Republic v County Council of Kwale & another; Kondo & 57 others (Exparte) (Miscellaneous Civil Application 384 of 1996) [1998] KEHC 2 (KLR) (2 February 1998) (Ruling)

Republic v County Council of Kwale & another ex parte Kondo & 57 others (1998) 1klr (e&l)

Neutral citation: [1998] KEHC 2 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 384 OF 1996

PN WAKI, J

FEBRUARY 2, 1998

LAND – LAND USE BY INDIGENOUS INHABITANTS – RIGHTS OF ACCESS TO THE SEA BY

RIGHTS - MATTERS THE COURT WILL CONSIDER.

PRIVATE DEVELOPER – PROCEDURE BY WHICH THE COMMUNITY CAN ENFORCE THEIR

LOCAL COMMUNITY – WHERE THE LAND HAS BEEN SET APART AND ALLOCATED TO A

JUDICIAL REVIEW – NOTICE TO THE REGISTRAR – WHERE THE REGISTRAR IS GIVEN

NULLITY – CIVIL PROCEDURE RULES ORDER 53

NOTICE SIX MONTHS AFTER FILING THE APPLICATION – WHETHER SUCH NOTICE IS A

JUDICIAL REVIEW – APPLICATION FOR LEAVE – PURPOSE OF THE LEAVE STAGE –

GRANTED – EXERCISE OF THE COURT'S DISCRETION

MATTERS A COURT WILL CONSIDER BEFORE LEAVE TO COMMENCE ACTION MAY BE

JUDICIAL REVIEW – CERTIORARI - WHETHER AN ORDER OF CERTIORARI MAY BE

ORDER OF CERTIORARI MAY LIE - CIVIL PROCEDURE RULES ORDER 53 RULE 2.

WHETHER THE COMMISSIONER OF LANDS IS A PERSON AGAINST WHOSE ACTIONS AN

PERSONS OR BODIES AGAINST WHOM AN APPLICATION FOR CERTIORARI MAY LIE –

GRANTED SIX MONTHS AFTER THE DATE OF THE PROCEEDINGS BEING CHALLENGED -

BETWEEN

REPUBLIC ..... APPLICANT

AND

COUNTY COUNCIL OF KWALE & ANOTHER ..... RESPONDENT

AND

KONDO & 57 OTHERS ..... EXPARTE

A judicial review application for orders of certiorari cannot succeed when filed outside the six-month limit

The applicants, native inhabitants of Funzi Island, sought judicial review to quash the Commissioner of Lands' decision allocating trust land used as a boat landing base to a private developer, claiming it curtailed their livelihood. The application, filed seven months after the impugned decision, was held time-barred under order 53 rule 2, despite the applicants' invocation of the Trust Land Act. The court found that while the notice to the Registrar given one day before hearing was irregular, it was not a nullity. The application was dismissed, underscoring the mandatory six-month limit for seeking certiorari.

Reported by Kakai Toili

Judicial Review *– judicial review applications - notice to the Registrar of the High Court – where the Registrar was given notice six months after filing the application – whether such notice was a nullity – Civil Procedure Rules, order 53, rule 1(3) .*

Judicial Review *– judicial review applications - application for leave – matters to be considered in application for leave - what matters would be considered before granting leave to commence action in a judicial review application.*

Judicial Review *– judicial review orders - certiorari – timeline for issuing orders of certiorari - whether an order of certiorari could be granted six months after the date of the proceedings/decision being challenged - Civil Procedure Rules, order 53, rule 2.*

Judicial Review *– judicial review orders - certiorari - persons or bodies against whom orders of certiorari could be issued – whether the Commissioner of Lands was a person against whose actions an order of certiorari may lie.*

Brief facts

An application was made by 58 persons who said they were native inhabitants of Funzi Island off the Kenyan Coast. They were mostly fishermen and boatmen who had used the waters around the Island for fishing. To access the sea and to be able to land their boats they used a sand-pit adjoining the Island. The sand-pit used to come in handy particularly during the South – East Monsoons in April up to October in each year. They also claimed customary rights over the entire Island which was part of trust land.

Later on, they realized that a portion of the Island had been set aside by the Commissioner of Lands and allocated to a private limited liability company, which had started developing it. The allocated land included the entire area of the sand-pit used by the applicants in their fishing activities. The applicants argued that the blockage which prevented them from accessing the sea was bound to affect their livelihood. The applicants

thus filed an application stating that the entire process offsetting apart the land was *ultra vires* the law and thus a nullity and sought for the process to be quashed through an order of *certiorari*.

The application was drawn and filed about seven months after the decision of the Commissioner of Lands. A notice of the application was not served on the Registrar of the court until six months after the filing of the application.

Issues

i. What matters would be considered before granting leave for the institution of a judicial review application?
ii. Whether the Commissioner of Lands was a person against whose actions an order of *certiorari* may lie.
iii. Whether a judicial review application may be instituted to seek the remedy of *certiorari* after the lapse of six month after the making of an administrative decision that was under challenge in the application.
iv. Whether a notice given to the Registrar of the High Court six months after filing a judicial review application could be considered a nullity.

Held

1. A notice to the Registrar of an application under the Civil Procedure Rules, Order 53 rule 1(3) was an integral part of the application for leave. It was mandatory because without it the application itself was incomplete, incompetent and could not be proceeded with.
2. Where notice was given to the Registrar one day before the actual hearing of the application and six months after the filing of the application, such notice was irregular but not a nullity and was curable by a directive that proper service be affected. So long as an applicant had served notice on the Registrar of the High Court one day before actual appearance before a single judge, there was compliance with the rule.
3. The purpose of the application for leave to apply for judicial review was to eliminate at an early stage any applications for judicial review which were either frivolous, vexatious or hopeless and to ensure that the applicant was only allowed to proceed to the substantive hearing if the court was satisfied that there was a case fit for further consideration.
4. Leave may only be granted if on the material available the court was of the view, without going into the matter in depth, that there was an arguable case for granting the relief claimed by the applicant, the test being whether there was a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It was an exercise of the court's discretion but as always it had to be exercised judicially.
5. Order 53 rule 2 of the Civil Procedure Rules was a mandatory provision prohibiting the grant of an order of *certiorari* unless the application was made not later than six months after the date of the proceedings against which it was to be issued.
6. *Certiorari* lay not only to courts but to other persons and bodies having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially. The Commissioner of Lands was such a person and his actions were amenable to the grant of orders of *certiorari*.
7. In an *ex parte* application when the court did not have the benefit of hearing the other party, the applicant had a duty to conduct the application with utmost good faith and make full and frank disclosure of all material facts.

Application dismissed.

Citations

Statutes

1. Civil Procedure Act
2. Constitution of Kenya, 2010
3. Interpretation And General Provisions Act
4. Land Act

5. Law Reform Act

Advocates

None mentioned

RULING

1. The Miscellaneous Civil Application dated 31.5.1996 raises some vexing questions of fact and law. It is an ex parte chamber summons seeking leave of this court under order 53 Rule 1(2) Civil Procedure Rules to apply for judicial review in the nature of orders for certiorari mandamus and Prohibition.

2. Although the application was drawn on 31.5.96 and two affidavits in support thereof were sworn on 6.6.1996, the application was not filed until 17.12.1996 –about seven months later! No notice was served on the Registrar at the time of filing the application. But six months later on 19.6.1997, the applicant filed a notice addressed to the Registrar in the words:

> "Take Notice that on or after the day succeeding this notice, the above named applicants will apply to this Honorable Court for leave to apply for orders of Certiorari Prohibition and mandamus as detailed in the statement. A copy of the statement and of the supporting affidavit is filed herewith. Dated 30.5.1997".

3. The chamber summons itself was fixed for hearing on 20.6.97.

4. The first vexing question is whether the Notice to the Registrar was given in accordance with order 53 Rule 1(3). Put another way, the issue is whether then Rule requires the giving of notice at least one day before the filing of the application or the day before the hearing of the application or one day before the hearing of the application before a judge in chambers.

5. The law is clear in situations where no notice at all is served on the Registrar. Leave granted in such circumstances and the Notice of Motion filed subsequent thereto would be a nullity. It was so held by two judges of this court (Cockar J (as he then was) and Amin J) in Walter Fredrick Odhiambo –vs- Registrar of Trade Unions HCC Misc 210/87 UR. They said in their findings

> "We agree with Mr.Nowrojee that these prerogative orders fall under a special jurisdiction of this court created by a statute whereby an institution of the republic is empowered to supervise the functions of its subordinate institutions. There are no pleadings involved. The whole process becomes a nullity if leave is not first obtained from a judge in chambers.
>
> It is to be observed that the application itself before the judge in chambers is ex parte. The Registrar receives the notice on behalf of the republic which thereby becomes involved in the matter. In our view, notice to the Registrar of the application under sub-rule 3 is an integral part of the application for leave. It is mandatory because without it the application itself is incomplete, incompetent and cannot be proceeded with. The proceedings are a nullity."

6. That is not the position in this application. Notice was given to the Registrar but only one day before the actual hearing of the application and six months after the filing of the application. It becomes necessary to cite the provisions of sub rules (2) and (3).

> "2 An application for such leave as aforesaid shall be made ex parte to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought and by affidavits verifying the facts relied on.

3. The applicant shall give notice of the application for leave not later than the proceeding day to the Registrar and shall at the same time lodge with the Registrar copies of the statement and affidavits. Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown."

7. These are the steps governing the first step in obtaining any of the orders of judicial review. In an article written by Pheroze Nowrojee, senior councel for the Nairobi Law Monthly magazine in November/ December 1987, on the "Practice, Procedure and values" of the three orders of mandamus certiorari and Prohibition councel opined thus:

> "Order 53 rule 1 (2) sets out the steps at this stage. The application for such leave shall be made ex parte to a judge in chambers. This application consists then of:
>
> a) The chamber summons endorsed "ex parte".....
>
> b) A statement filed pursuant to order 53 Rule 1 (2)....
>
> c) An affidavit.....
>
> All three documents must be intituled as set out in Appendix B.
>
> The applicant is required to give notice of the application for leave "not later than the preceding day"
>
> to the Registrar of the High Court and the statement and the affidavits must be filed at the same time (order 53 rule 1 (3)).
>
> The application is then heard by a single judge in chambers."

8. It seems to me that the suggestion is that the notice to the Registrar be filed at the same time the statement, affidavits and the applications are being filed in court for subsequent hearing before a single judge. If that opinion is correct then I think with respect that it places a strained construction on the Rule. I agree with Mr Lumatete for the applicant in this case in his submission that the rule is plain beyond argument that so long as an applicant has served notice on the Registrar of the high court one day before the actual appearance before a single judge, there is compliance with the rule.

9. The other vexing question is how such Notice is given. For there is only one Registrar of the High court who is stationed at the High Court buildings in Nairobi. Was it the intention of the Rules Committee that the person for the time being occupying that office be personally served" I do not think so. Registrar as defined under the *Civil Procedure Act* section 2 "includes a District Registrar and a Deputy Registrar." It is sufficient for purposes of the rule that a District Registrar or a Deputy Registrar, where one is available, be served. There is no prescribed form of such Notice so long as it conveys the intention of the Rule and encloses the statement and affidavits as required under the rule. Nor, as far as I can see, is there a prescribed manner in which service of the Notice on the Registrar may be effected. It would remain in each particular case therefore a matter of fact to be established that the notice was served.

10. As far as I can see in this application, the Notice conveys the required message under the Rule and was filed, received and paid for in the court registry. There are several Deputy Registrars in these courts and some have been assigned specific tasks in the High Court. There is an administrative arrangement that the Chief Magistrate who doubles up as the Deputy Registrar, and is for the time being in the person of Mr Aggrey Muchelule, be served with applications under order 53. Where possible such service has been affected personally on Mr Muchelule. Where such personal service has not been affected however and a party has filed the Notice in the registry clearly indicating that it is filed for the purpose of order

53 Civil Procedures Rule, I am not prepared to say that such service is a nullity. It may be irregular but not a nullity and is curable by a directive that proper service be effected. I am satisfied that the notice given herein is not a nullity.

