly or by legal implication."**

14. In arriving at that decision, the Court relied on the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696**. In that case **Law, JA** was of the following view:

> **"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

15. As for **Newbold, P**:

> **"A preliminary objection is in the nature of what used to be called a *demurrer.* It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".**

16. Also cited was the decision in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** where it was held that:

> **"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."**

17. Dealing with the same issue, **Ojwang, J** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141**

expressed himself as follows:

> **"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"…The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."**

18. I will come to those principles later in this ruling. On the issue of limitation period for commencing judicial review proceedings, section 9 of the ***Law Reform Act*** provides:

> ***9. (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of 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;***
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> ***(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;***
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> ***(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.***
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> ***(2) 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.***
>
> ***(3) 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.

19. The issue of the six months limitation was dealt with by a three judge bench in the case of **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR.** The same issue was also the subject of **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998.** In these cases it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned therein and to nothing else. A decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision. The Court therefore held that the question of attacking it under order 53 rule 7 would not arise since there is nothing capable of being exhibited thereunder.

20. It therefore follows, firstly that the six months limitation applies to a "*judgment, order, decree or conviction*". In my view the decision of a lands registrar, or the Chief Lands Registrar for that matter in registering a restriction cannot amount to a judgement, order decree or conviction. Such an action is merely a decision.

21. The next issue is however whether such an act amounts to "*other proceeding"* for the purposes of the said limitation. According to the *ejusdem generis* rule where there are general words following particular and specific words the general words must be confined to things of the same kind as those specified. In other words, when a series of particular words in a statute is followed by general words, the general words are confined by being read as the same scope of genus as *(ejusdem generis* with) the particular words. See **R vs. Edmundson [1859] 28 LJMC 213 at 215** and **Registered Trustees of Kampala Institute vs. Departed Asians Custodian Board SCCA No. 21 of 1993 [1994] IV KALR 110**.

22. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.

23. In the premises it is my view and I so hold that the six months limitation period was inapplicable to the present proceedings and the preliminary objection cannot succeed on that basis.

24. I must however disabuse the ex parte applicant's notion that the said six months limitation ought to be ignored. In my view, judicial review acknowledges the need for speedy certainty as to the legitimacy of the target activities. The court's responsibility is that of handling matters before it with speed, efficiency and economy so as to achieve the overall objective of judicial review. See **O'reilly vs. Mackman and Others [1982] 3 ALL ER 1124.**

25. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity

of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.**

26. The issue of delay can therefore be a factor in determining whether or not to grant judicial review, even if merited. This was the position adopted by **Majanja, J** in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** where the learned Judge pronounced himself as hereunder:

> ***"The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and***
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> ***Fulham (Respondents) and Other Exparte Burkett &***
>
> ***Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,***
>
> ***"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision…But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."***

27. In judicial review proceedings, therefore, the provision relating to limitation is not a procedural provision. Rather it is a substantive provision. Accordingly, it cannot be treated as a mere technicality and it has been held even in civil matters that an abandonment of a plea of limitation cannot relieve the Court from taking notice of it. See **Tzamburakis and Another vs. Rodoussakis Civil Appeal No. 5 of 1957 (PC) [1958] EA 400.**

28. It is however my view that the issue of delay in bringing the proceedings in judicial review unless barred by limitation, being a discretionary matter cannot be the subject of a preliminary objection.

29. The second ground is based on the fact that no decision has been exhibited as required under Order 53 rule 7 of the ***Civil Procedure Rules***. The said provision provides that a copy of the decision sought to be quashed be verified by an affidavit before the hearing. It follows that such an omission can only be raised once the hearing has commenced and not before. That was the position adopted by **Tanui, J** in **Republic vs. Land Disputes Tribunal Siaya District Ex Parte Allan Mwalo Wambani Kisumu HC Misc Application No. 45 of 2003** where he expressed himself as hereunder:

> **"Order 53 rule 7(1) of the Civil Procedure Rules envisages that before the hearing of an application for judicial review which seeks an Order of Certiorari, the applicant shall have lodged with the Registrar a copy of the document sought to be quashed, verified by an**

affidavit and therefore where the hearing date is yet to be fixed the issue of lodgement of the document has not arisen."

30. Secondly, the said provision seems to give the Court the power to exempt the said requirement. Accordingly, the decision whether or not to grant the said indulgence is discretionary on the part of the Court. As held in ***Mukisa Biscuits Case*** (supra) a preliminary objection cannot succeed if what is in issue is an exercise of discretion.

31. Having considered the issues raised herein, I find no merit in the preliminary objections which I hereby dismiss with costs to the ex parte applicant. The said costs will be borne by the 2nd respondent.

32. Orders accordingly.

Dated at Nairobi this 8th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ouma for the applicant

Miss Lunyolo for Mr Opondo for the 2nd Respondent

Cc Mwangi