



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC JUDICIAL REVIEW NO. 5 OF 2019

REPUBLICAPPLICANT

VERSUS

THE CABINET SECRETARY LANDS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

ORWA GROUP RANCH REPRESENTATIVES...INTERESTED PARTY

EX-PARTE

- 1. PATRICK PKIACH**
- 2. PAULO PKORON CHEPOTPOT**
- 3. BENSON NAITALIMA LOMERIKOR**
- 4. PEKON NGORIARITA DIAKAYO**
- 5. LOLINGARRENG RIWALE**
- 6. IBRAHIM LOSEKER**
- 7. JOSEPH KATUKUMWOK LOLEM**

RULING

1. The application dated **23/7/2019** and filed in court on the same date has been brought by the applicants seeking the following orders:

(1) ...spent

(2) That an injunction do issue restraining the Group Representatives of Orwa Group Ranch namely: Simon Ngolekong Merii, Joakim Kriwei Alemusia, Moses Lokada, Solomon Psinen Mukedem, Ngiromuk Chilangole, Enos K. Lomorie, Daniel Lekem Koriye and Lima Dungoki either by themselves, individually or jointly, through their servants, employees and/or agents from alienating, disposing of, subdividing, and/or in any other way dealing with parcels of land referenced LR. WEST POKOT/ORWA GROUP RANCH/1. WEST POKOT/ORWA GROUP RANCH/2, WEST POKOT/ORWA GROUP RANCH/3 pending the hearing and determination of this application inter-parties(sic) and thereafter, pending the hearing and determination of the judicial review application herein.

(3) That an injunction do issue restraining the Group Representatives of Orwa Group Ranch namely: Simon Ngolekong Merii, Joakim Kriwei Alemusia, Moses Lokada, Solomon Psinen Mukedem, Ngiromuk Chilangole, Enos K. Lomorie, Deniel Lekem Koriye and Lima Dungoki either jointly or individually through their servants, employees and/or agents from making deposits into, withdrawing monies from and/or in any way operating Account No: 1070175561152, Account Name: Orwa Group Ranch held at equity Bank, Kapenguria Branch pending the hearing and determination of this application inter-parties(sic) and thereafter, pending the hearing and determination of the judicial review application herein.

(4) That the costs of this application be provided for.

2. The grounds upon which the application is made are that the applicants have challenged the cancellation of the certificate of incorporation for Orwa Group Ranch dated the **11/3/2015** vide this judicial review application; that the applicants were appointed as its Group Representatives by the Registrar, Group Representatives but the cancellation was done illegally, unprocedurally and in bad faith and with ulterior motive. It is alleged that the applicant were never accorded fair hearing before the cancellation of their certificate of incorporation vide which they had been appointed for a term of 5 years commencing **15/3/2015** and that the purported cancellation was done after the repeal on **31/9/2016** of the **Land (Group Representatives) Act Cap 287**. By reason of that repeal it is alleged that the Registrar's action of cancellation was *ultra vires*.

3. The second ground is that the issuance on the **5/10/2016** of certificate of incorporation to the interested party by the Registrar, Group Representatives is under challenge for the following reasons:

(a) It was issued after the repeal of Cap 287.

(b) The persons subsequently registered as group representatives were not at the time members of the Orwa Group Ranch.

(c) There were no elections held by the Orwa Group Ranch members to elect the persons registered as group representatives.

4. It is alleged that the persons registered under the impugned Certificate of Incorporation as Orwa Group Ranch Representatives purported to enter into a contract with Kenya Electricity Transmission Company Limited (KETRACO) for the creation of an easement for its power lines over **West Pokot/Orwa Group Ranch/1, 2 and 3** at a consideration of approximately **Kshs.38,000,000.00**; that on the strength of the impugned Certificate of Incorporation the purported officials of Orwa Group Ranch opened Account No: 1070175561152, Equity Bank, Kapenguria Branch in the account name: Orwa Group Ranch; that on or about the **2/4/2019**, KETRACO paid the first instalment of the aforementioned consideration; a sum of approximately **(Kshs.19,000,000/=)** into the said bank account; that the aforementioned monies paid by KETRACO to-date remains unaccounted for; that the balance of approximately **Kshs.19,000,000/=** is due and owing and shall be paid at any time and that therefore the *bona fide* Orwa Group Ranch members and the applicants herein stand to suffer irreparable loss and damage in case the relief sought is not granted.

5. The sworn affidavit of **Patrick Pkiach** one of the applicants herein **23/7/2019** was filed in support of the application.

6. In reply to the application, **Simon Ngolekong Merii**, filed a sworn replying affidavit on **23/8/2019**. He deponed that he is the current Chairman of Orwa Group Ranch; that the current group of representatives were elected on **8/7/2016** during an annual general meeting held on that day and which was attended by 60% of group membership and that the agenda of the day was election of group representatives and A.O.B; that after election they presented an application to the registrar, group representative in Nairobi for incorporation which was done; that therefore the election was lawful and in any event has never been challenged to date; that this judicial review does not challenge that election; that they have been in office for three years now and have several achievements to their record including obtaining the three titles to the group ranch and commencing the subdivision of the land; that the surveyors have been mandated by the County Commissioner to carry on with the survey work which is now ongoing; that the current officials of the Orwa Group Ranch are members of the group ranch; that the decision to elect the current officials having been made by the group membership is not capable of being brought to this court for quashing since the decision on who to elect as an official is purely the members' decision; that the application for certiorari has been brought after expiry of 6 months and is therefore fatally defective and for striking out; that the an injunction cannot be issued in judicial review proceedings and **Order 40 rule 1** as well as **Section 1A, 3, 3A and 63(e)** of the CPA are inapplicable to judicial review proceedings and in any event injunctions cannot be issued in the absence of a pending civil suit; that the complaint that the certificate of issued to current officials after the repeal of **Cap 287** has been raised without regard to the saving and transitional provisions in the **Land community Act 2016**; that in any event it is not true that the current officials have failed to account for funds received from KENTRACO and that receipt is monies is part of their mandate; that that money have been utilized as per the law and otherwise members could have complained to the relevant state agencies.

7. The Interested Party filed **Notice of Preliminary Objection** dated **26/8/2019**. That objection highlights the following main grounds which have also been addressed in the affidavit of **Simon Ngolekong Merii** whose contents are analysis above:

(a) That the judicial review application for certiorari has been filed outside the 6 month period limit provided for under the Law Reform Act and order 53 of the CPR and it is therefore an abuse of the court process.

(b) Order 40 rule 1 and Sections 1A, 3, 3A and 63 (e) of the CPR are all inapplicable to judicial review.

8. The 1st and 2nd respondent filed Notice to Raise Preliminary Objection dated **9/9/2019**. They echo the sentiments of the interested party regarding the ground (a) in the immediately preceding paragraph and urge generally that the notice of motion is incompetent and that the court lacks jurisdiction.

9. The applicants filed their submissions on **2/9/2019**. The Interested parties filed their written submissions on **23/9/2019**. The 1st and 2nd respondents filed their submissions alongside their grounds of preliminary objection on **18/9/2019**. I have considered all those submissions.

Determination

The Issues for Determination

10. The issues of determination in this application are as follows:

(a) *Whether the judicial review notice of motion is fatally defective for being filed after the expiry of 6 months from the date of the impugned decision.*

(b) *Whether an injunction may issue in these proceedings as sought in the application.*

(c) *Who should pay the costs?*

(a) *Whether the judicial review notice of motion is fatally defective for being filed long after the expiry of 6 months from the date of the impugned decision.*

11. The objection addressed by this ground is premised on **Order 53** which provides as follows:

“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.”

12. Section 9(2) of the **Law Reform Act** provides as follows:

“(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.”

13. The 1st and 2nd respondents and the interested parties refer to the case of **Rosaline Tubei & 8 Others Vs Patrick Cheruiyot & 3 Others 2014 eKLR**.

14. The interested parties also cite the case of **Republic vs CCK Ex Parte East African Television Network Ltd 2001 eKLR** and the decision of this very court in **John Kaberia Vs District Land Adjudication And Settlement Officer Igembe South District & 2 Others 2018 eKLR** for the proposition that once leave is granted the same the court that granted the leave has power to set it aside.

15. In the **John Kaberia Case** this court stated as follows:

“19. Though leave had been granted to the ex-parte applicant to bring these proceedings, the observation of this court is that the leave stage is usually conducted ex-parte unless the court gives directions to the contrary.

20. A look at the case of Rosaline Tubei & 8 others v Patrick K. Cheruiyot & 3 others [2014] eKLR will underline the seriousness with which the issue of limitation of time in judicial review proceedings must be regarded. In that case the applicant sought for extension of time within which to apply for judicial review orders. While dismissing the application, the court observed as follows:

“16. It follows that a court cannot grant leave to a party seeking to file an application for judicial review out of time, and if such leave is granted, it can be challenged at the substantive hearing of the motion.

17. It is upon the ex-parte applicants to find other avenues to push their grievances, for the door to access the remedy of judicial review, is now firmly shut and the key to open the door is not available, for it was thrown into the proverbial sea by effluxion of time.

18. I do not see how this application can succeed. I decline to extend time for commencement of judicial review and further decline to grant leave to commence judicial review to quash the subject decision of the tribunal and subsequent decree from the Magistrate's Court. This application is hereby dismissed but I make no orders as to costs.”

21. Though this court granted leave ex-parte on the 9th November 2012 and ordered that such leave was also to operate as a stay, it is possible to revisit the grant of such leave where a good reason is provided.

22. In this case an objection has been raised that the proceedings were commenced more than six months from the date of the impugned decision. I have examined the record and from the analysis above, found that this ground has merit. I would therefore uphold the Interested Party's objection regarding time-bar.”

16. Citing the case of Republic vs KENHA & 2 others Ex parte Amica Business Solutions Ltd 2016 eKLR, the 1st and 2nd respondents argue that the relief of certiorari was sought as a prerogative relief and not as a constitutional relief and therefore by the operation of the Law reform Act which governs these proceedings, the applicant's application must be deemed to be time barred.

17. In the light of all the above decisions this court is of the view that the proceedings for certiorari herein do not lie for the reason that the proceedings were filed after the expiry of 6 months.

18. As to whether an injunction can issue in judicial review proceedings the interested parties, citing the case of Cortec Mining Kenya Ltd

Vs Cabinet Secretary Attorney General and 8 Others, 2015 eKLR, submit that it can not.

19. Effectively tied to this argument is that the application has been brought under the provisions of the **Law Reform Act** and is not a constitutional petition nor an application under the **Fair Administrative Action Act**. It is argued that when the applicant brought his claim under the **Law Reform Act** he undertook to have himself bound by that Act.

20. In the case of **Commissioner Of Lands Vs Kunste Hotel Limited 1997 eKLR** the Court of Appeal held that a court in judicial review proceedings is exercising a special jurisdiction to which no provisions of **Section 13A** of the **Government Proceedings Act** could not be imported to defeat the proceedings.

21. In the **Cortec Case (supra)** the Court of Appeal observed as hereunder:

“34.Can this court grant an order of injunction in a judicial review matter such as this one? For starters, to grant an injunction would amount to giving a relief or remedy that was not even sought in the High Court in the first place.

The High Court could only grant these three prerogative orders. It could not in the judicial review under Section 8 of the Law Reform Act grant an order of injunction such as is sought in the motion before us for the simple reason that injunction is not authorized by and falls outside the amplitude of the reliefs available under Section 8 of the Law Reform Act. An injunction is also not exclusively within the amplitude of public law remedies. But even more compelling is the fact that subsection (3) of Section 3 of the Appellate Jurisdiction Act requires this court -

“In the hearing of an appeal in exercise of the jurisdiction conferred by the said Act to apply the law applicable to the case in the High Court.”

It is plain to see that in judicial review, the Court is concerned with public law remedies. An injunction is a private law remedy, and it can also serve as a public law remedy. However, in the context of judicial review, it is not available either in the High Court or in this Court on appeal under the Law Reform Act.

35. As is apparent, judicial review being sui generis in which the only orders available are certiorari, mandamus & prohibition, the notice of motion in judicial review having been dismissed, there is nothing that can be stayed under rule 5 (2) (b). Mr. Ngatia was quite correct when he postulated this to be the reason why an order of stay was not sought.”

22. The 1st and 2nd respondents, while citing **Jim Kipkore Vs Chief Magistrate’s Court Kitale & 2 Others 2019 eKLR, Republic Vs County Government of Kajiado & 2 Others, Ex Parte Leah Wanjiru Mburu**, argue that no other provisions of the **Civil Procedure Rules** may be imported into proceedings commenced under **Order 53** of the **Civil Procedure Rules**, and that the court lacks jurisdiction to hear an application commenced under **Order 40** of the **Civil Procedure Rules** in a judicial review application.

23. In this court’s view therefore seeking an injunction or as in this case the additional relief of declaration in judicial review proceedings is improper whether the court has pronounced itself on the application for stay or otherwise.

24. Having found as above I find that the applications dated **13/5/2019** and **23/7/2019** to be incompetent and they are hereby struck out with costs to the respondents.

Dated, signed and delivered at Kitale on this 19th day of November, 2019.

MWANGI NJOROGE

JUDGE

19/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for Interested Party

N/A for Applicant

1st Applicant present

Mr. Kiarie holding brief for Odongo for the Respondents.

COURT

Ruling delivered in open court.

MWANGI NJORGE

JUDGE

19/11/2019