Woche (Suing as the Legal Administrator of the Estate of Woche Imala Deceased) v Senior Resident Magistrate's Court Moyale; Sode (Interested Party) (Environment and Land Judicial Review Case E001 of 2023) [2025] KEELC 5747 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5747 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023

JO MBOYA, J

JULY 31, 2025

BETWEEN

ABI WOCHE [SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF WOCHE IMALA DECEASED] ..... APPLICANT

AND

THE SENIOR RESIDENT MAGISTRATE'S COURT MOYALE ... RESPONDENT

AND

ADAN CHULA SODE ..... INTERESTED PARTY

JUDGMENT

1. The Ex-parte applicant herein [who has however, been described as the Applicant on the face of the application] has approached the court vide the Notice of Motion Application dated 24th February 2023; and wherein same has sought the following reliefs;

    i. That order of certiorari to bring to the high court to quash the proceedings and orders of the court in S.R.M.C. NO. 2 of 2008 – Moyale issued on the 30/4/2008 – Adan Chula vs Woche Imala.

    ii. That costs of this application be provided for.

2. It is instructive to state that the application beforehand is premised on the statement of facts dated 8th February 2023; the affidavit in verification of statement of facts, sworn by Abdi Woche Imala [the deponent] on even date. Furthermore, the application is said to be premised on the various grounds contained in the body thereof.

3. Additionally, the application is supported by the further affidavit sworn by the applicant and wherein the applicant has reiterated the averments contained in the body of the affidavit in verification of the statement of facts.

4. The interested party herein filed a replying affidavit sworn on 24th March 2025 and wherein same has annexed assorted documents. The documents annexed to the replying affidavit include a copy of the judgment delivered vide Moyale SRMCC No. 2 of 2008; copy of land sale agreement dated 12th June 2008, copy of the ruling vide Nairobi HCC Misc. Application No. 512 of 2008; copy of duly extracted order dismissing appeal no. Milimani HCCA 125 of 2009 for dismissal and copies of assorted receipts demonstrating payment of rates to the county government of Moyale.

5. The respondent [senior resident magistrate's court Moyale] does not appear to have entered appearance and or filed any response to the application. For good measure, no such response is traceable to and or obtainable by the court tracking system. [e-platform].

6. The application came up for hearing on 26th March 2025, whereupon the advocates for the parties agreed to canvass same by way of written submissions. To this end, the court proceeded to and circumscribe the timelines for the filing and exchange of the written submissions.

7. The exparte applicant [applicant] filed written submissions dated 16th June 2025 and wherein same has highlighted two key issues for consideration by the court; namely, whether the applicant is deserving of the prayer for enlargement of time and whether the applicant's case meets the threshold needed to warrant the granting the orders of certiorari sought.

8. Regarding the 1st issue, learned counsel for the applicant has submitted that this court is seized of the requisite jurisdiction, leave and or extension of time within which to file an application for judicial review. In particular, it has been submitted that the court can grant extension of time to file such an application, where it is shown that the applicant was prevented through fraud or misrepresentation, from getting to know of the administrative action in question.

9. Additionally, learned counsel for the applicant has submitted that in respect of the instant matter, the applicant has laid before the court sufficient basis and or explanation to warrant the extension of time. In this regard, learned counsel for the applicant has posited that the applicant's deceased father, namely, Woshe Imala, found out about Moyale SRMC No. 2 of 2008 when same [deceased] was served with the judgment dated 30th April 2008. Moreover, it was contended that upon discovering about the existence of the said suit and the judgment thereunder, the deceased proceeded to and instructed the firm of Ms. P.K Murithi & Co. Advocates.

10. Furthermore, it has been submitted that thereafter the said advocates advised the deceased to file an appeal in Nairobi. Besides, it has been posited that the advise to file the appeal in Nairobi was because Moyale was inaccessible at the time in question. In any event, it has been contended that the highway to Moyale was only completed in 2017.

11. Other than the foregoing, learned counsel for the applicant has also submitted that an appeal was subsequently filed. To this end, learned counsel has referenced Milimani HCCA 125 of 2009. Nevertheless, it has been submitted that the prosecution of the said appeal was curtailed by several circumstances, including what is said to be the unavailability of the lower court file.

12. On the other hand, it has been contended that subsequently, the firm of Ms. Mabeya and Mabeya Advocates was instructed and took over the conduct of the appeal in 2023. However, learned counsel has submitted that the said advocates could not progress the prosecution of the appeal because same were frustrated by the inactions of the previous advocate on record.

13. From the catalogue of issues captured and highlighted at the foot of paragraph 13 of the applicant's submissions, it has been contended that the applicant has therefore established a sufficient cause to warrant the extension of time for purposes of lodging the judicial review applications.

14. With respect to the 2nd issue, learned counsel for the applicant has submitted that the applicant has demonstrated and established that the orders of certiorari ought to be issued. In particular, it has been contended that the subordinate court [Moyale senior resident magistrate's court], which entertained the dispute and thereafter rendered the impugned judgment, was not seized of the requisite jurisdiction to handle land matters.

15. Moreover, it has been submitted that the subordinate court, including the respondent herein was only vested with jurisdiction to entertain and adjudicate upon land matters following the promulgation of the 2010 constitution. In this regard, learned counsel for the applicant has posited that the subordinate court therefore entertained and adjudicated upon the dispute without the requisite jurisdiction. [see the contents of paragraphs *21* & 22 of the written submissions].

16. Flowing from the foregoing submissions, learned counsel for the applicant has therefore contended that the impugned decision was void ab initio and thus same ought to be quashed. In any event, it has been submitted that where a court is divested of jurisdiction, such a court is obligated to lay down its tools and in the event of proceedings and decisions being undertaken by such a court, such proceedings are a nullity.

17. Learned counsel for the applicant has thereafter cited and referenced various decisions, including the Owners of Motor Vessel Lillian "S" vs Caltex Oil Ltd (1989) eKLR and Mumo Matemu vs Trusted Society of Human Rights Alliance & others (2013) eKLR.

18. Premised on the foregoing, learned counsel for the applicant has therefore implored the court to find and hold that the impugned judgment is a nullity and thus an order of certiorari ought to issue.

19. The interested party filed written submissions dated 23rd July 2025 and wherein same has raised and canvassed three key issues for consideration and determination. The issues canvassed by the interested party are namely; whether the applicant herein has the legal authority/capacity to initiate the current suit; whether the current suit can be sustained under the provisions of sections 8 & 9 of the *law reform act* cap 26 laws of Kenya or otherwise; and whether the application by the ex-parte applicant has been mounted with unreasonable and inordinate delay.

20. Regarding the 1st issue, learned counsel for the interested party has submitted that the deceased is said to have died on 13th June 2012. However, it has been contended that an application was filed vide Nairobi HCCA No. 125 of 2009 and which application was supported by an affidavit of Woshe Imala. To this end, it has been contended that it was not possible for such an affidavit to have been sworn by Woshe Imala [deceased] on the 9th October 2017, yet same is indicated to have died on 13th June 2012.

21. In this regard, learned counsel has therefore submitted that the applicant herein appears to be one who engages in fraudulent and unlawful proceedings and to this end, this court should determine whether the subject proceedings are bonafide or constitute an abuse of the due process of the court.

22. With regard to the 2nd issue, learned counsel for the interested party has submitted that in so far as the applicant has invoked the provisions of sections 8 & 9 of the *law reform act* as read together with order 53 of the civil procedure rules, this court can only engage with the process only. Moreover, it has been submitted that the court is divested of the requisite jurisdiction to entertain a merit review.

23. In support of the foregoing submissions, learned counsel for the interested parties has cited and referenced the decision of the supreme court in the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment).

24. Be that as it may, learned counsel for the interested party has submitted that what the applicant is now asking the court to do is to engage with a merit review so as to ascertain the validity and or propriety of the judgment of the court. Suffice it to state that learned counsel has posited that the validity of the said judgment could only be addressed by way of an appeal and not otherwise.

25. Additionally, learned counsel for the interested party has submitted that the subordinate court [including the respondent] was seized of jurisdiction to entertain and adjudicate upon land matters. In this regard, learned counsel has cited and referenced the provisions of section 159 of the Registered *Land Act*, Cap 300 Laws of Kenya [now repealed] and section 9 of the Magistrate's Act, Cap 10 Laws of Kenya [now repealed].

26. Based on the foregoing, learned counsel for the interested party has submitted that the contention by the applicant that the respondent did not have jurisdiction to entertain the land dispute is therefore premised/anchored on a misapprehension of the law. Simply put, learned counsel for the interested party has submitted that the respondent herein entertained and adjudicated upon the land ownership dispute in accordance with the law.

27. Regarding the last issue, learned counsel for the interested party has submitted that the current application has been mounted and lodged with unreasonable and inordinate delay. To this end, learned counsel has pointed out that the impugned judgment was rendered on the 30th April 2008 and yet the application herein was only filed in February 2023. Furthermore, learned counsel has computed the timeline and stated that the delay amounts to more than 16 years.

28. On the other hand, it has been submitted that the suit property, which is the subject of the current proceedings, was subsequently subdivided by the interested party and portions thereof were sold to third parties. Moreover, it has been posited that the 3rd parties who purchased the portions of the suit property have not been joined in the subject suit.

