



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CONSTITUTION & JUDICIAL REVIEW NO 11 OF 2014
FORMERLY KERUGOYA MISC CIVIL APPL NO. 14 OF 2014

LABAN KIBINGA KIMONDO

GRACE MUTHONI

BENSON GUCHU GITAU.....APPLICANTS

BENARD WAINAINA

JOHNSON MUTURI

NANCY WANGUI MWITHIRA

VERSUS

THE HON. ATTORNEY GENERAL, (Sued for and on behalf of)

THE MINISTER FOR LANDS.....1st RESPONDENT

THE DISTRICT COMMISSIONER, MBEERE NORTH.....2nd RESPONDENT

THE REGISTRAR OF LANDS, EMBU DISTRICT..... 3rd RESPONDENT

THE DISTRICT SURVEYOR, EMBU DISTRICT..... 4th RESPONDENT

RULING

Introduction

By their chamber summons filed under Section 8(2) Law Reform Act, Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules of 2010 and Section 65 of the Constitution of Kenya (now repealed), the ex-parte applicants, Laban Kibinga Kimondo and 5 others have applied to this court for an ex-parte leave to file for the following orders:

1. *Certiorari*
2. *Mandamus*
3. Prohibition

The chamber summons is supported by the statement of facts and the verifying affidavit of

Laban Kibinga Kimondo, who was authorized to do so on behalf of the other five ex-parte applicants.

The Ex-parte Applicant's Factual Basis:

The chamber summons is supported by a statement of facts sworn to by Laban Kibinga Kimondo dated 18th June, 2010 and filed on 18th June, 2010. The statement of facts is accompanied by the verifying affidavits of Laban Kibinga Kimondo dated 18th June, 2010. According to this deponent he has deposed on behalf of all the other five ex-parte applicants. They are seeking an order of certiorari to bring before this court, the decision of the second respondent made on 3rd December 2009, which is sought to be quashed on the grounds that the decision was made without jurisdiction and that the decision was in breach of fundamental rights of all the ex-parte applicants.

Furthermore, they are seeking leave to file for an order of prohibition directed to the 3rd respondent prohibiting him from executing any orders or instructions made pursuant to the order of the second respondent issued on 3rd December, 2009. Finally, the ex-parte applicants are also seeking for an order of *mandamus* against the respondents.

Factual Basis of the Interested Party, Mr Justin Nyaki Ngure:

Mr Justin Nyaki Ngure has by his notice of motion dated 24th July, 2014 filed in court on the same date sought to be enjoined in this application as an interested party. His notice of motion is supported by an affidavit which was filed in court on same date. According to him, the parcels of land in Mbeere/Kirima/2117, 2118, 2119, 2120, 2121 and 1529 belonged to his Mburia house of Gekara clan. It is his further evidence that the Minister's appeal case number 244 of 2003 awarded him the parcels of land mentioned above. Finally, he has stated that the ex-parte applicants have never occupied or utilized the parcels of land in dispute. It is for these reasons that he has sought permission to be enjoined as an interested party to these proceedings, in order to protect his interests.

The Applicable Law:

The law governing the issuance of the orders of certiorari, mandamus and prohibition are to be found in **Section 8 and 9 of the Law Reform Act Chapter 26** of the Laws of Kenya. There are further enabling provisions in **Order 53 Rule 2** of the **Civil Procedure Rules of 2010**. According to **Section 9(3) of the Law Reform Act**, leave to apply for an order of certiorari should be filed not later than six months from the order, judgement or proceedings complained of. The provisions of that Section are as follows:

“In the case of an application for an order of certiorari to remove any judgement, 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 judgement, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgement, 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”

It is clear from these provisions that leave for certiorari should be applied for within six months from the event complained of. They are couched in mandatory language. The case of *An Application by Gideon Waweru Gathunguri (1962) E.A 520* has judicially approved the interpretation that these provisions are indeed couched in mandatory language. It therefore follows that the court has no discretion to extend the time within which to file for an order of certiorari. These provisions impose an absolute period of six months limitation.

There are statutory provisions that confer discretion in the court to extend the time within which applications may be made to the court. One such provision is **Section 79G of the Civil Procedure**

Act Cap 21. The provisions of that Section states as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”.

These provisions unlike the ***Law Reform Act in Section 9(3)*** do confer discretion in the court to extend the time within which an appellant may appeal out of time to the High Court from the subordinate court, so long as the appellant shows that he has good and sufficient cause for not filing his appeal within the permitted period of 30 days from the date of decree or order appealed against.

There are also provisions in the ***Criminal Procedure Code in Section 349 Cap 75 Laws of Kenya*** which similarly confer on the court the discretion to extend the time within which to file an appeal out of time to the High Court from the subordinate courts, if the failure to file the appeal within 14 days was caused by the inability of the appellant to obtain a copy of the judgement or order appealed against within the period specified. In terms these provisions state as follows:

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgement or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.

I have made references to the Civil Procedure Act and the Criminal Procedure Code to show that the intention of parliament is clear for not conferring discretion in the court once the six months period of limitation has expired.

In addition to the provisions of ***Section 9(3) of the Law Reform Act***, there are further enabling provisions in ***Order 53 Rule 2 of the Civil Procedure Rules*** which in terms provide as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgement, 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”.

It is also clear from the provisions of Order 53 Rule 2 that the six months period of limitation is absolute, because it is couched in mandatory language.

As regards the orders of mandamus and prohibition, there is no absolute period of limitation prescribed within which ex-parte leave has to be applied for. In respect of these two orders, there is discretion in the court to extend the time within which to file for those two orders. This was judicially approved by the Court of Appeal in the case of ***Lucy Mirigo & 550 others Vs Minister of Lands & 4 others (2014) Eklr (COA)***.

Issues for Determination:

Having considered the affidavit evidence, the statutory laws and the judgements of the

superior courts, it is my view that the following are the issues for determination:

1. Whether the notice of motion is time barred in terms of Section 9(3) of the Law Reform Act as read with Order 53 Rule 2 of the Civil Procedure Rules of 2010.
2. Whether the interested party should be enjoined in these proceedings.
3. Whether there is discretion in the court to extend the time within which to apply for an order of certiorari either on its own motion or upon application by the parties.
4. Who is to bear the costs of this motion.

Evaluation of the Facts and the Law:

According to the record, the decision which is sought to be quashed by an order of certiorari was made on 3rd December, 2009. The application for ex-parte leave to file for an order of certiorari was made on 18th June, 2010. That was the date in which the chamber summons seeking leave to file for an order of certiorari was filed in the High Court. It is clear from these dates that the application was filed out of time by two weeks. In the light of the mandatory statutory provisions and the decision referred to above, the application is time barred. Furthermore, the court has no discretion to extend the time within which to file for an order of *certiorari*. And for that reason, leave to file for an order of *certiorari* is hereby refused and since the orders of *mandamus* and prohibition are depended on the grant of the leave for *certiorari*, they cannot be granted to the ex-parte applicants. If leave was granted to apply for an order of *certiorari*, then ex-parte leave to apply for orders for *mandamus* and prohibition would have been granted as a result.

Verdict and Disposal Order:

In the light of the above reasons, I hereby make the following orders:

1. The ex-parte application of the applicant for leave to file for an order of certiorari is hereby refused and is therefore dismissed.
2. As regards the application of the interested party to be enjoined in these proceedings, his application is refused because the subject matter of the intended application is no longer in existence.
3. And finally, as regards to issue of costs of this application, each party will pay for its own costs because these were ex-parte proceedings.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **3rd** day of December **2014**

In the presence of

Mr M. Njage holding brief for Mr. Wandugi for the ex parte Applicant and in the absence of the Respondents

Court clerk Mr Muriithi

Right of Appeal under Order 43 explained to the parties.

J.M. BWONWONGA

JUDGE