

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ELCL JR NO. E003 OF 2023

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
FOR AN ORDER OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF
KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

AND

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4
OF 2015**

**IN THE MATTER OF ARTICLE 22, 23, AND 47 OF THE
CONSTITUTION OF KENYA 2010
BETWEEN**

REPUBLIC APPLICANT

VERSUS

**THE ATTORNEY GENERAL 1ST
RESPONDENT**

**THE PRINCIPAL SECRETARY MINISTRY OF
LANDS AND PHYSICAL PLANNING (THRO' COMMISSIONER
KYUSO SUB-COUNTY) 2ND
RESPONDENT**

**THE CHIEF LAND REGISTRAR 3RD
RESPONDENT**

**MUTUKU MAILU 1ST INTERESTED
PARTY**

**KONGO SYENGO 2ND INTERESTED
PARTY**

**ANNA MUTHAKYE SYENGO 3RD INTERESTED
PARTY**

RULING

1. I am called upon to determine a preliminary objection filed in court vide a notice to raise it dated 23/4/2024. The objection was raised by 2nd and 3rd interested parties - KONGO SYENGO and ANNA MUTHAKYE SYENGO - and its cardinal points are as follows:

(i) The Notice of Motion offends the mandatory provisions of the law and in particular Order 53 Rule (2) and (4) of the Civil Procedure Rules, 2010.

(ii) The proceedings herein were commenced out of the time prescribed by law.

(iii) No relief is available to the ex parte applicant in the manner sought in the pleadings.

(iv) The proceedings herein are fatally defective, and abuse of the court process and the same ought to be struck out in limine with costs to the interested parties.

2. To give context to the objection, it is necessary to point out that the matter herein is a judicial review application seeking prerogative orders of certiorari and prohibition. The Judicial Review application is itself a logical sequel to an earlier

application dated 24/10/2023 seeking leave to move the court to obtain the aforesaid prerogative orders. That earlier application was allowed by this court, hence the current application now seeking the orders.

3. The 1st interested party's response to the judicial review application came vide a replying affidavit dated 21/2/2024. It is a robust denial and rebuttal of the matter at hand. The replying affidavit contains some history and antecedents which paint the Ex parte Applicant as somebody driven by greed. The 1st interested party emphasizes clearly in his response that it is him, and not the ex-parte applicant, who owns the disputed parcels of land. The 2nd and 3rd interested party only filed the preliminary objection. I don't see any other response from them.
4. The respondents on their part filed grounds of opposition denying the ex-parte applicant's averments.
5. The ex-parte applicant filed a replying affidavit to the objection. It is dated 30.8.2024 and he stated, inter alia, that the objection as filed is not based on pure points of law and that while the interested parties think that time to file judicial review proceedings started running when the

decision was made, he himself got the proceedings much later and there was no formal communication of the decision. Time, according to him, should start running from the time he got aware of the decision. His view is that the court needs to make a determination on these two conflicting positions.

6. The objection was canvassed by way of written submissions. The interested party's submissions are dated 15/10/2024 while ex parte applicant's submissions are dated 30/9/2024.
7. The interested parties submitted, inter alia, that the application for a judicial review was filed out of time. Section 9 (3) of the Law Reform Act was quoted to make the point that where a party is seeking for an order of certiorari the application for leave to get that order has to be made within six (6) months after the date of the order or decision being challenged. In further support of the position, Order 53 Rule 2 of the Civil Procedure Rules was also cited.
8. The decision being challenged in this matter was said to be dated 13/6/2022 while the application for leave to quash the decision was said to have been filed on 15/11/2023. This is over one year from the time of the decision. This court was

said to lack jurisdiction to entertain the application. The case of **Wilson Osolo -vs- John Ojuambo Ochola and Another [1996] eKLR** was cited and quoted to show, inter alia, that the six months' period cannot be extended. This is the same position which was espoused in the case of **Chabari -vs- District Land and Adjudication Officer, Meru South Maara District & 3 others [2024] KEELC 1128 (KLR)**, which was again cited and quoted.

9. Noting that the ex parte applicant had emphasized that the date he received the decision is the one to be considered concerning the running of time, the interested parties submitted thus; *“The date when a copy of the decision was supplied is irrelevant in determining whether an application was filed outside the limitation period.”*
10. The application was also said to be fatally defective as it allegedly offends the provisions of Order 53 (1) and (4) of the Civil Procedure Rules. The provision is said to be mandatory and it requires, inter alia, that the reliefs to be sought in the judicial review application be spelt out clearly when leave to file such matter is being sought. The

application for leave is supposed to be accompanied by a statement containing, *inter alia*, the remedies being sought.

11. In this regard, the interested parties faulted the Ex-parte Applicant for spelling out the reliefs in a manner showing that what is to be sought is leave to file an application to seek orders of certiorari and prohibition instead of actually stating exactly the reliefs he would be seeking in the substantive application for Judicial Review. To reinforce this submission, the case of **Malawi Railways Ltd -vs- Nyasulu [1998] MWSC 3** was cited and quoted.

