REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

JUDICIAL REVIEW APP. NO. 7 OF 2017

IN THE MATTER OF: APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION & MANDAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26, SECTIONS 8 & 9, LAWS OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF GOVERNMENT LANDS ACT CAP 281 LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT, CAP 281 (REPEALED)

AND

IN THE MATTER OF SURVEY ACT, CAP 299 (REPEALED)

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 (REPEALED)

AND

IN THE MATTER OF THE WATER ACT NO. 8 OF 2002

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

SETTLEMENT FUND TRUSTEE.....2ND RESPONDENT

DIRECTOR OF SURVEY.....3RD RESPONDENT

DIRECTOR OF LAND AND SETTLEMENT....4TH RESPONDENT

NATIONAL LAND COMMISSION.....5TH RESPONDENT

AND

JEREMIAH OTIENO OKENYE.....INTERESTED PARTY

EXPARTE APPLICANT

OSORO KENNEDY OMWOYO

R U L I N G

1. The ex parte Applicant, Osoro Kennedy Omwoyo **("the Applicant")** is a resident of Nyamira County, Gesima Settlement Scheme. The 1st, 2nd, 3rd, 4th & 5th Respondents caused land Gesima Settlement Scheme parcels No. **812** and **813 ("Public Plots")** to be alienated, allotted or amalgamated with Kisii/Gesima Settlement Scheme Parcel No. 45 which belongs to Jeremiah Otieno Okenye **("interested party").**

2. The Applicant filed an application by way of a Chamber Summons dated 13th December 2017, seeking leave for the following substantive orders:

> **a) An order of certiorari to remove to the High Court and quash the decision of the 1st, 2nd,3rd and 4th Respondent to allocate all that public parcel of land known as Gesima Settlement Scheme No. 812 and 813 to the Interested Party.**
>
> **b) An order of prohibition be issued restraining the 1st, 2nd, 3rd and 5th respondents by themselves, their employees, servants and or agents or other person(s) claiming through or under them from allocating, transferring, selling, disposing, encumbering of in any other way whatsoever and howsoever dealing with all that parcel of land known as Gesima Settlement Scheme No. 812 and 813 to the interested party.**
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> **c) An order of mandamus be issued to compel the 1st, 2nd, 3rd, 4th and 5th respondents to cancel the allocation, sell, auction and or alienation of public parcel of land known as Gesima Scheme 812 and 813 to the interested party or any other person.**
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> **d) An order of mandamus be issued to compel the 1st, 2nd, 3rd, 4th and 5th respondents to cancel the letter of allotment, grant, title, certificate of title or any other title documents issued to the interested party or any other person in respect of all that public parcels of land known as Gesima Settlement Scheme No. 812 and 813.**
>
> **e) In the alternative, an order of mandamus be issued to compel 1st, 2nd, 3rd, 4th and 5th respondents to revoke, annul and cancel title deeds Gesima settlement scheme 561, 562, 563, 564 and 565 and reinstate plot No. Gesima Settlement Scheme No. 812, 813 and 45 to its original boundaries and sizes as demarcated and surveyed by the Respondents vide the development plan map of 22nd December 1964.**

3. The application is supported by statement and verifying affidavit sworn on even date by the applicant. The facts are as follows. The interested party is the proprietor of **Kisii/Gesima Settlement Scheme Parcel No. 45** (**"Plot No. 45"**) which was separate and distinct from the public plots which were set aside to be utilized by the public as a cattle dip and a water catchment source. In August 1985 the 3rd Respondent published a map and amalgamated **Plot No. 45** with the public plots thus the 1st, 2nd & 4th Respondents enlarged the acreage of plot 45.The inclusion of the public plots into **Plot No. 45** was unprocedural, unlawful and illegal as the intention was to deprive the public, including the applicant of the use of public plots thus prejudicial to public interest. In 1998-1999 the interested party was the chairperson of Rigoko Dispensary Health Centre and caused members of the public to set aside funds to build said dispensary. On 4th December 2003, the 2nd Respondent transferred **Plot No. 45** (now consolidated with the public plots) to the interested party. Thereafter, on 4th April 2006 the interested party subdivided **Plot No. 45** into **Gesima Settlement Scheme No. 561, 562, 563, 564** and **565**.

4. On 11th January, 2018 the interested party filed his replying affidavit and a preliminary objection to the applicant's judicial review application. In the preliminary objection the interested party has sought to have the applicant's application struck out on the grounds that; the matter is *res judicata*, the leave granted to the applicant was null and void to the extent that it offends provisions of Order 53 Rule 1 of the Civil Procedure Rules 2010 and provisions of Section 8 & 9 of the Law Reform Act Cap 26 Laws of Kenya and the application is barred by the Limitations of Actions Act Cap 22 Laws of Kenya and the Land Registration Act 2012. The preliminary objection was further grounded on the fact that the ex-parte applicant has not satisfied the statutory threshold to warrant the orders of Judicial Review in the nature of Certiorari, Prohibition and Mandamus thus the instant application amounts to an abuse of due process of Court.

5. The court directed that the preliminary objection be first dispensed with before hearing of the substantive application. The preliminary objection was canvassed by way of written submissions with brief highlighting at the plenary hearing.

6. The interested party submitted that the allocation and/or alienation of the Plot No. **45** took place in 1964 and the amalgamation in 1985, thus the judicial review proceedings in the nature of certiorari was more than six (6) months old. He submitted that no leave should have been issued challenging the allocation and/or alienation and relied on the case of **Aga Khan Education Service Kenya -vs- Ali Seif & 3 Others, Court of Appeal C. A No. 257 of 2003 (Unreported)** as well as the case of **Rosaline Tubei & 8 Others -vs- Patrick K. Cheruiyot & 3 Others [2014] eKLR.**

7. It was their case that the order of prohibition sought by the applicant is powerless against a decision that has already been made, such an order could only prevent the making of a decision and quoted the holding of **Kenya National Examination Council -vs- Republic & 10 Others (Unreported) Court of Appeal Civil Appeal No. 266 of 1996**. It was also the interested party's submissions that the order of mandamus sought to cancel the letter of allotment was not sustainable as the order seeks to command performance of a public duty which has not been performed. The interested party extensively submitted that the appellant alluded to fraud in the allocation, alienation and alleged amalgamation of Plot No. **45** and the public plots. The interested party pointed out that in judicial review, the court is not seized with

jurisdiction to interrogate and/or investigate the merits of a dispute, the mandate of the court is merely concerned with ensuring that due process was complied with in the making of the decision. He also contended that the issues raised in this suit had been raised vide **Kisii ELC No. 38 of 2007 Lawrence Sese & 6 Others -vs- Jeremiah Otieno Okenya & Another** (unreported) filed for and behalf of the residents of Gesima Settlement Scheme and hence the suit is *res judicata*.

8. In opposition to the preliminary objection the applicant filed written submissions on 13th September 2018. He emphasised that the application for certiorari is not time barred. He called in aid the decision in **Nairobi HC Miscellaneous Civil Suit No. 273 of 2007 Republic -vs- Commissioner of Lands & 4 Others** (unreported) in which I sat as a member of a three Judge Bench and we held that the 6 months limitation period for a party to apply for order of certiorari only applies to judgements, orders, decrees, convictions or other like proceedings by the court or other quasi judicial institutions. He reiterated that **Order 53 Rule 2 of the Civil Procedure Rules** covers specific matters and the six month limitation period only affects the specific formal orders mentioned therein and nothing else (**Republic -vs- Commission of Inquiry into the Goldenberg Affair and 3 Others Ex-parte Mwalulu & 8 Others, Misc. Application 1279 of 2004**). Thus the preliminary objection should be rejected as it is not in regard to all matters that judicial review must be sought before the expiry if six months of the decision sought to be quashed. It was his submission further that if the prayer of certiorari succeeds, then the order of prohibition comes into play, thus the order of prohibition in the notice of motion is purely futuristic. As for the order of mandamus he submitted that his prayer for mandamus fulfils all the characteristics for an order of mandamus and thus the interested party's arguments are unmerited. It was his further submissions that findings on fraud warrant a full trial and that in this case the law applicable to limitation period was Order 53 of the Civil Procedure Code. On whether the matter was res judicata, the applicant submitted that **ELC No. 38 of 2007** (supra) was a case *in personam* and not *in rem*. The judgement was binding upon the parties to the suit and not third parties. The issue of *res judicata* thus does not arise.

9. In determining whether the preliminary objection can be sustained, the court is guided by the decision in **Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors Ltd (1969) EA 696** where it was held as follows:

> **"A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of judicial review does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."**

10. Thus, from the parties submissions the issues this court is called to determine are as follows:

> **a) Whether this matter is res judicata.**
>
> **b) Whether the suit is time barred.**
>
> **c) Whether the applicant has established any grounds for judicial review orders of certiorari, prohibition and mandamus.**

11. The doctrine of *res judicata* is provided for under Section 7 of the Civil Procedure Act which provides as follows:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

For the doctrine to be applied, it must be established that all of the following elements have been satisfied:

> ***a. The suit or issue was directly and substantially in issue in the former suit.***
>
> ***b. That former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***c. Those parties were litigating under the same title.***
>
> ***d. The issue was heard and finally determined in the former suit.***
>
> ***e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.***

12. In the case of **The Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal explained the role of the doctrine thus:

> **"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."**

In **Lotta -vs- Tanaki [2003] 2 EA 556** it was held as follows:

> **"The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit."**

13. Having outlined the above principles on *res judicata*, it is pertinent to determine whether the parties in **Kisii ELC Case No. 38 of 2007** are the same as the parties in the instant case for res judicata doctrine to be held to be applicable, if it is further established the two suits raise the same or similar issues which were finally determined in the earlier court. In **ELC Case No. 38 of 2007** there were a total of 7 plaintiffs who vide a plaint dated 4th April 2007 sued the interested party herein on their own behalf and on the behalf of members of Gesima Settlement Scheme and Rigoko Community. In its judgement the court in **ELC Case No. 38 of 2007** observed as follows:

> **"The Plaintiffs' following a ruling by Musinga, J. (as he then was) on 20th July 2009, amended the plaint on 29thJuly 2009 to the intent that their claim was for and on their own behalf as individuals and not on behalf of the community who were not a registered society or organization."**

14. The decision in ELC Case No. 38 of 2007 was made after the plaintiffs amended its plaint to the extent that the orders sought therein would only apply to them. It is therefore important that a distinction be drawn between decisions which are *in personam* and those which are made *in rem*. In **Kamunyu and Others -vs- Attorney General & Others [2007] 1 EA 116** it was held that:

> **"In a suit seeking judgement *in rem,* that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world."**

In **Japheth Nzila Muangi -vs- Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was held:

> **"It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement in personam. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement in rem. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally."**

15. The effect is that orders *in personam* do not affect third parties, and in this case the applicant is such a third party. I find and hold that the application before me is not *res judicata* given that the parties to the suit are not similar or the same as in the earlier determined suit.

16. The second issue for determination is whether the applicant's application is time barred. A brief review of the facts presented in the cases that have been cited by the parties' is appropriate for purposes of appreciating their precedent value. Precedents should only be followed to the extent that they define the path of justice, but in paying deference to the doctrine of precedence one must be cautious to shed off the dead wood and trim off the side branches or else you find yourself lost in the thickets and branches (See the **High Court of Delhi at New Delhi February 26, 2007 W.P (C). No. 6254/2006 Prashant Vats -vs- University of Delhi & Another-Citing Lord Denning**).

17. The interested party relied on the case of **Rosaline Tubei** (supra) where the applicant sought leave to commence judicial review proceedings out of time. It also sought leave to apply for an order of Certiorari to quash proceedings and decision of the Koibatek Land Disputes Tribunal and decision of the Senior Resident Magistrate's Court at Eldama Ravine. Both decisions had been made after 4 and 3 years had lapsed respectively. The court declined to extend time for commencement of judicial review proceedings as they had been brought after the expiry of the 6 months statutory period.

18. In the **Aga Khan Education Center** (supra) case the Court of Appeal was called to determine an application by the appellants. The facts were that the respondents had filed judicial review proceedings on 9th January 2002 before the High Court and sought an order of certiorari to quash the directive of the Minister of Education which allowed the school to be managed by the appellant. The Court of Appeal agreed with the finding of the trial court which directed that since the affidavit in support of the application indicated that the order became known to the Respondents on 20th December 2001 and the directive took effect in January 2002, the respondents' application was within time. The court also noted that if it turned out at the hearing of the motion that provisions of Section 9 of the Law Reform Act would apply, then the interested party and the appellant would be vindicated.

19. The Applicant relied on the case of **Republic -vs- Commission of Inquiry into the Goldenberg Affair** (supra), in that case the applicant vide an application dated 30th September 2004 sought an order of certiorari to quash Rule (i) of the Rules and Procedures made by the 2nd Respondent vide Gazette Notice 1566/2003 dated 5th March 2003 to the extent that the rule converts the respondents statutory power to summon witnesses from mandatory to discretionary power. The respondents argued no application for relief could be entertained outside the 6 months limit. The court held that the six month limitation only affects the specific formal orders mentioned in Order 53 and nothing else. It was the courts holding that the act of making an ultra vires rule is outside the limitation.

20. In the case of Nairobi HC Misc Suit No. 273 of 2007 (supra) the applicant therein alleged that the respondents irregularly allotted to the 1stinterested party a parcel of land which had been set aside as a road reserve. The respondent argued that the letter of allotment was issued on 26th June 1999 while the application for judicial review was made on 19th March 2007, thus the application was out of the 6 months period. It was the applicant's claim that it came to know of the decision in 2006. The court held that**: a decision to alienate or to allocate land is not a formal order because the commissioner may in most cases issue titles without necessarily making the decision and the date he made the decision formal, and the time limitation cannot apply to such a decision.** In **Republic -vs- Kenya National Highways**

Authority & 2 others ex-parte Amica Business Solutions Limited [2016] eKLR the Court of Appeal observed as follows:

> **"The decision complained of is unique in the sense that the decision of the 1st respondent arose out of the request by the 3rd respondent. At no time were there formal proceedings leading to the decision. The decision was in a letter responding to 3rd respondent's request for permission to erect and maintain billboards and gantries. The elephant in the room here is whether that communication qualifies as one of the acts contemplated under Section 9 (3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.**
>
> **There has been debate as to whether the six months limitation envisaged in order 53 Rule 2 of the Civil Procedure Rules applies strictly to *"any judgment, order, decree, or conviction, or other proceedings'',* or whether this also includes decisions of other kinds, or letters such as the one that is the subject of this case.**
>
> **In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the case here."**

21. In the circumstance, I find that the court in its discretion to grant leave made no error on its part and I fully associate myself with the initial orders of the court granting leave for the application to be made. It is also important to note that under the Constitution of Kenya, 2010 specifically under **Article 47 the administrative processes are more of a constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law but is to be measured against the standards established by the Constitution.**

22. On the issue of whether the applicant has established any grounds for judicial review orders of certiorari, prohibition and mandamus, the court must be alive to the fact that it is only dealing with preliminary objection issue and cannot enter the realm of considering the merits and/or demerits of the application as that will be the preserve of the trial court. A preliminary objection must be predicated on points of law and facts that are agreed. Prof. Ojwang, J. (as he then was) observed as follows in the case of **Oraro -vs- Mbaja (2005) 1KLR 141** that:

> **"Anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive foundation from factual information which stands to be tested by normal rules of evidence. If the Applicant's instant matter required the affidavit to give it validity before the court, then it could not be allowed to stand as a Preliminary Objection…"**

23. to determine the merits and/or demerits of the application will entail receiving and taking arguments from the opposite parties analysing and evaluating the same and ultimately make the determination. That cannot be within the ambit of a preliminary objection.

24. I have said enough to demonstrate that the preliminary objection is unsustainable and the same is hereby rejected. The costs occasioned by the preliminary objection will abide the outcome of the application.

RULING DATED, SIGNED and **DELIVERED** at **KISII** this **8TH DAY** of **MARCH 2019.**

J. M. MUTUNGI

JUDGE

In the Presence of:

N/A for the applicant

N/A for the 1st, 2nd, 3rd and 4th respondents

N/A for the 5th respondent

Mr. Olando for the interested party

N/A for the Ex parte applicant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE