

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: ASIKE- MAKHANDIA, KIAGE & OMONDI JJ.A.)

CIVIL APPEAL NO. 151 OF

2019 BETWEEN

GEORGE PETER BWIRE OGENGO.....APPELLANT

AND

**THE ATTORNEY GENERAL.....1ST RESPONDENT
THE CABINET SECRETARY
MINISTRY OF AGRICULTURE 2ND
RESPONDENT**

(Being an appeal against the Judgment and decree of the High Court of Kenya at Kakamega (Matheka, J.) dated 12th July, 2018

in

Judicial Review No. 7 of 2017)

JUDGMENT OF THE COURT

[1] Vide Kakamega HCCC No. 58 of 1982, **George Peter Bwire Ogengo, “the appellant”**, who claimed to be the registered owner of all those pieces or parcels of known as Land Parcel Nos. **Marachi/Bujumba/980 and Marachi/Bujumba/981, “the suit properties”**, sued the **Attorney General, “ the 1st respondent”** and **Michael Adwanyika**, a manager of Agricultural Machinery Services, a department under the Ministry of Agriculture, **“the 2nd respondent”**, seeking vacant possession of

the suit properties,

compensation for the loss suffered when Michael Adwanyika in the course of his employment, without any colour of right moved and fenced the suit properties, claiming that they had been acquired through compulsory land acquisition. As a result, the appellant was unable to access the suit properties. There was no defence filed nor evidence offered in defence by the respondents.

[2] Following exparte hearing, the learned judge entered judgment in favour of the appellant and awarded him Kshs.74,537.50 as special as well as general damages. The learned judge directed the respondents to open a direct access road from the main Bumala-Port Victoria Road to enable the appellant to access the water point from the suit properties. Apparently, the respondents failed, ignored or neglected to comply with the latter directive.

[3] This compelled the appellant by way of a Judicial Review application dated 14th November, 2014, to move the court pursuant to Order 53 Rule 3(1) of the Civil Procedure Rules 2010 seeking the order of mandamus to compel compliance with the decree and in particular, the part directing the respondents to open a direct road access to the main road and the water points as decreed by the High Court in Kakamega HCCC No. 58 of 1982, **“the suit”**.

[4] The application was based on the grounds that the appellant was a successful litigant in the suit, which suit was against the

respondents jointly and severally. That judgment was entered against the respondents in favour of the appellant in the suit on 22nd July 1983. There was also an order that the respondents open a direct road of access to the main road and to the water point from the suit properties.

[5] The appellant claimed that the respondents had neglected and/or refused to honour the decree, as a result, the orders of mandamus sought were to compel the respondents to comply with the judgment and decree aforesaid. He complained that he had been denied the right to enjoy the fruits of the judgment, hence the application.

[6] The respondents in opposing the judicial review application, averred that the application as filed was fatally incompetent and bad in law as it offended the mandatory provisions of Section 9(2) of the Law Reform Act, which provided the time limit for filing actions anchored on judicial review.

[7] It was contended that the decree in the suit, which the appellant intended to be enforced by an order of Mandamus was issued on 22nd July, 1983 and the appellant filed the application for judicial review on 14th July, 2014, without first obtaining leave to file it out of time yet there was an unexplained delay of 31 years on the part of the appellant.

[8] The respondents maintained that being matters of public policy, judicial review proceedings ought to be initiated, heard and determined within the shortest time possible hence the stringent limitation that has been provided for instituting such proceedings.

In his determination, the learned judge noted that the decree in the suit for which the appellant intended to be enforced by an order of Mandamus was issued on 22nd July, 1983 and that the applicant applied for judicial review on 14th July, 2014 without leave to file it out of time. Further, there had been an unexplained delay of over 31 years on the part of the appellant. The learned judge accordingly dismissed the application on the grounds that it was time-barred.

[9] Aggrieved, the appellant instituted the instant appeal faulting the learned judge for failing to grant the orders sought, finding that there was a delay in filing the application, and applying the wrong provisions of the law.

[10] At the hearing of the appeal, learned counsel **Ms. Were** appeared for the appellant. There was no appearance for the respondents nor did they file their written submission though they were properly served with the hearing notice for the day. Ms. Were had filed written submissions which she relied on entirely. In support of the appeal, counsel for the appellant contended that

the appellant had been

granted leave to institute judicial review proceedings despite
the

unexplained delay in instituting the same. By granting leave, the learned judge implied that the application disclosed a prima facie case warranting consideration and the refusal to grant it based on a factor that had already been determined was erroneous. The learned judge ought not to have revisited the issue since it had already been considered and determined.