12. Further, the interested parties submitted that while the reliefs stated in the statement accompanying the application for a leave refer to a decision dated 23/6/2022, the substantive application for judicial review filed later refer to a decision dated 13/6/2022.

13. Ultimately, this court was urged to strike out the matter.

14. The ex parte applicant on his part submitted, *inter alia*, that the decision sought to be challenged was communicated to the parties on 18/5/2023 and that is when he got to know of the decision. It was pointed out that the proceedings were conducted on 27/11/2022. The decision however was not

delivered to the parties. The ex parte applicant wrote several letters asking about the decision and he only got the decision of 18/5/2023.

15. The ex parte applicant further said the issue as to when time started running for filing a judicial review is seriously contested and the issue itself was said to be not a pure point of law.

16. For persuasion and/or guidance, the cases of **Mukisa Biscuit Manufacturing Company Limited vs- West End Distributors [1969] EA 696, George Oraro -vs- Barak Eston Mbaja [2000] eKLR**, and **Independent Electoral and Boundaries Commission -vs- Jane Cleperenge & 2 others [2015] eKLR**, among others, were cited.

17. This court was finally urged to dismiss the objection with costs to the ex parte applicant.

18. I have considered the preliminary objection and in order to appreciate more fully the context in which it has been brought, I have had a look into the entire matter as filed. In my view, the issue to address is whether the merits of the objection have been demonstrated.

19. The essence and definition of a proper preliminary appear in the case of **Mukisa Biscuit Co. Ltd. -vs- West End Distributors Ltd. [1969] EA 696**, as follows:

Per: Law JA:

“So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, a plea of limitation; or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Per: Sir Charles Newbold P.

“A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

20. From the aforesaid position as espoused in Mukisa’s case (supra), it is clear that a preliminary objection should be on

a pure point of law. It should be based on undisputed or incontrovertible facts and it cannot be raised if any facts require interrogation by the court. Further, such an objection cannot be raised where use of court's discretion is required.

21. To shed more light on what a proper preliminary is, or should be, the case of **Oraro -vs- Mbaja [2005] KLR 141** is apt. In the case, Ojwang, J. (as he then was) stated as follows:

“A preliminary objection correctly understood is now well defined as, and declared to be, a point of law which must not be blurred by factual details liable to be contested, and in any event to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication is not, as a matter of legal principle a true preliminary objection which the court should allow to proceed.”

22. And in **Eunice Karimi Kibunja -vs- Mwirigi M'Ringeri: CA No. 103 of 1996, Court of Appeal Nyeri [1996] KECA 85 (KLR)**, a three Judge bench (JE Gicheru, R. O.

Kwach and A. A. Lakha (JJA's), as they then were) expressed itself as follows while handling an appeal from a ruling and decree of the High Court of Kenya at Meru (delivered by Kuloba J, as he then was) dated 4/3/1993:

“The issue before the court clearly required a full hearing and we reiterate that the practice of raising points, which should be argued in the normal manner, by way of a preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. A preliminary point cannot be raised if any facts has to be ascertained.”

23. Turning now to the matter at hand, it is easy to appreciate that the matter before the court requires the exercise of court's discretion. Prerogative orders of certiorari and prohibition are essentially discretionary remedies. It goes without saying therefore that the raising of the preliminary objection by the 2nd and 3rd interested parties runs afoul of the requirement that an objection cannot be raised if what is sought involves the use of judicial discretion.

24. Secondly, it is a seriously contested point whether the six-month period within which an order of certiorari can be applied for to quash a decision starts running when the

decision is made or when it is communicated to the parties. The court would obviously need to pronounce itself on that issue. The court can only accept to handle the issue preliminarily if the ex parte applicant is not contesting the aspect of time. As things stand now, the issue is contested and the objection before me is wanting in terms of its suitability as a proper preliminary objection.

25. Thirdly, the 2nd and 3rd interested parties are attacking the substance essentially contained in the application for leave. That application was considered and allowed by this court differently constituted. Via the preliminary objection now before the court, this court is now being invited to consider afresh the substance of what had been considered earlier. It does not fall within the remit of this court to reconsider by way of a preliminary objection what can be deemed to have been considered earlier by itself. The court would need to be moved in a different manner if an exercise or consideration of that kind has to be undertaken.

26. The upshot in light of the foregoing, is that the objection before the court is for dismissal. Its merit has not been demonstrated and it is not even a proper preliminary

objection in the eye of the law. The objection is therefore hereby dismissed. Costs in the cause.

RULING DATED, SIGNED and DELIVERED in open court at **KITUI** this **16TH DAY** of **OCTOBER, 2025**.

In the presence of,

Court Assistant - Musyoki

Applicant - Absent

Respondent - Absent

Interested Party - Absent

Kinyua for Ex-parte Applicant

Mandela for 1st Interested Party

M/S Esami for Nyamu for 2nd Interested Party

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI