



**Mutuku v County Commissioner of Machakos & 3 others (Civil Appeal
289 of 2018) [2025] KECA 1956 (KLR) (21 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1956 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 289 OF 2018
AO MUCHELULE & SG KAIRU, JJA
NOVEMBER 21, 2025**

BETWEEN

DISHON NGAO MUTUKU APPELLANT

AND

THE COUNTY COMMISSIONER OF MACHAKOS 1ST RESPONDENT

MUIA NZENGI 2ND RESPONDENT

MUTUNGA MBITHI 3RD RESPONDENT

TIMOTHY MALEI 4TH RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Machakos (K.K. Ogolla, J.) dated 8th March 2017 in HC. Misc. Application No. 41 of 2014)

JUDGMENT

1. This appeal arises from the ruling of the High Court at Machakos (E. K. O. Ogolla, J.) delivered on 8th March 2017 dismissing the appellant's application for judicial review on grounds that it was time barred having been filed after the expiry of six months prescribed under Order 53 rule 2 of the Civil Procedure Rules and on grounds that the application was an abuse of the court process.
2. The procedural background in brief is that by an application by Chamber Summons dated 14th February 2014 and presented to the High Court at Machakos on 27th February 2014, the appellant applied under Order 53 of the Civil Procedure Rules for leave to apply for orders to quash "the judgment of the District Commissioner Kathiani in cases numbers 302, 303 and 304 of 2005." The 1st respondent herein, the County Commissioner Machakos was named as the respondent in that application whilst the 2nd to 4th respondents herein were named as interested parties.



3. Leave having been granted by the High Court on 28th February 2014, the appellant then moved the High Court by a Notice of Motion dated 19th March 2014 for an order of Certiorari to quash the said judgment. It was the appellant's case that the respondent was threatening to evict him and his family from their land; that the judgment of the District Commissioner (DC) was against his legitimate expectation; that the DC took into account irrelevant issues and his decision was unprocedural, unlawful, contravened the provision of the Law of Succession Act, and was against public good and interest.
4. At the heart of the dispute is a parcel of land referred to as Number 747 (the property) which the appellant says was registered in the name of his grandmother Mumbua Mutuku. It was his case that the property originally belonged to one Malei Nguli who sold it to Mutiso Kini for the price of one bull. That after a long period, Mutuku Malei, the husband of Mumbua Mutuku, bought the land back from Mutiso Kini whereupon it was registered in her name, i.e. Mumbua Mutuku. Malei Nguli was polygamous and his children from his other wives sued Mumbua Mutuku at the local Land Committee for uprooting sisal plants that constituted a boundary. However, the Land Committee found in favour of Mumbua Mutuku on grounds that her husband had bought the land back from Malei Nguli. Dissatisfied with that decision children from Malei Nguli's other wives appealed to the Land Adjudication Board, but that appeal was withdrawn when the representative of those children, one Muimi Malei, acknowledged Mumbua Mutuku to be the owner of the property.
5. It is the appellant's case that in 2005, an objection over the property was filed before the District Land Adjudication Officer who despite the afore-stated decisions of the Land Committee and of the District Land Adjudication Officer, upheld the objections. That following an appeal to the Minister, the District Commissioner Kathiani District on behalf of the Minister rendered the judgment the subject of the appellant's judicial review application dated 19th March 2014.
6. Opposing that application through a replying affidavit sworn by the 2nd respondent Muia Nzezi on behalf of the 2nd to 4th respondents, it was contended that the application was an abuse of court process and time barred; that time within which the judicial review application should have been made began to run when the judgment of the District Commissioner was read as opposed to when a photocopy of the same was certified; that the appeal to the Minister was properly decided and all parties given an opportunity to be heard in accordance with the rules of natural justice.
7. Having heard and considered the application and rival submissions, the learned Judge of the High Court in his ruling delivered on 8th March 2017 (the subject of this appeal) held that the appellant's application did not comply with the law as it was not supported by any evidence; that it was improper for the appellant to have purported to rely, in support of his substantive Notice of Motion, on the documents that had been filed in support of the application for leave, which were already spent.
8. As to whether the application was time barred, the learned Judge, pronounced:

“The ex-parte applicant filed or commenced these proceedings on 27th February 2014 four (4) years after the delivery of the judgment. Order 53 rule 2 is mandatory. No application for judicial review can be filed upon expiry of six (6) months after delivery of the judgment.”
9. The Judge further held that the appellant had not demonstrated that the 1st respondent acted without jurisdiction in hearing the appeal or that he exceeded his mandate or violated the rules of natural justice; that it was demonstrated that the judgment of the District Commissioner was read to all the parties and each party given a copy; that despite being aware of the judgment the appellant did not challenge it.



