Republic v Obura (Sued as the Administratrix to the Estate of Nelson Obura) & another; Okello (Ex parte Applicant) (Environment and Land Miscellaneous Case 53 of 2015) [2025] KEELC 6182 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6182 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND MISCELLANEOUS CASE 53 OF 2015

BN OLAO, J

SEPTEMBER 25, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

PRISCA OBURA (SUED AS THE ADMINISTRATRIX TO THE ESTATE OF NELSON OBURA) ..... 1ST RESPONDENT

JOHN MAKOKHA ..... 2ND RESPONDENT

AND

JOHN NAKHABI OKELLO ..... EX PARTE APPLICANT

JUDGMENT

1. By a ruling dated 13th November 2024, this Court reinstated to hearing, the Notice of Motion by John Nakhabi Okello [the Applicant then acting in person] dated 27th April 2015 and which had erroneously been withdrawn on 13th July 2022 after Mr Wanyama informed Omollo J that the Applicant had died 1½ years earlier. It is not clear why Mr Wanyama addressed the Court as he did as the Applicant was acting in person.

2. The said Notice of Motion dated 27th April 2015 had sought the following orders:

    1. That this Honourable Court be pleased to grant the Applicant leave to file this suit out of time.

    2. That upon granting prayer [1] above, an order of certiorari do issue directed against the Funyula Land Disputes TribunaL and the decision in respect of Samia/Luanda/Mudoma/1260 together with the proceedings subsequent adoption and decision in Busia Chief Magistrates Court Land Disputes No. 20 of 2008 in which the decision has been adopted and/or entered as judgment.

3. That an order of prohibition do issue directed at the aforesaid Funyula Land Disputes Tribunal and the Busia Chief Magistates Court from enforcing, executing or purporting to adjudicate over any claim in respect of the aforesaid parcel of land instituted by the said Interested Party or by any person on his behalf.

4. That costs of this application and that of leave be in the cause.

The basis of that Motion dated 27th April 2015 is not relevant for the purposes of this ruling. Suffice it to state that the Motion was subsequently amended on 13th January 2025 by Ms Nabulindo Advocate who had come on record for the Applicant.

3. By the said amended Notice of Motion dated 13th January 2025, the Applicant seeks the following orders:

> " That pursuant to an order for leave being granted, this Honourable Court shall be moved on the – day of – 2024 at 9 am or so soon thereafter for orders:
>
> 1. That an order of certiorari be issued as against the decision of Funyula Land Disputes Tribunal quashing the ruling on cancellation of entries on L.R No. Samia/Luanda/Mudoma/1260 that was registered in the name of John Nakhabi Okello.
>
> 2. That an order of mandamus be issued cancelling the County Land Registrar to cancel the subsequent entries on L.R Samia/Luanda/Mudoma/1260 in relation to the Funyula Land Disputes Tribunal decision and revert the registration of L.R No. Samia/Luanda/Mudoma/1260 back to John Nakhabi Okello.
>
> 3. That costs of this application be borne by the Interested Party."

I must add at this point that in the amended Motion, the name of one Nelson Obura who had been named as an Interested Party was deleted.

4. The amended Motion was based on the grounds set out therein and supported by the Applicant's affidavit dated 15th January 2024.

5. The gravamen of the Motion is that the Applicant is the registered proprietor of the land parcel No. Samia/Luanda/Mudoma/1260 [the suit land] since 10th March 1989. However, Prisca Obura and John Makokha [the 1st and 2nd Respondents respectively] approached the Funyula Land Disputes Tribunal [the Tribunal] in 2007 seeking orders that the suit land be surrendered to them. The Tribunal heard the case and delivered a ruling on 7th May 2007 and ordered the Land Registrar Busia to revoke his title to the suit land. The ruling was adopted as a judgment of the subordinate Court in Busia CMCC No. 20 of 2008 on 16th May 2008. It is the Applicant's case that the Tribunal had no jurisdiction to order for the cancellation of his title to the suit land which has now been taken over by the Respondents. Hence this application seeking the order of Certiorari and Mandamus.

6. The Applicant had earlier filed the following documents when he filed his initial Motion:

1. Copy of the certificate of official search for the land parcel No. Samia/Luanda/Mudoma/1260 issued in the name of the Applicant on 10th March 1989.

2. Copy of the proceedings and ruling of the Tribunal dated 7th May 2007.

3. Copy of the order by the Resident Magistrate's Court Busia in Land Case No. 29 of 2008 dated 16th May 2008 adopting the Tribunal's award as a judgment of the Court.

4. Copy of proceedings in Busia Chief Magistrate's Court Civil case No. 118 of 2008 John Nakhabi v Obura Nelson.

5. Copy of a letter dated 21st January 2009 from Maloba & Company Advocates to the Applicant in respect of Busia PMCC No. 118 of 2008.

6. Copy of a letter dated 16th June 2008 from the Provincial Commissioner Western Province and addressed to the Senior Resident Magistrate Busia seeking stay of execution in land case No. 20 of 2008.

7. Copy of a letter dated 20th November 2008 from Maloba & Company Advocates and addressed to John Nakhabi in respect to Busia PMCC No. 118 of 2008.

8. Copy of application to the Land Control Board for the transfer of the land parcel No. Samia/Luanda/Mudoma/1260.

9. Copy of application for correction of name in the register in respect of the land parcel No. Samia/Luanda/Mudoma/1260.

10. Copy of letter of consent to transfer the land parcel No. Samia/Luanda/Mudoma/1260 from Opiyo Omondi Gira to John Nakhabi Okello.

7. In opposing the Motion, the 2nd Respondent filed a replying affidavit dated 17th February 2025 in which he has deposed, inter alia, that the decision of the Tribunal which is being challenged was adopted as a judgment of Cout in the presence of the Applicant who did not move to this Court within six [6] months to seek orders of Certiorari as is required in law. That the Applicant moved to this Court on 27th April 2015 after a lapse of over seven [7] years seeking leave to file this Motion and also seeking for orders of Certiorari. The Applicant did not file any chamber summons seeking leave as required under Order 53 of the Civil Procedure Rules. Therefore, this Court lacks the jurisdiction to extend time or to grant the orders sought in the Motion which has been filed some 16 years late, a delay which has not been explained. Further, ignorance of the law is not an excuse as the Applicant is represented by a senior Advocate.

8. The Court directed that the Motion be canvassed by way of written submissions. The same have been filed both by Ms Nabulindo instructed by the firm of D. K. Nabulindo & Company Advocates for the Applicant and by Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the Respondents [although he has erroneously titled his submissions to read that he is counsel for the Applicant].

9. I have considered the Motion dated 27th April 2015 as amended on 13th January 2025, the statement of facts the supporting affidavit and annextures thereto as well as the submissions by counsel.

10. It is common, ground that the judgment which the Applicant seeks to be quashed by an order of Certiorari was made by the Tribunal on 7th May 2007 and was adopted as a judgment of the subordinate Court on 16th May 2008 in Busia Chief Magistrate's Court Land Case No. 29 of 2008. That is clear from the documents filed herein and is not contested.

11. The orders sought by the Applicant are also not in dispute. They are:

    1. Leave.

2. Order of Certiorari.

3. Order of Mandamus.

I shall start with the prayer for leave because if it collapses, then too will the whole Motion.

LEAVE:

12. On this issue, counsel for the Respondents has submitted as follows at pages 2 and 3 of his submissions:

> " The application is incurably defective and incompetent and should be dismissed. Even if several amendments are made, they will not cure the wrong procedure that was adopted by the ex-parte Applicant in conceiving his Judicial Review cause herein.
>
> In order for a party to move the Court for orders of Certiorari and Mandamus under the provisions of Order 53, such Applicant must begin by filing the chamber summons application ex-parte to the judge and pray for leave to apply for Mandamus, prohibition or Certiorari. Such Chamber Summons application for leave to apply is required to be filed with the statement of facts and the verifying affidavit which would carry the evidential material in support of the statement of facts. The application for leave to apply for Certiorari and Mandamus was clearly not filed within the 6 months period following the adoption of the Tribunal decision of the year 2008. If such leave had been applied for and granted, the substantive Notice of Motion would have only been filed within 21 days following the grant of an order for leave allowing the ex-parte Applicant to seek Certiorari and Mandamus."

Counsel for the Respondents then goes on to add at page 4 of his submissions that:

> " Since no prior leave from Court was ever sought and obtained, the prayers for Certiorari and Mandamus lack any foundation on which they can stand. The amended application should be refused for having been filed in clear contravention of the law."

In response, counsel for the Applicant has made the following submissions in the last paragraph:

> " Failure to file the Chamber Summons application for leave to apply for judicial review orders of Certiorari under Order 53 of the Civil Procedure Rules can be cured under Article 159 [2] [d]. We plead with the Honourable Court to look at the substance of the case at hand and not to disregard the same because of failure to file Chamber Summons application for leave to apply for judicial review orders. This is only a technicality.
>
> Your Lordship, it is our humble submission that the application before Court for orders of Certiorari as against the decision of Funyula Land Dispute Tribunal be allowed."

Earlier on in her submissions at page 2, counsel for the Applicant had stated that:

> " Your Lordship, in terms of Section 3[1] Land Disputes Tribunal Act NO 18 of 1990, the Tribunal has no jurisdiction to entertain a dispute relating to ownership of land. Similarly in terms of Section 159 of the Registered *Land Act*, Tribunal cannot entertain a dispute relating to land registered under that Act."

There can be no doubt that the Tribunal made an order on 7th May 2007 revoking the Applicant's title to the suit land. In paragraphs [1] and [2] of it's decision, the Tribunal stated as follows:

1:

> " The Court awards plot No. Samia/Luanda-Mudoma/1260 to Nelson Obura Kudoyi and John Makokha Wanyama."

2:

> " The Court requests the District Land Registrar Busia [K] to revoke title deed for Samia/Luanda-Mudoma/1260 currently registered in the names of John Nakhabi Okello."

The Tribunal clearly acted beyond it's jurisdiction as it had no power to revoke a title to registered land.

13. Having said so, was the requisite leave sought for filing this Motion seeking orders of Certiorari and Mandamus as required by law? Order 53 Rule 1[1] and [2] of the Civil Procedure Rules provides for the procedure for seeking such leave before filing an application for Certiorari and Mandamus. It reads:

1.

> " No application for an order of Mandamus, prohibition or Certiorari shall be made unless leave therefore has been granted in accordance with this rule."

2.

> " An application for such leave shall be made exparte to a judge in chambers, and shall be accompanied by:-
>
> a. a statement setting out the name and description of the Applicant, the relief sought and the grounds on which it is sought; and
>
> b. affidavits verifying the facts and averments that there is no other cause pending, and that there have been no previous proceedings in any Court between the Applicant and the Respondent, over the same subject matter and that the cause of action relates to the Applicants named in the application."

It is clear from the record herein that no such leave was sought by the Applicant prior to filing this motion. The need for such leave was discussed by Waki J [as he then was] in the case of R.V County Council Of Kwale & Another Ex-parte Kondo & Others Civil Application No. 384 of 1996 [1998 KEHC 2 KLR] where he said at paragraph 12:

> " The purpose of 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."

The Judge then proceeded to cite Lord Diplock in the case of R. V. Inland Revenue Commissioners Ex-parte National Businesses Ltd. 1982 AC 617 that 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."

Waki J.A [as he then was] then continues to add at paragraph 13 of the R.V. County Council Of Kwale & Another Ex-parte Kondo & Others [supra] that:

> " 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 investigations at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the Courts discretion but as always, it has to be exercised judicially."

For this Court to decide whether there is infact any proper application for leave before me, I must look at Order 53 Rule 2 of the Civil Procedure Rules which reads:

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's being squashed, unless the application for leave is made not later than six months after the date of the proceedings 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 hearing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired." Emphasis added.

As stated earlier, the order by the Tribunal sought to be quashed was delivered on 7th May 2007 and was adopted by the Court on 16th May 2008. This Motion was filed on 27th April 2015 before being amended on 13th January 2025. That was some 8 years after the Tribunal had delivered it's ruling and which is well beyond the 6 months statutory period provided for in the law within which leave ought to have been filed seeking orders of Certiorari and Mandamus.

14. The Applicant concedes that indeed there was a delay in approaching this Court. The delay has not even been explained. But the Applicant's counsel has submitted, as already stated above, that the failure to comply with the provisions of Order 53 of the Civil Procedure Rules "can be cured under Article 159 [2] [d] of *the Constitution*." That provision reads:

[2]

> " In exercising judicial authority, the Courts and tribunals shall be guided by the following principles:-
>
> a. –
>
> b. –
>
> c. –
>
> d. Justice shall be administered without undue regard to procedural technicalities and –."

In the case of Siasa Pashua & 2 Others v Mbaruk Khamis Mohamed & Another 2012 KEHC 3740 KLR [2012 eKLR] J.B Ojwang J [as he then was] expressed himself as follows in a ruling delivered on his behalf by M. Odero J on 12th March 2012:

> " The obligation placed upon the Courts by *the Constitution*'s requirement [Article 159[2] [d] that they are to render justice without undue regard to procedural technicalities does not, in my opinion, negate the orderly scheme of litigation provided by the Civil Procedure Rules and the law in respect of Originating Summons is by no means nullified."

In the case of Isaac Aluoch Polo Aluochier v Independent Electoral And Boundaries Commission v 17 Others, Supreme Court Petition No. 20 [E023] of 2022, the Supreme Court affirmed the following findings by the High Court on the issue of seeking leave for filing a Judicial Review application:

> " What then is the procedure for bringing Judicial Review application? The submission by Mr Aluchier that this application is under Article 47 of *the Constitution* and therefore not subject to order 53 Civil Procedure Rules and Section 8 and 9 of the *Law Reform Act* cannot hold water. Judicial Review is a special jurisdiction. In so far as no rules have been made under Article 47 of *the Constitution*, there can be no vacuum in law. A party approaching Court for Judicial Review orders of Certiorari, Mandamus and Prohibition must comply with the procedure under Order 53 of the Civil Procedure Rules. He must seek the Court's leave first through a Chamber Summons Application supported by a statement of Facts and Verifying Affidavit and annextures in support of the prayers. In this case, the Applicant should have annexed the impugned decision. It is after grant of leave that an Applicant is allowed to file the Notice of Motion application within 21 days. Seeking of leave is meant to expedite the process and weed out any frivolous applications." Emphasis added.

That is the predicament in which the Applicant herein finds himself. And as is now clear from the Supreme Court's decision of Isaac Aluoch Polo Aluochier v Iebc [supra] as well as the decision in the case of Siasa Pashua & Others v Mabruk Khamis Mohamed [supra], non-compliance with the provisions of Order 53 of the Civil Procedure Rules renders this Motion incompetent. Indeed, in the case of Hunker Trading Company Ltd v Elf Oil Kenya Ltd C.A. Civil Appeal No. 6 of 2010 [2010 KECA 480 KLR], the Court of Appeal addressed itself in the following terms:

> " It seems to us that in the exercise of our powers under the 'Oxygen Principle,' what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are Oxygen complaint so as to maintain consistency and certainty. We think the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the Oxygen Principle could easily become an unruly house."

I am of course alive also to the decision of the Court of Appeal in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission And Others C.A. Civil Appeal No. 228 of 2013 [2013 KECA 113 KLR] where Ouko JA [as he then was] with J Mohammed JA concurring and Kiage J.A dissenting, stated that:

> " Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should

> rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness." Emphasis added.

I have taken that route before – see for example my decision in the case of Francis Odongo Buluma v Priscah Nigh Manyuru & 2 Others Busia Elc Case No. 28 of 2017 [2025 KEELC 4887 KLR]. However, each case must be determined on the basis of it's own peculiar circumstances. No two cases can exactly be the same. In this case, not only is there a procedural lapse which, on its own, may have been curable under the Oxygen Principle including Article 159 [2] [d] of *the Constitution* but most importantly, there has been an inordinate and unexplained delay of 8 years in approaching this Court for the judicial review orders of Certiorari and Prohibition. The Respondent has also been prejudiced as he has had no opportunity to challenge any application for leave which is a pre-condition before any orders of Certiorari or Prohibition can issue. The case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission cannot be of any assistance to him in the circumstances of this case.

15. Even if this Court were to bend backwards and consider the Applicant's application for leave as also seeking extension of time within which to seek leave, it will still be beyond the jurisdiction of this Court to grant. There is binding judicial precedents that the 6 months period set out in the law cannot be extended. In the case of Wilson Osolo v John Ojiambo Ochola & A-G C.A. Civil Appeal No. 6 of 1995, the Court of Appeal after considering the provisions of Order 53 Rule 2 of the Civil Procedure Rules which is similar to the provisions of Section 9[3] of the *Law Reform Act* said there can be no extension of time to apply for leave to file suits after the expiry of a Limitation period. That case is binding on this Court.

16. It is clear from all the above that no leave was sought before filing the Notice of Motion herein. And even if such leave was sought, it would have been futile for being not only contra statute but also for having been sought after an inordinate delay which has not been explained satisfactorily or at all. It follows therefore that without leave as required both by the law and procedural rules, there is no basis upon which the Court can proceed to consider the prayers of Certiorari and Mandamus.

17. The up-shot of all the above is that the amended Notice of Motion dated 13th January 2025 is devoid of merit. It is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 25TH DAY OF SEPTEMBER 2025 WITH NOTICE TO THE PARTIES.

RIGHT OF APPEAL.

BOAZ N. OLAO

JUDGE

25TH SEPTEMBER 2025