



the tribunals and the decision she seeks to quash only came to her attention when the 4<sup>th</sup> Respondent moved to the court in Kithimani CMELC No. E042 of 2023 seeking eviction orders against her.

I have considered the preliminary objection. The same seeks to have this suit struck off as the it is res judicata. The issue for determination is whether the Respondents' preliminary objection has satisfied the threshold or not. The leading decision on Preliminary Objections is the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) EA 696, where the Court held as follows:

*“a preliminary objection consists of a 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 or 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... 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”.*

Similarly, the Supreme Court in Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others (2015) eKLR made the following observation as relates to Preliminary Objections:

*“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”*

The purpose of judicial review was enunciated in the case of Municipal Council of Mombasa vs Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR, where the Court of Appeal held that;

*“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not*

*entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.*

It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. This position was adopted by the court in *Associated Provincial Picture Houses, Ltd. vs Wednesbury Corporation* (1947) 2 All E.R 680. As a result, it is only in exceptional circumstances that the court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in *Republic vs Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* (2013) eKLR, while citing the *Associated Provincial Picture Houses Ltd. vs Wednesbury Corporation* (supra) namely:

*“where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is ‘so unreasonable that no reasonable authority could ever come to it.’”*

The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the

decision- making process as was held by Mumbi Ngugi J in the case of Republic vs Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited (supra),

*“That the purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question.”*

In the case of Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & another (2014) eKLR, the court held that;

*“Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”*

Similarly, in the case of Commissioner of Lands vs Kunste Hotel Limited (1997) eKLR (E & L) 1 at page 249, the Court of Appeal stated that;

*“But it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”.*

In Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 2 Page 508 where it is stated that;

*“Certiorari is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The judicial discretion of the Court being a judicial one, must be exercised on the basis of evidence and sound legal principles”.*

The 3<sup>rd</sup> respondents opposed the application and raised a preliminary objection that the application has been brought out of time. In essence that Order 53 Rule 2 of the civil procedure rules as read with section 9(3) of the law reform act provides for a time limit of six months within which the application should have been filed.

Judicial review jurisdiction is a special jurisdiction which is neither Civil nor Criminal and it is governed by Section 8 and 9 of the Law Reform Act which is the substantive law while Order 53 of the Civil Procedure Rules sets out the procedural law. By those provisions the court is mandated to issue orders of mandamus,

certiorari or prohibition in appropriate judicial review proceedings. That the matter is also *sub judice*.

Be that as it may, applications for prerogative orders have a limitation period.

The Law Reform Act Cap 26 Laws of Kenya, provides as follows at Section 9 (3):

*“In the case of an application for an order of certiorari to remove any judgment, 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 proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the 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.”*

The above provision is echoed in the Civil Procedure Rules, 2010, which in Order 53 rule 2 provides as follows:

*“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 proceedings 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 proceedings is subject to appeal and the 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.”*

It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of the decision. The decision that is sought to be quashed is was made way back in 1997 in Machakos Land Disputes Tribunal Case No. 13 of 1995 and in 2006 in Embu Provincial Land Disputes Appeal Tribunal Case No. 15 of 1997. The application was filed in 2025. The application is therefore out of time.

The Court of Appeal case in Wilson Osolo vs John Ojiambo Ochola & Another (1996) eKLR expressed itself thus;

*“It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil procedure rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case the Law Reform Act.” There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (Cap 22, Laws of Kenya)*

*which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.”*

I am also guided by the case of Republic vs Chairman Amagoro Land Dispute Tribunal & Another Ex-parte Paul Mafwabi Wanyama (2014) eKLR wherein D. Maraga JA (as he then was) held that:

*“The judicial review proceedings before the learned judge, which have given rise to this appeal were therefore special in nature and the learned judge erred in importing provisions of the Civil Procedure Act and rules to proceedings governed by the said provisions of the Law Reform Act and Order 53 Civil Procedure Rules. We agreed with learned counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do.”*

I am aware that by dint of the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the rules. Following this provision, it may be arguable that time may be enlarged to make application for Judicial Review outside the 6 months' limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provisions set out in Section 9(3) of the Law Reform Act (above), and it is trite law that rules made under statute, cannot override a

statutory provision. The Law Reform Act itself has no provision for extension of time. I have seen no law, which can entitle me to enlarge time for the filing of an application for certiorari outside the 6-month limitation period. The applicant ought to pursue their claim in a civil matter if administrative procedures have failed as opposed to a judicial review. I find that the preliminary objection is merited and I strike out this application with costs to the 4<sup>th</sup> Respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 17<sup>TH</sup> DAY OF  
DECEMBER 2025.**

**N.A. MATHEKA**

**JUDGE**