



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC MISC. APP 1 OF 2017

REPUBLIC.....APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER

MAKINDU SUB-COUNTY, MAKUENI COUNTY.....RESPONDENT

DISMUS KASIO SIVA.....1ST INTERESTED PARTY

NDUKU KASIO.....2ND INTERESTED PARTY

CHARLES KASIO.....3RD INTERESTED PARTY

SAMMY KASIO.....4TH INTERESTED PARTY

DAUDI KASIO.....5TH INTERESTED PARTY

JAMES KASIO.....6TH INTERESTED PARTY

PETER KASIO.....7TH INTERESTED PARTY

ESTATE OF KASIO SIVA (DECEASED).....8TH INTERESTED PARTY

EX-PARTE JOEL MUTUKU MUSANGO,

DAVID MWANDAU, DANIEL KIILU MUSANGO

AND JOHN MWAU MUSANGO (*Legal representative*

of Simon Musango Mwandau)

RULING

1) What is before this court for ruling is the notice of preliminary objection by the Interested Parties dated 7th May, 2018 and filed in court on the 8th May, 2018. The Interested Parties contend that this suit is statute barred as it offends the mandatory provisions of Section 9(3) of the Law Reform Act Chapter 26 in that no leave to file the application was sought within 6 months of the judgement sought to be quashed. That the suit is statute barred as it offends the mandatory provisions of Order 53 Rule 2 of the Civil Procedure Rules, 2010 for orders of certiorari within six months of the judgement, as the application as time barred.

2) On the 8th May, 2018 the court directed that the preliminary objection be disposed off before the application by the Ex-parte Applicant could be heard.

3) The Interested Parties in their submissions stated that the time limit for an application for prerogative orders are provided for under Section 9(3) of the Law Reform Act Chapter 26 of the Laws of Kenya as follows:-

In the case of 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 judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law: and where that judgement, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for 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.

4) The counsel further cited Order 53 Rule 2 of the Civil Procedure Rules which provides as follows:-

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 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 bringing of appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appeal has expired.

5) Regarding the Applicant's application for enlargement of time made by the Applicants in their application for leave to institute judicial review, the counsel for the Interested Parties submitted that Section 9(3) of the Law Reform Act is a statutory provision and has no provision for extension of time. The Counsel added that rules made under the statute cannot override a statutory provision.

6) The counsel cited the case of Republic Vs Mwangi Ngunyi & 3 others Ex-parte Haru Ngunyi in Nbi High Court Misc. Application number 89 of 2008 where Odunga, J observed that;

“Judicial review proceedings ought as a matter of public policy be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognized that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve millions and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdiction and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes.”

7) Arising from the above, the counsel for the Interested Parties submitted that this court had neither the jurisdiction to grant leave to the Ex-parte Applicants to institute the present application nor did it have jurisdiction to entertain it. The counsel was of the view that the court had no choice but to down its tool without further ado. The counsel cited the case of Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd [1989] KLR 1, where Nyarangi, JA expressed himself as follows;

“Where the court takes itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given... jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court ...”

8) The Interested Parties further contend that the application before this court dwells on the merit of the case rather than in the decision process. Their counsel cited the case of Municipal Council of Mombasa Vs Republic & Umoja Consulting Ltd in Civil Appeal Number 185 of 2001 where the Court of Appeal stated that;

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself, the court would concern itself with such issues as to whether the decision makers had jurisdiction, whether persons affected by the decision were heard before it was made and whether the decision maker took into account relevant matter or did take into account irrelevant matters. The court should not act as a Court of Appeal over the deciders which involve going into the merits of the decision itself such as whether there was or there was no sufficient evidence to support the decision”

9) The Counsel also cited the case of Timotheo Makenge Vs Manunga Ngochi in Civil Appeal number 25 of 1978 (1979) KLR 53 where Law, JA stated;

“Section 12(1) of the Act imposes on the adjudication officer the duty, when hearing an objection “so far as practicable” to follow the procedure in the hearing of civil suit... but no such duty to follow the procedure laid down in hearing of civil suits is prescribed in respect of the minister. He is not bound to follow the prescribed procedure. His duty, under Section 29 of the Act is to “determine the appeal and make such order thereon as he thinks just” and that is exactly what the minister did in this case. He had in his mind to the previous litigation, but gave no effect to it and he was justified in doing so... and no breach of the rules of natural justice resulted from the ministers refusal to give effect to the decision in earlier litigation ... the minister had the jurisdiction to entertain the appeal, and even if he has reached a wrong decision, which may well be the case, his jurisdiction is not destroyed since he has jurisdiction to go right he has jurisdiction to go wrong.”

10) Arising from the above the counsel for the interested Parties submitted that the minister heard the appeal as presented to him by the parties and decided it as per the evidence before him. The counsel added that the minister went out of his way to hear all the parties who were present as dictated by the rules of natural justice and termed the contention that the minister acted ultra vires in taking fresh evidence as not true.