11. Having determined the issues arising on the Notice, it remains for the applicant to satisfy me that the leave sought should issue.

12. The purpose of the application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. As was pointed out by Lord Diplock in Republic -vs- Inland Revenue Commissioners ex p National Federation of Self Employed and Small Businnesses Ltd [1982] AC 617, the requirement that leave must be obtained before making an application for judicial review is designed to:

> "Prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

13. Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the courts discretion but as always is has to be exercised judicially. Has the applicant satisfied these principles"

14. The application is made by 58 persons who say they are the native inhabitants of Funzi Island off the Kenya coast for many generations. They are mostly fishermen and boatmen and have used the waters around the Island for fishing. To access the sea and to be able to land their boats they use a sand-pit adjoining the Island. The said sand pit comes in handy particularly during the south-east monsoon in April up to October in each year. They also claim customary rights over the entire Island which is part of the trust land as defined under *the Constitution* of Kenya.

15. In 1994, they had a member of parliament in the name of one Kassim Mwamzandi. They approached him for assistance to petition the government on their behalf to have their rights on the island adjudicated upon and titles to the land issued to them. They never saw him again. The next thing they realized was that a portion of the Island had been set apart by the commissioner of lands and was allocated to a private limited liability company known as PATI Ltd. It is not clear when they came by this information but, there is a Gazette Notice No 3831 dated 24.6.1994 signed by the Commissioner of Lands in these words:

> "The Trust *Land Act* cap 288 Setting Apart of Land.

16. Notice is given that the land described in the schedule hereto has been duly set apart in accordance with the provision of part V of the Trust *Land Act* for the purpose specified in the said schedule.

> Schedule
>
> Place: Funzi Island, Kwale District
>
> Purpose: Boat Landing Base
>
> Area: 0.7 hectares approximately

Description: The site lies along Funzi Beach on the Western side of Funzi Island to Mto Vikuarani and South West of Mlimani Island. It is edged red on the top sheet copies of which can be available in the office of the District Commissioner, Kwale District.

Dated 24th June 1994.

Wilson Gachanja

Commissioner of Lands. ”

17. Then the applicant discovered (and they do not say when) that although the area so described is said to be 0.7 Hectares, it measures 3.7 Hectares on the ground. After allocation to the private company and the issuing of a grant of title under the Registration of Titles Act on undisclosed dates, the company fenced off the area and started developing it. It included the entire area of the sand-pit used by the applicants in their fishing activities.

18. They say their means of livelihood and earning income has been curtailed by these acts. The setting apart of the land and the subsequent allocation of it to a private company was unlikely to benefit them and they should have been given an opportunity to object to such allocation. It was an insult above injury to take their land without compensation and, in addition, deprive them access from the beach. The entire process from setting apart the land up to the issuing of the grant and giving possession of the land was ultra vires *the Constitution*, the Trust *Land Act* and the Registration of Titles Act and therefore a nullity. All that process should be quashed and the Commissioner ordered to follow the law if he still intends to have the land set apart.

19. On the face of it, the application for an order of certiorari seeking to bring before the court and have quashed the Gazette Notice dated 24.6.1994 and the Grant No CRN 106 issued subsequent to that Notice, flies in the face of the provisions of order 53 Rule 2. It is a mandatory provision prohibiting the grant of such an order in certain cases; that is:

> “.....any judgment, order, decree, conviction or other proceeding .....unless the application is made not later than six months after the date of the proceeding...” Underlining mine.

21. The underlined parts raise the question at once whether the Gazette Notice and the Grant issued by the Commissioner of Lands are covered under the Rule. It is my view nonetheless that certiorari lies not only to courts but to other persons and bodies having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially. The Commissioner of Lands in my view is such a person and his actions are amenable to the grant of orders of certiorari. So the orders sought to quash the two documents are clearly out of time and no application can under the rules be entertained or orders thereunder granted.

22. Indeed I did not understand Mr Lumatete for the applicant to have differing views on this position in law.

23. His contention was that order 53 rule 2 Civil Procedure Rules does not apply because there are express provisions under the Trust *Land Act* cap 288 at section 12. That section states:

> “12. Notwithstanding anything in this Act, any person claiming a right or interest in Land set apart under this Act shall have access to the High Court for –
>
> (a) the determination of the legality of the setting apart
>
> and

(b) the purpose of obtaining prompt payment of any compensation awarded".

24. In Mr Lumatete's submission, the applicants are coming to court to question the legality of the setting apart of trust land and the section does not set a time limit as to when that can be done. The time limit set out in order 53 rule2 of the Civil Procedure Rules is set by the Rules Committee established under the *Civil Procedure Act*. The Rules therefore become the subsidiary legislation referred to in section 29 of the *Interpretation and General Provisions Act* cap 2. As such, the Rules cannot, in Mr Lumatete's submission, oust the provisions of an Act of Parliament, which the Trust *Land Act* is. Unless section 12 of that Act is repealed therefore, there is no time limit as to when one can come to court after six months.

25. With utmost respect to counsel, that argument may be logical but is flawed and misconceived in law.

26. The Rules Committee established under the *Civil Procedure Act* did not make rule 2 of order 53 on the basis of their appointment and power granted to them under section 81(1) of the *Civil Procedure Act*. Order 53 rule (2) Civil Procedure Rules has as its genesis an Act of Parliament,

27. The *Law Reform Act* cap 26 Laws of Kenya. The Act itself under section 9 (3) has a provision identical to rule 2, and there is further subsidiary legislation in L/N 299/1957 in which the Rules Committee specifically invoked the power granted to it under section 9 (1) of the *Law Reform Act*, to make the rule which has existed in identical wording since the legal Notice was published on 29th May 1957. The special jurisdiction established under the *Law Reform Act* is also reflected in the Rules made under section 9 of the same Act. As was stated by Cockar & Amin JJ in the Walter Odhiambo case above.

> "Subsidiary legislation is as good binding a law as an Act and must be interpreted and applied as strictly as a statute."

28. I agree with that view and hold that the provisions of the Trust *Land Act* and the *Law Reform Act* with the Rules made thereunder is not mutually exclusive.

29. The applicants made a conscious decision to challenge actions ascribed to an Act of Parliament which are amenable to orders of certiorari. Whether such actions arise from Acts of Parliament which leave limitation periods open or not the provisions of the *Law Reform Act* are applicable. In this particular case I find that the Act was not complied with. There has been no attempt to explain the delay in filing the proceedings in this matter and the affidavit in support is evasive on certain dates when the applicants became aware of the infringement of their rights. It is trite law that in an ex parte application when the court does not have the benefit of hearing the other party the applicant has a duty to conduct the application with utmost good faith and make full and frank disclosure of all material facts in documents. A court of equity will look at an application not so conducted with disfavor.

30. There may well be some merit in the applicants' complaints that the Commissioner of Lands contravened the law in proceeding in the manner he did, and for my part I regret that this application was not brought within the law. Equity follows the law however and there is a law prohibiting the grant of orders of certiorari after a period of six months, which have in this matter admittedly long expired. I am afraid I have no discretion in the matter and the application on that score will have to fail.

31. I see no time limit provided for under the *Law Reform Act* for one to apply for orders of mandamus and prohibition, although section 9(2) of the Act provides for such limitation to be made. In view of my ruling regarding the orders of certiorari however I doubt the efficacy of those orders even if they were granted. It seems to me that the two are only consequential on the grant of the first order of certiorari. It would be futile therefore to grant leave to pursue a shadow. The application must regrettably fail and is hereby dismissed. There may perhaps be other avenues of pursuing the same goal. I leave it to counsel.

There will be no order as to costs.

DATED AND DELIVERED THIS 2ND DAY OF FEBRUARY, 1998

P. WAKI

JUDGE