**Mutiso v Kitonyi & 2 others (Civil Appeal 135 of 2019)**
**[2025] KECA 2127 (KLR) (5 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2127 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 135 OF 2019**

**SG KAIRU, M NGUGI & WK KORIR, JJA**

**DECEMBER 5, 2025**

**BETWEEN**

**PATRICK MUSYOKI MUTISO ..... APPELLANT**

**AND**

**KISOI KITONYI ..... 1ST RESPONDENT**

**DEPUTY COUNTY COMMISSIONER KANGUNDO SUB COUNTY .... 2ND RESPONDENT**

**ATTORNEY GENERAL ..... 3RD RESPONDENT**

***(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Nairobi (O.A. Angote, J.) dated 25th January 2019 in ELC JR. No. 86 of 2017)***

## JUDGMENT

1. In this appeal, the appellant, Patrick Musyoki Mutiso, has challenged the judgment of the Environment and Land Court (ELC) at Machakos (Angote, J.) delivered on 25th January 2019. In that judgment, the ELC allowed an application for judicial review by the 1st respondent, Kisoi Kitonyi, and quashed, by an order of certiorari, the proceedings and judgment of the Deputy County Commissioner Kangundo Sub-County dated 18th July 2017 in Minister's Land Appeal Case No. 99 of 1995. In addition, the ELC granted an order prohibiting the Deputy County Commissioner, Kangundo Sub-County or any Lands Officer/Surveyor acting on the basis of that judgment.

2. The factual background in brief. The respondent, Kisoi Kitonyi, is the son of John Kitonyi Ivai (Ivai), deceased. Ivai and the appellant's grandfather, Luka Nzina (Nzina) (also deceased) were brothers. Ivai and Nzina lived harmoniously on the family land. However, according to the respondent, after the death of Nzina, his son, Mutiso Luka who is the father of the appellant claimed ownership over the

entire family land. That dispute was referred to and resolved by clan elders on 15th November 1967 by establishing a sisal boundary between Ivai's portion and that of Nzina.

3. The appellant's father was apparently dissatisfied and took it upon himself to destroy the sisal boundary established by the elders. Thereupon, Ivai instituted Civil Case No. L. 76 of 1969 before the District Magistrate's Court at Kangundo, which, in a judgment delivered on 25th November 1969 (at page 47 of the record), upheld the decision of the clan elders by confirming the boundary fixed between the two portions.

4. Thereafter, after the area was declared an Adjudication Section, the appellant's father lodged an objection before the Land Adjudication Officer of that adjudication section, who re-opened the dispute and disregarded or reversed the decision of the clan elders and awarded the entire family land, except for a small portion, to the appellant's father. The Adjudication Officer based that decision on the failure or refusal by the respondent to take a traditional oath (Kithitu) while the appellant's father had done so, and on that basis awarded the land to the appellant's father while the respondent was allowed to retain "the area where his home is."

5. Dissatisfied, the respondent appealed to the Minister (the 2nd respondent), being appeal No. 99 of 1995 between John Kitonyi Ivai vs. Mutiso Luka, who in a decision/judgment given on 18th July 2017, upheld the decision of the Land Adjudication Officer. In doing so, the Deputy County Commissioner, Kangundo Sub-County stated that "no new evidence contrary to the evidence tendered before the Adjudication Officer" had been brought out, and that he therefore had "no reason whatsoever to upset the finding and decision of the Land Adjudication Officer."

6. Having obtained leave, the 1st respondent moved the ELC with his application for judicial review dated 10th October 2017 to quash the proceeding and judgment of the Deputy County Commissioner. The main ground was that the decision of the Land Adjudication Officer and by extension that of the Minister were res judicata and unsustainable. After considering the same, the affidavits and submissions, the learned Judge of the ELC rendered the impugned judgment allowing the application. The learned Judge of the ELC held that although the decision of the Magistrate's Court at Kangundo was not binding on the Minister, the same was a relevant factor that should have been considered before arriving at his decision. The Judge stated:

> " Having failed to take into account the decision of the court in Kangundo DMCC No. L. 76 of 1969, which decision had decreed that the two protagonists should share the land in equal shares, I find that the decision of the first respondent was ultra vires, null and void."

7. As regards the contention by the appellant before the ELC that the respondent's judicial review application was filed outside the mandatory period of six months, the learned Judge expressed, on the strength of the decision of the High Court in Republic vs. District Commissioner Machakos & Another, Ex-parte Kakui Mutiso [2014] eKLR and the decision of this Court in Stephen Kibowen vs. The Chief Magistrate's Court Nakuru & 2 Others, Nyeri Civil Appeal No. 211 of 2011 that since the decision of the Minister had not been acted upon, "the six (6) months limitation period captured in Order 53 Rule 7(1) does not come into play".

8. Based on the memorandum of appeal, the grounds on which the appellant has challenged that decision are that the learned Judge erred in failing to hold that the respondent's application was time barred under Rule 2 and 7 of Order 53 of the Civil Procedure Rules, 2010; holding that the Deputy County Commissioner did not consider a judgment of the Magistrate's Court in Kangundo DMCC No. 76 of 1969; nullifying, as ultra vires, the decision of the Deputy County Commissioner; and in failing to appreciate the principles on judicial review.

9. We heard the appeal on 14th May 2025 when learned counsel for the appellant, Mr. Nicholas Malonza, appeared before us and relied entirely on his written submissions dated 12th October 2020. (Only pages 8 to 21 of those submissions are relevant to this appeal). There was no appearance for the respondents despite notice of hearing having been served.

10. In his submissions, counsel for the appellant condensed the appellant's grievances to the complaint that the Judge erred in failing to find that the 1st respondent's application for judicial review was time barred and in holding that the 2nd respondent did not consider the decision of the Magistrate's Court.

11. Counsel submitted extensively on the background as set out above urging that the appellant's father had been aggrieved by the decision of the Magistrate's Court in Kangundo DMCC No. 76 of 1969 and had indeed applied on 8th September 1975 to set it aside, but before that application could be heard, the area where the land is situated was declared an Adjudication Section, thereby halting the court proceedings; that subsequently, and following adjudication, the subject land was demarcated and registered in favour of the 1st respondent's father as parcel 2625 in Kathiani Adjudication Section whereupon the appellant's father lodged objection before the Land Adjudication Officer who then ruled in favour of the appellant's father, holding that he was entitled to parcel 2625 save for the portion on which the 1st respondent had settled on; that the portion of parcel 2625 given to the appellant's father was subsequently registered as Parcel No. 3544. The decision of the Land Adjudication Officer was on appeal by the 1st respondent to the Minister upheld and hence the application for judicial review.

12. Counsel submitted that the ELC erred by holding that the Judicial Review Application was not affected by the six (6) months limitation period; that the 2nd Respondent's judgment was a formal order to which Order 53 Rules 2 and 7 mandatorily apply; that the 2nd Respondent's decision in Appeal No. 99 of 1995 was made with requisite jurisdiction under Section 29 of the *Land Adjudication Act*, and the 6- month time restriction should apply.

13. It was urged that the Judge erred in concluding that the Minister failed to consider the previous judgment in Kangundo DMCC No. L. 76 of 1969; that that judgment was not physically presented before the 2nd Respondent and the 2nd Respondent was under no obligation, on his own motion, to call for additional evidence, such as the magistrate's judgment in question.

14. It was submitted that the mandate of the Minister (2nd Respondent) under Section 29 of the *Land Adjudication Act* is to "determine the appeal and make such order thereon as he thinks just," and the Minister is not bound by the procedure laid down for hearing civil suits. It was submitted that the learned Judge erred in finding that the 2nd Respondent's Judgment was ultra vires, null, and void, and that the application for judicial review should have been dismissed. The appellant prays that the appeal be allowed. In the alternative the appellant prays that the matter be remitted back to the 2nd respondent with directions to reconsider his decision considering the said decision of the Magistrate's Court.

15. Having considered the appeal and the submission, we begin by noting that the grant or refusal of an application for judicial review involves exercise of judicial discretion. Judicial Review orders are granted at the discretion of the Court. As the Court stated in Kenya National Highways Authority vs. Tangerine Investments Limited (Civil Appeal 84 of 2018) [2023] KECA 79 (KLR):

> "The discretionary nature of public law remedies is an important feature which distinguishes judicial review remedies from private law remedies in general. It encompasses both the court's discretion to determine what remedy should result and the discretion to decline a remedy in the face of failings by the public authority."

16. In effect, the Court has the leeway, in considering an application for judicial review, whether to grant the reliefs sought. However, the court's discretion must be exercised judiciously based on the evidence of sound legal principles. As stated by the editors of Halsbury's Laws of England 4th Edition Volume 2 Page 508:

> " 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."

17. As the Supreme Court of Kenya stated in the case of Kibira vs. Independent Electoral & Boundaries Commission & 2 Others (Petition 29 of 2018) [2019] KESC 62 (KLR), discretionary power is to be exercised in a manner that is not capricious or whimsical, and that judicial officers to whom this power is donated should exercise the same judiciously.

18. The circumstances in which an appellate Court may interfere with the exercise of discretion are limited. See United India Insurance Company Limited Kenindia Insurance Company Limited & Oriental Fire & General Insurance Company Limited v. East African Underwriters (Kenya) Limited [1985] eKLR. In that regard the Supreme Court in Kibira vs. Independent Electoral & Boundaries Commission & 2 Others (above) stated further that:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v Bashir [2010] NZSC 112; [2011] 2 NZLR 1 (Kacem)where it was held [paragraph 32]:
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> "In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

19. In Deynes Muriithi & 4 Others vs. Law Society of Kenya & Another; SC Application No. 12 of 2015; [2016] eKLR the Supreme Court stated that it would only interfere with the exercise of discretion by another Court where there is plain and clear misapplication of the law. With these principles in mind, the main question in this appeal is whether, as contended by the appellant, the Judge erred in holding that the application before him was not affected by the six months limitation period under Rule 2 and 7 of Order 53 of the Civil Procedure Rules.

20. Evidently, the learned Judge was alive to and did consider the matter of limitation. In that regard, the Judge stated:

> " The matter before me is challenging the decision of the Minister for being ultra vires and a nullity. Consequently, and considering that the said decision has not been acted upon, the six (6) months limitation period captured in Order 53. Rule 7 (1) does not come into play. However, in a situation where the decision of the minister has been acted upon, and the right of parties have crystallized, the court should in such instances, refuse to exercise its discretion in favour of the applicant under the doctrine of laches."

21. The Judge found support in the High Court decision in Republic vs. District Commissioner Machakos & Another, Ex parte Kakui Mutiso [2014] eKLR, where Odunga, J. (as he then was) held

that the six months limitation period set out in Order 53 Rules 2 and 7 "only applies to specific formal orders mentioned in Order 53 Rules 2 and 7 and nothing else." That view is fortified by a decision of this Court in the case of Republic vs. Kenya National Highways Authority & 2 Others, Ex parte Amica Business Solutions Limited [2016] eKLR where the Court stated as follows:

> "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.
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> 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...
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> ...We are persuaded in this respect by the High Court decision in The Goldenberg Affair Ex-parte Hon. Mwalulu and Others, HCMA No. 1279 of 2004 [2004] eKLR, and Republic vs The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi, H.C. Misc. Application No. 1235 of 1998 where the courts held that the six (6) months limitation period set out in order 53 Rules 2 and 7 only applied to specific formal orders mentioned in Order 53 Rules 2 and 7 and to nothing else, certainly not to contents of one private letter in response to another..." [Emphasis added]

22. This Court in that case then held that the six months limitation would not apply to "decisions" made by administrative bodies which fall outside the purview of the definition "decision, judgment, order, decree or other proceedings" as contemplated under Order 53 rule 2 of the *Civil Procedure Act*. In our view, the impugned decision of the 2nd Respondent falls within the purview of that definition.

23. However, in the present case, the learned Judge was evidently alive to and did consider the question whether the limitation period applied. However, it seems to us that his decision in refusing to hold that the application was time barred turned on when time began to run to the extent that, as the Judge found, the decision of the Minister had not "been acted upon and the rights of parties [had not] crystallized." Counsel did not address us or otherwise fault this aspect of the decision.

24. Furthermore, having concluded that the impugned decision of the Minister was a nullity, the Judge was further fortified in his holding by the decision of this Court in the case of Stephen Kibowen vs. The Chief Magistrate's Court Nakuru & 2 Others, Nyeri Civil Appeal No. 211 of 2013 where this Court, castigated the trial Judge in that case for taking "a strict approach to the six (6) months limitation period" and for failing to appreciate that the decision therein was being challenged on the grounds that it was a nullity "against which time could not run." The Court in that case expressed the view that such a decision was "incapable of commencing a reckoning of time and was deliberately incapable of triggering a statutory bar ..."

25. In the result, the appellant has not demonstrated that the learned Judge considered matters he should not have or that he failed to consider matters he should have or that his decision is plainly wrong to justify interference with his decision by this Court.

26. Consequently, the appeal fails and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2025.**

**S. GATEMBU KAIRU, FCIArb, C.Arb.**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

**.....**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**