[11] Relying on the case of **Mburu Kinyua vs. Gachini Tuti** **[1978]69 KLR**, counsel argued that the learned judge lacked the jurisdiction to review and overturn the decision of a judge with concurrent jurisdiction.

[12] Regarding the substantive application, the appellant contended that the learned judge misdirected himself by holding that an order of mandamus was subject to a time limitation under section 9[2] of the Law Reform Act yet the Law Reform Act as read with Order 53 Rule 2 which places limits on the time to only prayers seeking certiorari; and therefore, an application for an order of mandamus cannot be time-barred as it is not subject to any time limitation. Counsel accordingly prayed for the appeal to be allowed as prayed.

[13] This being a first appeal, we are mandated under rule 31(1)(a) of the Court of Appeal Rules, 2022 to re-assess, re-evaluate and re-analyse the record of appeal so as to reach an independent

finding.

This principle was reiterated in the case of **Selle vs. Associated Motor**

Boat Co. Ltd. [1968] EA 123, where the court stated:

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

[14] Having considered the record of appeal, the written submissions of the appellant, the authorities cited, and the law, the main issue for determination is whether the judicial review application was properly dismissed. However, before we delve further, we need to deal with the peripheral issue of leave. From the record it is clear that the leave obtained was to allow the appellant to commence judicial review proceedings and not leave to commence judicial review proceedings out of time. These are different and distinct processes and considerations. Therefore, by learned judge holding that the appellant filed the judicial review proceedings out of time and without obtaining leave of court, he was not sitting on of a decision of a court of concurrent jurisdiction contrary to the submissions of counsel of the appellant. The trial court was at liberty to revisit the issue of leave to commence

judicial review proceedings during the substantive hearing of the motion.

[15] In the instant appeal, it is not in dispute that the judgment and decree of the suit sought to be enforced by way of judicial review application for an order of mandamus was rendered on 22nd July 1983. Leave to commence judicial review proceedings was however granted on 14th July, 2014, 31 or so years later. The complaint by the appellant is that the trial court erred in holding that the appellant applied for judicial review without first obtaining leave of court to file it out of time.

[16] We understand the appellant to be saying that unlike the order of certiorari which must be pursued within 6 months of what is sought be quashed, an order of mandamus has no such limitation and he is right. However, this was not the only ground upon which the application was dismissed. There was the issue of delay. There was need for the appellant to explain to the satisfaction of the court, why it took him 31 years to undertake the enforcement of the judgment and decree. However, no such explanation was forthcoming from the appellant. Courts have inherent power to manage their dockets efficiently and ensure fairness to all parties. Unexplained, extensive delays disrupt this process and impacts negatively on the administration of justice and efficient case management.

[17] In a nutshell, a court is generally, not required to entertain

a

matter filed after an unexplained long delay. This was the case here!

See **McLean & Another v Kiago & Another [2025] KEHC 3572 (KLR)**. The mere fact that a judicial review application for an order of mandamus is not time bound is no licence for a party to sit on his laurels forever and wake up from his deep slumber after 31 years to seek redress. Indeed, it defeats the essence and whole purpose of judicial review proceedings which is designed for quick, speedy, urgent and expedited remedies unlike standard civil suits which often deal with disputes over long timelines.

[18] We are also aware that in our jurisdiction, the time limited for the execution of a judgment and decree or ruling and order is 12 years from the date the judgment and decree or ruling and order was delivered. This is stipulated in section 4(4) of the Limitation of Actions Act. In essence therefore, an action cannot be brought upon a judgment and decree or a ruling and order after 12 years from the date it was delivered. This limit serves to promote timely resolution of disputes and protects defendants from stale claims. The judicial review application was in the nature of execution of the judgment and decree passed in the suit. It was thus time barred. We are aware that this was not canvassed before us by the appellant, but could he! Your guess is as good as ours. We have therefore raised it *suo moto* as it goes to the competence of the application and to the jurisdiction of the

trial court to entertain the application. As we all know, jurisdiction is

everything and without it, the court has no business entertaining such a suit. See **Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) [1989] eKLR.**

[19] In the end, we are satisfied that this appeal lacks merit and is dismissed with no orders as to costs.

Dated and delivered at Kisumu this 30th day of January, 2026.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

P. O. KIAGE

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR