State v Cabinet Secretary, State Department for Lands and Physical Planning & 2 others; Rowa (Exparte Applicant); Ngorome & 4 others (Interested Parties) (Judicial Review Miscellaneous Application E005 of 2024) [2025] KEELC 55 (KLR) (21 January 2025) (Ruling)

Neutral citation: [2025] KEELC 55 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E005 OF 2024

FO NYAGAKA, J

JANUARY 21, 2025

BETWEEN

THE STATE ..... APPLICANT

AND

THE CABINET SECRETARY, STATE DEPARTMENT FOR LANDS AND PHYSICAL PLANNING ..... 1ST RESPONDENT

THE DEPUTY COMMISSIONER, SUBA SUB-COUNTY ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

DISMAS OKELL WILLIAM ROWA ..... EXPARTE APPLICANT

AND

SIALS OUKO NGOROME ..... INTERESTED PARTY

HEDMONDS JAMES KOBIL ..... INTERESTED PARTY

EDWIN OCHIENG AGIK ..... INTERESTED PARTY

KENNEDY ANTONY ..... INTERESTED PARTY

KENNEDY OCHIENG OLELA ..... INTERESTED PARTY

RULING

1. The Ex-Parte Applicant filed a Notice of Motion dated 30th May 2024. He brought it under the following provisions: Articles 40, 47, 48 and 50 of *the Constitution* of Kenya, 2010, Sections 8 and 11

of the *Law Reform Act*, Order 53 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. He sought the following many orders: -

1. That orders of prohibition do issue preventing or prohibiting the interested parties from taking possession and/ or dispossessing the Ex-Parte Applicant from land parcel numbers Kaksingri West B/1291, 1292, 1293 and 1294 as held in the ruling of the 1st and 2nd Respondents on 3rd November 2023.

2. That interim orders prohibition do issue barring the execution of the orders of the Respondents made in their ruling delivered between the parties on or about 3rd November 2020 a directing that status quo ante be maintained where the Ex-Parte Applicants remain the owners of the suit property.

3. That orders of certiorari do issue against the 1st Respondent bringing and quashing the proceedings, Ruling and Orders contained in the ruling delivered by the Respondent on or about the 3rd day of November 2023 between the Ex Parte Applicants and the Interested Parties.

4. That costs on the application we provided for.

2. The application was based on twenty-one (21) grounds that have a lot of content. This Court does not need to summarize all the content of the grounds at this stage for reasons that before the application could be heard, the Respondents raised a Preliminary Objection the Court ought to consider first, as the law requires. On the one hand, should the preliminary objection fail then the Court will promptly delve into the merits of the Judicial Review and therefore will summarize and consider the contents of the grounds of the application and the depositions thereto. On the other, if the Objection succeeds, there would be no need to go into the content of the grounds and even the deposition in the Supporting Affidavit.

3. This Court is of the above humble view because a Preliminary Objection being a point of law obliges a court, for consideration of its merits or otherwise, to analyze the pleadings of the parties and not facts. For that reason, it will summarize where necessary the relevant (parts of the) content of the grounds in support of the application. That is to say, it shall use only the content that touches on the Preliminary Objection. This is based on the explanation below on the law, meaning and import of a preliminary objection. Thus, this Court needs to look at the pleadings only, which is the Application itself and not the facts in support thereof. In any event, the grounds of the application have been replicated word for word in many paragraphs of the deposition of Dismas Okello Willim Rowa sworn on 30th May 2024. The Interested Parties filed a Relying Affidavit sworn on 31st October 2024 by the 2nd Interested Party, Hedmond James Kobil. Its content will be relevant at the time of considering the merits of the Motion.

4. Before the application could proceed the Respondents filed a Notice of Preliminary Objection dated 24th July 2024. It was based on two grounds, namely: -

   1. The application is fatally defective for being iniquitous to Order 53 of the Civil Procedure Rules, 2010.

   2. The application is legally unsound for being noncompliant with Sections 8 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya.

5. When the Application came before my brother Judge G.M.A Ong'ondo on 13th November 2024 for further directions, he ordered that it be canvassed by way of written submissions. He gave timelines for the filing of submissions. I have confirmed from the Case Tracking System (CTS) that only the Respondents and the Interested parties filed their written submissions.

