



**IN THE COURT OF APPEAL
AT NAIROBI**

CIVIL APPEAL NO. 6 OF 1995

WILSON OSOLO.....APPELLANT

AND

JOHN OJIAMBO OCHOLA

ATTORNEY GENERAL.....DEFENDANTS

**(Appeal from the Ruling of the High Court of Kenya at Nairobi of (Mr. Justice Okubasu) dated
28th October, 1994**

IN

H.C.MISC.C. C. NO. 343 OF 1982)

JUDGMENT OF THE COURT

On the 24th day of May, 1982, the District Commissioner, Busier District Mr. Zackary Orwa on behalf of the Minister of Lands and Settlement, in the exercise of the powers under the provisions of sections 29(1) of the Land Adjudication Act (Cap 284, Laws of Kenya) ordered that land parcel number 1080 in Bujwanga Adjudication Section in Busia District be registered in the name of Mr. George W. K. Osolo.

Mr. Ochola Niare was aggrieved by that decision. He therefore applied, on the 6th day of December, 1982, for leave to apply for an Order of Certiorari to remove into the superior court for the purpose of quashing the said order of the Minister which order was made by the said District Commissioner in the exercise of the powers delegated to him by the Minister under legal Notice No. 74 of 1978. At the same time Mr. Niare sought leave to apply for an order of Mandamus directing the Minister to register him (Mr. Niare) as the proprietor of the said land parcel number 1080.

When the application for such leave came up for hearing before Porter Ag. J. (as he then was) the learned judge declined to grant the leave as the application was filed out of time. Under Order 53 rule 2 as it stood in 1982 no such leave could have been granted unless the application for such leave was filed within six months of the date of the order sought to be quashed.

The said rule was worded in mandatory terms as follows:

"2. 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.....”

Mr. Niare then in a separate suit (H. C. Miscellaneous Civil Case No. 35 of 1983) applied for extension of time to file the application for such leave. That application was heard ex-parte by Platt J. (as he then was) and was granted. There was quite clearly a fundamental error on the part of the Superior Court in granting such extension of time as Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed.

Section 9(3) of the Law Reform Act reads:

“(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;.....”

It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from S.9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act.

There is no provision for extension of time to apply for such leave in the Limitations of Actions Act (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a Limitation period. But this Act has no relevance here.

It therefore is apparent that the extension of time granted by Platt J. was a nullity. Any steps taken thereafter are therefore of no consequence. But the orders of Platt J. were not challenged on appeal.

However in this particular case the Superior Court (Okubasu J.) proceeded to grant leave de novo some twelve years after the event, that is on the 28th day of October, 1994. This appeal is against the ruling of Okubasu J. delivered on 28th day of October, 1994. Okubasu J. was hearing an application dated 28th April, 1994 (file on 4th May, 1994) which is entitled “Notice of Motion” under Order LIII rule 3(1) of the Civil Procedure Rules. Although that application (as it shows) was filed pursuant to leave granted by Platt J. on 15th February, 1982 yet in third prayer thereof the first respondent was seeking leave to file the notice of motion out of time.

In 1994 the learned judge (Okubasu J.) made efforts to trace the file of H. C. Misc. Civil Case No. 35 of 1983 by personally going to the Registry of the Superior Court and later through the staff and had learnt that Platt J. had extended the period to apply for leave to apply for orders of certiorari and mandamus. Nevertheless he proceeded to hear the same application de novo, granted leave to file the already filed Notice of Motion out of time and ordered its hearing on priority basis.

We do not see how the learned judge could again have made orders which Platt J. made twelve years earlier. In so doing the learned judge clearly erred. He had no jurisdiction to make such orders. Again the learned judge failed to consider the argument advanced before him by Mr. Odera to the effect that there being no Notice of Motion (for certiorari and mandamus) filed within 21 days of 15th February, 1982 (assuming that Platt J. had made a valid order) there was nothing to be heard properly. An application was certainly filed on 26th February, 1982 but there is no evidence before us (there was none before the Superior Court) of the contents of that application. Yet there is no doubt that it was a chamber summons and not a notice of motion. It has been referred to as a chamber application throughout the typed proceedings of the Superior Court before us and we have to go by the proceedings before the Superior Court.

It was a mandatory requirement of Order 53 rule 3(1) of Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days of 15th February, 1982 there was no proper application before the Superior Court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules. There was no such application save the one dated 28th April, 1994. That came too late in the day in any event and the learned judge erred in even considering the extension of time some 12 years after the event.

This appeal therefore succeeds and is allowed with costs here and below with the result that the Notice of Motion filed in the Superior Court on 4th May, 1994 is dismissed with costs. The cross appeal by the second respondent is allowed with costs and notice of grounds to affirm the decision of Okubasu J. is dismissed with costs.

Dated and delivered at Nairobi this 6th day of August, 1996.

A.M. AKIWUMI

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B.SHAH

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JUDGE OF APPEAL