10. The appellant has appealed that decision on eight grounds set out in his memorandum of appeal, namely, that the Judge erred in dismissing the application based on irrelevant considerations; failing to critique the submissions of both parties and instead adopting those of the 2nd to 4th respondents; delivering a „ruling# instead of a „judgment#; failing to consider all pleadings on record; disregarding provisions of the *Land Adjudication Act* and the *Fair Administrative Action Act* 2015; failing to note that the 2nd to 4th respondent had previously given up their claim over the subject land when they withdrew it at the Land Board; misinterpreted the law relating to judicial review; and failed to give reasons for his findings.
11. During the hearing of the appeal before us on 2nd April 2024, learned counsel for the appellant Ms. King'oo Wanjau in written and oral submissions urged that contrary to the finding by the Judge, the application was supported by a statutory statement and verifying affidavit that were filed at the leave stage in accordance with the provisions of Order 53 of the Civil Procedure Rules and the Judge therefore erred in concluding that the application was not supported by any evidence.
12. As to whether the application was time barred, counsel submitted that the issue of limitation was already addressed when the court granted leave to bring the proceedings, and since no appeal was lodged against that finding, the issue should not have been revisited at the final decision stage; that time started running when the decision of the 1st respondent was made known to the parties; that the appellant was supplied with a certified copy of the 1st Respondent's ruling on 26th November 2013, which does not indicate when it was read or made; and that the appellant lodged the application three months after receiving the copy of the decision, meaning an order of certiorari could still issue and the application was within time.
13. On the merits and whether the application was an abuse of the court process as held by the learned Judge, counsel submitted that the 2nd to 4th respondents predecessors withdrew their claim at the District Arbitration Board where it was conceded that the property belonged to Mumbua Mutuku; that the Board approved the withdrawal, and the land was to remain the property of Mumbua Mutuku; that despite that final settlement of the matter, the 2nd to 4th respondents brought the matter before the Machakos land adjudication officer, who heard the matter afresh and purported to allocate the land to the 2nd to 4th respondents; that the appellant challenged this decision before the Minister of Land, who delegated the appeal to the District Commissioner Machakos who then upheld the adjudication officer's decision, and hence the judicial review proceedings. It was urged that once the claim was withdrawn, it could not be revived and the adjudication officer did not have jurisdiction to hear afresh a matter that was settled. It was urged that based on the foregoing the learned Judge erred in concluding that the application lacked merit and was an abuse of the court process.
14. With that, the appellant urged this Court to allow the appeal, set aside the High Court ruling, quash the decision of the 1st Respondent, and declare that the litigation came to an end when the 2nd to 4th respondents claim was withdrawn on 18th August 1981 when it was affirmed the property belongs to the family of the late Mumbua Mutuku.
15. Opposing the appeal, learned counsel for the 2nd to 4th respondents urged that the appeal should be dismissed. It was submitted that the learned Judge correctly found that the application for judicial review was statutorily time barred; that it is a requirement under Order 53 Rule 2 of the Civil Procedure Rules that an application for leave to be made no later than six months after the date of the proceedings complained of; that in this case the decisions the appellant sought to quash were dated 2/11/2011, 19/12/2011, and 18/7/2012; that the appellant filed the application for leave on 27/2/2014, which was clearly outside the six months provided by law. Furthermore, there were other defects in that the



substantive notice of motion in that it was not supported by evidence by way of an affidavit as required by law.

16. It was submitted that the complaint that the Judge did not consider the appellant's submissions is not borne out by the record; that the complaint that the Judge rendered a ruling instead of judgment is baseless as Order 53 of the Civil Procedure Rules does not specify whether the finding should be a ruling or a judgment, and the decision is "well captured" in the ruling.
17. It was submitted that Judicial review proceedings are special proceedings, and the role of the court is not to review the evidence afresh, but to determine if the decision the subject of challenge is ultra vires, made without jurisdiction, or violated rules of natural justice and it was not the mandate of the court to investigate whether any party had previously given up a claim.
18. With that, counsel urged this Court to find that the appeal lacks merit and to dismiss it with costs.
19. We have considered the appeal and the submissions consistently with our mandate on a first appeal. See *Selle vs. Associated Motor Boat Co* [1968] EA 123 and *Jabane vs. Olenja*, [1986] KLR 661. The issue arising for our determination is whether the learned Judge was right in concluding that the appellant's application was statute barred and an abuse of the court process.
20. As already stated, the appellant moved the High Court by his application dated 14th February 2014 specifically invoking Order 53 of the Civil Procedure Rules. He sought leave to apply to quash the judgment of the District Commissioner Kathiani in case numbers 302, 303 and 304 of 2005. In his supporting affidavit, the appellant deponed that the impugned decision of the District Commissioner was made on 13th November 2013 and that that decision was made in the absence of the parties; and that a certified copy of the judgment was issued on 20th November 2013.
21. However, the exhibits to the appellant's supporting affidavit tell a different story regarding when decisions of the District Commissioner Kathiani were made. In appeal number 302 of 2005, the decision or judgment of the District Commissioner (named as Waweru Kimani) upholding the decision of the Land Adjudication Officer dated 16th September 2005 was given on 18th January 2012. The appellant's appeal No. 303 of 2005 on behalf of Alfred Kiilu Mutuku, deceased, was heard on 18th October 2011 and the decision of the District Commissioner made on 21st November 2011. The decision of the District Commissioner in Appeal No. 304 of 2005 does not form part of the record of appeal before us.
22. Based on the foregoing, by the time the appellant moved the High Court with his application for judicial review dated 14th February 2014, slightly over two years had lapsed since the decision of the District Commissioner in appeal 302 of 2005 and over three years had lapsed since the decision of the District Commissioner in Appeal No. 303 of 2005.
23. Rule 2 of Order 53 of the Civil Procedure Rules provides that an application for leave to apply for an order of certiorari must be made not later than six months after the date of the proceedings to be questioned. It is in these terms:

“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.”



- 24. The six months within which the appellant should have moved the High Court for orders of certiorari had long lapsed. As this Court stated in Republic vs. Kenya National Highways Authority & 2 Others Ex Parte Amica Business Solutions Ltd [2016] eKLR “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.”
- 25. In the replying affidavit sworn by the 2nd respondent herein on 1st December 2015 in opposition to the appellant’s application for judicial review, it was deponed that “when the judgment [was] read to all the parties each party was given a copy thereof, however the ex parte applicant did not challenge it in time as required by law...” That assertion was not subsequently countered and the learned Judge was therefore well supported by the material before him in finding as he did that “every party had notice of the delivery of the judgment” and in concluding that the appellant’s application was filed after expiry of the six months prescribed under Order 53. The assertion by the appellant that the question whether his application was time barred was addressed at the leave stage is not supported by the record.
- 26. As to the complaint that the learned Judge erred in concluding that the application was an abuse of the court process and should have considered the merits of the dispute, the Supreme Court of Kenya in the case of Dande & 3 Others vs. Inspector General, National Police Service & 5 Others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) guided that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case but if a party files suit under the provisions of Order 53 of the Civil Procedure Rules, as was the case here, and does not claim any violation of rights or of *the Constitution*, then the court should limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision per se. That is the case here and the learned Judge cannot be faulted for reaching the decision that the appellant’s application did not meet the threshold for granting orders under Order 53 of the Civil Procedure Rules.
- 27. In the result, we find no merit in this appeal. It is accordingly dismissed.
- 28. Given the family relationship between the parties, we make no order as to costs.
- 29. Following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to delivery of this judgment, and the remaining members of the Court being unanimous, this decision is delivered in accordance with Rule 34(4) of the Court of Appeal Rules.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2025.

S. GATEMBU KAIRU, FCI Arb, C.Arb.

JUDGE OF APPEAL

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A.O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