6. This Court will nevertheless proceed to determine the Preliminary Objection on merits given that submissions are only a marketing language for parties as they argue their matters, and not pleadings or evidence. Thus, it will consider the submissions already filed not necessarily to the Applicant's detriment but analyze the arguments in favour of their position as borne out by the pleadings and the law. On this view I rely on the Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR in which the Court of Appeal held,

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

7. In their submissions dated 29th October 2024, the Respondents formulated only one issue for determination in regard to the preliminary objection. It was whether the Ex Parte Applicant had sought and been granted leave to file the instant Application for Judicial Review. On it, they submitted that it was incumbent on the Ex Parte Applicant to be granted leave from the Court for and before filing the instant application. They relied on the case of Republic v. Chief Magistrate, Milimani Commercial Courts and 2 others Ex Parte Frederick Bett [2022] eKLR. They contended that the Ex Parte Applicant neither sought leave of the court to apply for Judicial Review nor was he issued with one before filing the instant application. They relied further on Order 53 Rule 2 of the Civil Procedure Rules which provides that leave ought to be sought first before an application of the nature of the instant one is filed. Further, they argued that an applicant ought to apply for certiorari within six (6) months of the decision. Again, in this case the decision sought to be quashed was dated 3rd November 2023, but the application was filed on 13th June 2024. They argued that the application was filed outside of the time the law requires. They prayed that the Application be dismissed with costs.

8. The Interested Parties supported the Preliminary Objection and filed their written submissions dated 11th October 2024. They formulated three (3) issues for determination. The first one was whether the Notice of Motion was competent in light of the provisions of Order 53 Rule 3(1) and 4(1) of the Civil Procedure Rules. The second one was whether the application dated 30th May 2024 ought to be struck out. The third was who to bear the costs of the application.

9. Their submissions were elaborate. They argued that they had checked in the Case Tracking System (CTS) and noted that the instant matter was filed on the 3rd of May 2024 whereupon filing fee of Kenya Shillings 3750/= was paid. Further, given that the Notice of Motion was served on them on 30th of May 2024 they presumed that Leave to file it may have been obtained at the ex parte stage on 3rd May 2024. They added, they confirmed that the matter was placed before Honourable Justice Sila Munyao who issued directions on the same. Thereafter, the instant Notice of Motion was paid for in the sum of Kenya Shillings 10,575/= on the 10th of June 2024 which payment they contended were presumably in respect of this substantive motion dated 30th May 2024. They submitted that if indeed leave to file the Judicial Review Application was granted on 3rd May 2024, then the substantive Motion ought to have been filed within 21 days which ended on 24th May 2024. But it was not until 13th of June 2024 when the substantive Motion was filed.

10. They submitted that there was no application for extension of time for the substantive motion to be filed out of time. Further, the Notice of Motion offended Order 53 Rule 3(1) of the Civil Procedure Rules. They argued that Order 53 Rule 3 of the Civil Procedure Rules was absolute and not challengeable (sic) under Order 50 Rule 6. They relied on several authorities, namely, Wilson Osolo

v John Ojiambo Ochola & Another [1996] eKLR Civil Appeal No. 6 of 1995, also High Court at Kerugoya Judicial Review No. 20 of 2013 Republic v. Principal Magistrates Court Kerugoya & 2 others Ex Parte Nancy Wathiba Kimoo [2015] eKLR. and High Court at Kisii Constitutional Judicial Review 2 of 2018 Christine Kerubo Bosire & 15 others versus Ministry of Education & another [2019] eKLR. They prayed for the dismissal of the application.

Issue, Analysis And Determination

11. I have considered the preliminary objection, the law and the submissions in support of the same. Only two issues lie before me for determination. The first one is whether the Objection is merited. The second one is who to bear the costs of the objection and if it succeeds application those of the Notice of Motion.

12. Starting with the understanding of what a Preliminary Objection means, in the case of Mukhisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696, Sir Charles Newbold defined a Preliminary objection 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... 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

13. Again, in Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR, the same Court held that,

> " We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush."

14. Also, in SUSAN WAIRIMU NDIANGUI V PAULINE W. THUO & ANOTHER [2005] eKLR, Musinga J as he then was held as follows: -

> " a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect."

15. It is clear from the above decisions which guide and persuade this Court that a preliminary objection is purely an issue of law which is discerned and settled by the court analysing only pleadings of the parties. This Court will use the conventional process of determining legal issues to do likewise in this matter. It is that one uses a four-step method to arrive at a finding. This is by using the Issue (point of contention), Rule (the law or legal point alleged to be breached), Application (analysis of the law as applied to the facts of the case), and Conclusion (decision arrived at from the analysis).

16. The Issue herein is that the Ex Parte Applicant filed the instant application without first seeking leave from the Court and being granted it. This, the facts will demonstrate whether it is true or not.

17. The Rule (law) regarding applications for judicial review is Order 53 of the Civil Procedure Rules, 2010 as read with Section 8 of the *Law Reform Act*. This Court will not take time to explain the import of Section 8 of the *Law Reform Act*. Suffice it to say that Order 53 Rule 1(1) provides that "No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule."

18. Order 53 Rule 2 then 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 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."

19. Also, Order 53 Rule 3 provides that,

> " When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing."

20. The three provisions quoted above require, in summary, that a party wishing to apply for an order of Judicial Review for Prohibition, Certiorari or Mandamus ought to first seek leave the court to do so. Further, the application for leave should be filed within six (6) months of the application. Once the leave is granted, the application ought to be filed within 21 days of the order granting it. In my humble view, there seems to be no room for an extension of the 21 days.

21. This court now turns to the Analysis of the facts of the matter. The application dated 30th April 2024 was filed on the 3rd of May 2024 and placed before the Honorable Judge on the 6th of May 2024, when he issued directions at 16:06 hours. The directions were that the status quo be maintained and the Notice of Motion be filed and served within 21 days of the order or leave. The Respondents and Interested Parties were to respond within 14 days of service and further directions to be given on 2nd July 2024. The Notice of Motion herein was filed on 13th June 2024 at 13:17 hours. This was exactly 37 days from the date of the leave granted. It was after that that the Notice of Motion was placed before my brother Judge on 2nd July 2024 when directions were given. It appears that the only compliance with the leave was the placement of the Notice of Motion before the judge on 2nd July 2024.

22. Therefore, contrary to the arguments by the Respondents that there was no leave sought for filing this application, there actually was leave sought for and granted to the applicant. The only unfortunate and fatal undoing on the part of the applicant was that upon grant of the leave he slept on it or his rights so to speak. He only acted long after it was granted, and the time set lapsed. He must have forgotten that equity aids the vigilant. It therefore means the leave to file the "main motion" as the learned judge put it or envisaged in the orders issued on the 6th of May 2024 ceased to exist upon the expiry of the 21 days given. No motion could be validly filed using a non-existent leave. Further, but contrary to the arguments by the Respondents that leave was granted on 3rd of May 2024 and that the notice of

motion should have been filed by the 24th May 2024, the leave was granted on 6th May 2024. Flowing from the period of 21 days given to file and serve the motion, the applicant ought to have complied with the said limb of directions by 27th of May 2024. But he did not do so.

23. In the case of Nicholas Kiptoo Arap Korir Salat V Independent Electoral And Boundaries Commission & 7 Others [2014] EKLR, the Supreme Court held,

> " By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.
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> To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it."

24. In the circumstances of the instant Notice of Motion, the Conclusion is that the Applicant filed it without an existing leave of the Court. This is because it goes without saying that by the time the application was filed, the leave granted for 21 days had lapsed and there was no extension for it sought, or any further or other leave applied for and granted. It means that, indeed, the preliminary objection to the effect that instant application was filed without the leave of the court and contrary to Order 53 of the Civil Procedure Rules is merited. The Applicant did not even try to seek an extension of time to file it, as was in the Supreme Court decision (immediately above). Even so, by the same token as the Nicholas Salat case (supra) the Notice of Motion is a strange document to the court and a nullity. It is struck out with costs to the Respondents and the Interested Parties who opposed it.

25. The file is closed subject to payment of costs as ordered.

26. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 21ST DAY OF JANUARY 2025.

HON. DR. IUR F. NYAGAKA,

JUDGE

In the presence of,

Jack Otioeno Advocate for the Ex Parte Applicant.

Kojo State Counsel for the Respondents.

Owino Advocate for the Interested Parties 1, 2, 3.