29. Flowing from the foregoing, learned counsel for the interested party has submitted that the subject proceedings are defeated by the doctrine of laches, arising from the inordinate and unexplained delay.

30. In the premises, learned counsel for the interested party has invited the court to find and hold that the application beforehand is premature, misconceived, and legally untenable. The court has been invited to dismiss the application with costs.

31. Having reviewed the application, the response thereto and upon taking into account the submissions by learned counsel for the parties, I come to the conclusion that the determination of the subject application is premised on three key issues, namely; whether the application beforehand is competent or otherwise; whether the court is seized of jurisdiction to extend time for filing judicial review proceedings under the provisions of order 53 of the civil procedure rules and whether the order of certiorari ought to issue or otherwise.

32. Regarding the 1st issue, namely whether the application is competent or otherwise, it is worthy to recall and reiterate that the subject application seeks orders of certiorari. To the extent that the application beforehand seeks the orders of judicial review in the nature of certiorari, it is common ground that the applicant was obligated to seek and obtain leave of the court before filing the substantive notice of motion application. [See Order 53 Rule 1 of the Civil Procedure Rules].

33. For good measure, the applicant herein appears to have been knowledgeable of the obligation to seek for and obtain leave of the court. In this regard, the applicant herein filed the chamber summons application dated 24th February 2023. However, there is no court record showing that the chamber summons application seeking leave to file judicial review was ever heard and or disposed off. Notably, the first time the application was placed before the court, Hon. Justice Njagi, Judge [now retired] stated as hereunder;

> 28th February 2023
>
> Before J.N Njagi – Judge
>
> Court: I have perused and considered the notice of motion dated 24th February 2023. There is no urgency shown in the application. It is hereby ordered that the applicant to serve the application on the respondent and the interested party. Matter to be mentioned on 16th March 2023.

34. On the 16th March 2023, the matter was placed before the learned judge who thereafter proceeded to and directed same be mentioned on 25th May 2023. Thereafter, the matter was mentioned and the same was ordered to be transferred to Isiolo ELC for hearing and eventual disposal.

35. Back to the issue of whether leave was procured. It is not lost on me that the substantive notice of motion is dated 24th February 2023, being the same date as the chamber summons. Furthermore, the two applications were filed together. In addition, even though the applicants filed both the chamber summons application for leave and the substantive notice of motion, the applicant did not pursue the question of leave. In any event, it is evident that no leave was ever granted.

36. In the premises, there is no gainsaying that the subject application [notice of motion dated 24th February 2023] was filed without leave. Absent leave, the notice of motion application is incompetent and legally untenable.

37. Other than the fact that no leave was ever sought and or obtained, it is also important to highlight that an order of certiorari under the provisions of sections 8 & 9 of *Law Reform Act* Cap 26 Laws of Kenya; as read together with order 53 cannot issue unless the application is filed within a timeline of 6 months from the date of the impugned decision and or proceedings. In this regard, it suffices to take cognizance of the provisions of Order 53 Rule 2 of the Civil Procedure Rules.

38. For ease of appreciation, it suffices to reproduce the said provisions. Same are reproduced as hereunder;

> Time for applying for certiorari in certain cases [Order 53, rule 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 its 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; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn.
>
> The application for leave until the appeal is determined or the time for appealing has expired.

39. Arising from the foregoing perspectives, what becomes apparent is that the application beforehand is incompetent and irredeemably bad. Same is beyond redemption. For good measure, the application is a nullity from the onset.

40. Turning to the 2nd issue, namely whether the court has jurisdiction to extend time for lodgment of a judicial review, it is important to start by highlighting that an applicant is at liberty to either commence judicial review proceedings under the common law heading [traditional judicial review] or under the Fair Administrative Actions Act 2015. For coherence, the parent law invoked informs the nature of reliefs that a court can grant and also the scope of the jurisdiction of the court. [See Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) at paragraph 85 thereof.

41. In respect of the instant matter, it is worthy to recall that the application for judicial review was filed pursuant to the provisions of sections 8 & 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules. To the extent that the application was brought under the same provisions, the question that does arise is whether a court of law can grant an extension of time, where no express provision exists.

42. It is also instructive to recall that the provisions of order 53 of the Civil Procedure Rules [though housed in the Civil Procedure Rules] are not subject to the provisions of Order 50 of the Civil Procedure Rules, which regulates extension of time. In this regard, it is common ground that no application for extension of time to file for a judicial review can be entertained under the provisions of Order 53.

43. I am aware that the applicant's counsel has invoked the provisions of section 6 of the Fair Administrative Actions Act in an endeavor to procure an extension of time. However, I beg to underscore that the current application was filed pursuant to the provisions of Sections 8 and 9 of the *Law Reform Act* as read together with Order 53 of the Civil Procedure Rules. To this end, the applicant cannot now seek refuge in the provisions of section 6 (2) of the Fair Administrative Actions Act (2015).

44. Other than the foregoing, it is also important to highlight that the prayer for extension of time within which to lodge the judicial review proceedings does not form part of the application dated 24th February 2023. For good measure, the prayer for extension of time has been sneaked in vide the submissions. Nevertheless, there is no gainsaying that every litigant is bound by his/her pleadings. [see order 2 rule 6 of the Civil Procedure Rules 2010]. [see also the holding in IEBC vs Stephen Mutinda Mule (2014) eKLR; Dakianga Distributors Ltd vs Kenya Seed Co. Ltd (2015) eKLR and Raila Odinga and others vs IEBC & others (2017) KESC].

45. Additionally, it is important to point out that judicial review proceedings commenced under the common law heading [order 53 of the Civil Procedure Rules] are underpinned by the statements of facts. For coherence, the statement of facts and the affidavit in verification thereof constitute the pleading that anchors the judicial review proceedings. In this regard, it is incumbent upon the applicant to ensure that the substantive reliefs [if any] to be sought are captured in the body of the statement of facts. Absent such pleadings, no relief can be propagated in the body of the substantive application.

46. To this end, it is instructive to cite and reference the decision of the court of appeal in the case of Commissioner General, Kenya Revenue Authority through Republic v Silvano Onema Owaki t/a Marenga Filling Station [2001] KECA 34 (KLR), where the court stated as hereunder;

> We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:
>
> "The application for leave "By a statement" - The facts relied on should be stated in the affidavit (see R. v. Wandsworth JJ., ex p. Read [1942] 1 K. B. 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought,

and the grounds on which it is sought. I t is not correct to lodge a statement of all the facts, verified by an affidavit."

At page 283 of the report of the case of R. V. Wandsworth Justices, Viscount Caldecote C.J. said:

" The Court has listened to argument on the proper procedure or remedy i n the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case o f excess of jurisdiction."

The court in the Wandsworth case was considering the provisions of Order 53 of the English Rules of the Supreme Court which are in pari materia with our Order LIII of the Civil Procedure Rules.

47. Without belabouring the point, it is my finding and holding that the issue as pertains to extension of time for lodgment of the judicial review proceedings, has been propagated in vacuum. In this regard, there is no gainsaying that same cannot be entertained and or adjudicated upon by this court.

48. Next is the issue as to whether the applicant herein has demonstrated a basis to warrant the issuance of the orders of certiorari. Notably, the applicant herein contends that the applicant was not seized of the requisite jurisdiction to entertain and adjudicate upon land disputes. Furthermore, the applicant has posited that the subordinate court only acquire jurisdiction to entertain land disputes after the promulgation of the 2010 constitution and following the enactment of the Magistrate Courts Act 2015.

49. Be that as it may, it is common knowledge that the magistrates' court were vested with jurisdiction and adjudicated upon land disputes by dint of the provisions of section 159 of the Registered *Land Act* Cap 300, Laws of Kenya [now repealed, subject to pecuniary jurisdiction].

50. Section 159 of the Registered *Land Act* [supra] stipulated thus;

> 159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.

51. It is pertinent to observe that the subordinate court had the requisite jurisdiction to entertain and adjudicate upon the land matters provided that the monetary value thereof fell within the prescribed limitation. In this regard, I find it difficult to apprehend the gist of the applicant's submissions.

52. I beg to highlight that the applicant herein has not contended that the value of the suit property exceeded the pecuniary jurisdiction of the respondent herein as of the year 2008. To this end, there is no gainsaying that the contention by the applicant that the respondent was not seized of the requisite jurisdiction was predicated on a misapprehension of the applicable law at the material point in time.

53. In the premises, I come to the conclusion that even if the application beforehand was competent [which is not the case], the applicant would still fail for failure to satisfy the statutory threshold for

issuance of an order of certiorari. [see the holding in the case of Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR.

Final Disposition

54. Flowing from the analysis in the body of the judgment, it must have become apparent that the notice of motion application dated 24th February 2023 is not only premature and misconceived, but same constitutes an abuse of the due process of the court.

55. In the premises, the final orders of the court are as hereunder;

    I. The application dated 24th February 2023 [though captured in the submissions as 24th February 2024] be and is hereby dismissed.

    II. Costs of the application be and are hereby awarded to the interested party.

    III. The costs in terms of clause (II) shall be agreed upon and in default be taxed in the conventional manner.

56. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 31ST DAY OF JULY 2025

OGUTTU MBOYA, FCIArb

JUDGE

In the presence of:

Hussein – Court Assistant

Mr. Timothy Owade holding brief for Mr. Mabeya for the exparte applicant

Mr. Behailu for the interested party

No appearance for the respondent