11) On the other hand, the counsel for the Ex-parte Applicants termed the preliminary objection as an afterthought since it was filed and raised after the parties had filed their final submissions. The counsel termed the preliminary objection as one that is prejudicial to the Ex-parte Applicants. He urged the court to dismiss it so that it can proceed to make a decision on the merits of the main motion since parties had already filed their submissions by the time the preliminary objection was raised. The counsel pointed out that the application by the Ex-parte Applicants is premised on the Constitution of Kenya, 2010, the Civil Procedure Act (Cap 21) Laws of Kenya, the Land Adjudication Act (Cap 284) of the Laws of Kenya and the Fair Administrative Act, 2015. The counsel went on to submit that the period of limitation indicated in Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules only applies to order of certiorari and, therefore, the other prayers for mandamus and prohibition cannot be subject of the preliminary objection.

12) Regarding the issue of the application being time barred and having been overtaken by events since when the Applicants filed their original notice of motion dated 10th May, 2017 they also sought leave to have the time for applying for the orders sought extended and leave for judicial review, the counsel pointed out that the interested parties have never applied to set aside the orders granted by the court and, therefore, they cannot be allowed to do so through a preliminary objection. The counsel went on to submit that the Interested Parties did not object and/or challenge the amendment of the original notice of motion which gave the court the power or authority to consider the dispute under the provisions of the Fair Administrative Act, 2015. The counsel added that Article 159 (d) of the Constitution 2010 clearly states that;

“justice shall be administered without undue regard to technicalities” The counsel pointed out Article 23(3) (f) of the Constitution makes judicial review orders part of the reliefs that courts can grant to enforce individuals’ rights as envisaged under the Bill of Rights and also that Article 47(1) entitles everybody to fair administrative action. The counsel was of the view that the Ex-parte Applicant’s rights should not be trumped under mere technicalities of the law. The counsel further submitted that since the Interested Parties have not challenged the leave that was granted by the court it, remains unchallenged and therefore the substantive notice of motion as amended is properly before this court.

13) The counsel further submitted that it has been held in numerous authorities that once leave has been granted, the proper procedure is for the Respondent who feels aggrieved to apply to set aside the said leave and cited the case of ***R v Communication Commission of Kenya & others Ex-parte East Africa Television Network Ltd [2001] EA*** which authority the Counsel did not provide. I will, therefore, ignore the said authority.

14) The counsel added that having failed to do so, the Interested Parties preliminary objection on grounds of being time barred cannot stand and should be dismissed with costs.

15) Having read the submissions that were filed by the Interested Parties and the Ex-parte Applicants, my finding is as follows;

A preliminary objection can be raised at any stage of the proceedings. In the circumstances, therefore, the preliminary objection herein is properly before this court.

It is clear that the Ex-part Applicants seek to quash the decision that was made by Deputy County Commissioner on the 4th December, 2015 vide their application dated 10th May, 2017 and amended on 27th July, 2017.

The Ex-parte Applicants contend that their application is not only brought under Order 53 Rule 3(1) of the Civil Procedure Rules but also under Article 159(1) of the Constitution, Sections 7(1), (2)(a), (ii), (d) and 11(a), (b) of the Fair Administrative Act. The latter Act does not provide for time period within which an application for judicial review should be made. The Ex-parte Applicants’ counsel in his submissions correctly indicated that under Article 23(3) (f) of the Constitution judicial review orders are part of the reliefs that the court can grant to enforce the individual rights envisaged under the Bill of Rights. In the case of ***Kiluwa Limited & Another V Commissioner of Lands and 3 others*** M.J Anyara Emukule, J had this to say regarding Article 23(3),

“what Article 23(3) of the Constitution does is to prescribe the various reliefs or remedies which the court may grant upon determination of a petition. There is n statutory period prescribed for commencement of petitions under either Article 22 or 258 of the Constitution. The grant of those reliefs as remedies are consequently not subject to any statute or period of limitation either under the Limitation of Actions Act (Cap 22, Laws of Kenya), or the Law Reform Act aforesaid”.

16) In so far as the Ex-parte Applicants herein have not approached the court by way of a Constitution petition, I would agree with the interested parties that the application herein which is brought by way of a miscellaneous application offends Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules. This court lacks jurisdiction to entertain this suit and it must down its tools (see *owners of motor vessel “Lilian S” V Caltex Oil (Kenya) Limited [1989] KLR 1*). Suffice it to say, the application has merits. In the circumstances, I hereby proceed to strike out the Ex-parte Applicants application with costs to the interested parties.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 18TH DAY OF JANUARY, 2019.

MBOGO C.G.,

JUDGE.

IN THE PRESENCE OF:

Mr. Hassan for the Interested Parties

No appearance for the Ex-parte Applicant

MBOGO C.G, JUDGE,

18/1/2019.