



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**JUDICIAL REVIEW APPLICATION NO. 7 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY**

**FOR ORDERS OF JUDICIAL REVIEW (ORDER OF MANDAMUS)**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND**

**THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA**

**AND**

**IN THE MATTER OF KAKAMEGA HCC NO. 58 OF 1982**

**GEORGE PETER BWIRE OGENGO VS THE ATTORNEY GENERAL & ANOTHER**

**AND**

**IN THE MATTER OF THE DECISION AND/OR JUDGMENT OF THE**

**HIGHCOURT IN KAKAMEGA CIVIL CASE NO. 58 OF 1982**

**AND**

**IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE ATTORNEY GENERAL CABINET**

**SECRETARY MINISTRY OF AGRICULTUR.....RESPONDENTS**

**AND**

**EXPARTE APPLICANT.....GEORGE PETER BWIRE OGENGO**

**JUDGEMENT**

This application is brought under the Provision of Order 53 Rule 3(1) of the Civil Procedure Rules 2010 seeking the following orders;

1. THAT an order for mandamus be and is hereby issued to compel the Respondent herein to open a direct road access to the main road and the water points decreed by the High Court in Kakamega HCCC No. 58 of 1982.
2. THAT costs be in the cause.

The application is based on the grounds that the Exparte Applicant was successful litigant in Kakamega HCCC No. 58 of 1982 which suit was against the Respondent herein. That judgment was entered against the Respondent in favour of the Exparte Applicant in Kakamega HCCC No. 58 of 1982 on 22/7/1983 for a total sum of Kshs. 74,537.50 plus costs and interest of suit. There was also an order that the Respondent herein do open a direct road of access to the main road and to the water point from the said piece of land. That the Respondent has since neglected and/or refused to settle the claim as decreed by the court. The Exparte Applicant wishes to seek orders of mandamus to compel the Respondent to open a direct road access to the main road and the water point as decreed by the court on 22/7/1983. The Exparte Applicant has been denied the right to enjoy the fruits of the judgment, hence the instant application.

The applicant submitted that, the application dated 14/11/2014 is premised under Order 53 of the Civil Procedure Rules Article 159 of the Constitution of Kenya 2010 on the guiding principles of courts in exercising judicial authority and the Law Reform Act Cap 26 Law of Kenya.

They submit that, an order for mandamus in form, is a command issuing from the High Court of justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specific which appertains to his or their office... An order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has legal right to expect the duty to be performed as held in the case of Republic Vs Kenya Vision 2030 Delivery Board and Another Exparte Eng. Judah Abekah (2015) eKLR. The Exparte Applicant has no other option and/or no other legal redress to enforce his judgment. In fact no reasons at all have been given by the Respondents for failing to honour the judgment given in favour of the exparte applicant.

In Republic Vs Town Clerk of Webuye County Council and Another HCC NO. 448 of 2006 it was held;

*'A decree holder's rights to enjoy fruit of his judgment must not be thwarted. When faced with such scenario the court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the value of the constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) (b) and the applicant's right of access to justice protected under Act 48 of the Constitution'*

The applicant also relied on the case of R V County Secretary, Nairobi City County and Another Vs Ex-Parte Wachira Nderitu Ngugi And Co. Advocates (2016) eKLR, and in High Court J. R Miscellaneous No. 44 Of 2012 between Republic vs The Attorney General and Another Ex Parte James Alfred Koroso.

In the present case they submit the ex parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realised. Unless something is done he will forever be left babysitting his barren decree.

This state of affairs cannot be allowed to prevail under the current constitutional dispensation in light of the provision of Article 48 of the Constitution which enjoins the state to ensure access of justice to all persons. Access to justice cannot be said to have ensured when persons in whose favour judgments have been decreed by courts of competent jurisdictions cannot enjoy the fruits of their judgment due to road blocks placed on their paths by actions or inactions of public officers.

The Exparte Applicant has fulfilled all the requirements provided under Order 53 of the Civil Procedure Rules 2010. Leave was obtained before the instant proceedings were filed as required under Order 53. The Exparte Applicant's application is squarely on and/or under the purview of Order 53 as envisaged in law application offends Order 53 Rule 2 of the Civil Procedure Rules which provides that;

*"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purposes of its being quashed, unless the application for leave is made not later than six months after the date of 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."*

They submit that, stated provision touches on Certiorari. The Exparte Applicant herein is not seeking to quash any decision. In fact the Exparte Applicant seeks to enforce a decree that was issued in his favour and which has not been complied with by the Respondents. Certiorari orders and mandamus orders are totally different and seek to serve very different purposes.

It is the Respondent submission that the application as filed is fatally incompetent and bad in law as it offends the mandatory provisions of Section 9(2) of the Law Reform Act Cap 26 Laws of Kenya which provides the time limit for filing for judicial review orders. That section 9 (2) of the Law Reform Act provides state as follows:-

*"9(2) subject to the provisions of subsection (3) rules made under sub-section (1) may prescribe the 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 for which the application for leave relates."*

The Decree in Kakamega HCC No. 58 of 1982 in which the ex parte applicant intends it to be enforced by an order of Mandamus was made on 22<sup>nd</sup> July, 1983 and the applicant filed this instant application for judicial review on 14<sup>th</sup> July, 2014 without leave to file out of time. There has been an unexplained delay of 31 years on the part of the ex parte applicant. They relied on the decision of Laban Macharia vs. Commissioner of Insurance & another 20051eKLR in which the Honourable Court dismissed an application for judicial review orders of mandamus that had been brought outside the six months period stipulated under Section 9(2) of the Law Reform Act.

That judicial review proceedings ought as a matter of public policy to be initiated, heard and determined within the shortest time possible hence the stringent limitation that has been provided for instituting such proceedings. Thus an application for judicial review, may it be for an order of mandamus as is the case here, prohibition or certiorari should be made promptly and in any event within a maximum period of six months.

That the provisions of Article 159(2) d of the Constitution of Kenya will not be of assistance to the ex parte applicant application since the issue of limitation in a judicial review is not a procedural technicality, it goes to the root of the matter of jurisdiction of the court and is provided for by statute, that is, the Law Reform Act, Cap 26 Laws of Kenya.

That in as much as the Ex parte Applicant have argued in their submissions that limitation does not apply to judicial review orders of mandamus but only applies to certiorari it is the Respondents submissions that a period of 31 years as evidenced in the ex parte applicant pleadings is unreasonable time for an applicant to come to court for orders of mandamus It is the Respondents submissions that between the making of the decision sought to be enforced through an order of Mandamus by the Ex parte Applicant and the time of filing this instant application for judicial review circumstances have changed in that the orders being sought by the applicant cannot operate against the Respondents herein since as per part 2 of 4<sup>th</sup> Schedule of the Constitution Agriculture is now under the County Government and that the "County Government of Busia" and the National Government is now concerned with Agricultural Policy .That the orders of mandamus being sought by the ex parte applicant if granted will affect other third parties and therefore makes the order of mandamus not being and effective relief for the ex parte applicant.

It is the Respondents submissions that between the making of the decision sought to be enforced through an order of Mandamus by the Ex parte Applicant and the time of filing this instant application for judicial review circumstances have changed in that the orders being sought by the applicant cannot operate against the Respondents herein since as per part 2 of 4<sup>th</sup> Schedule of the Constitution Agriculture is now under the County Government and that the "County Government of Busia" and the National Government is now concerned with Agricultural Policy .That the orders of mandamus being sought by the ex parte applicant if granted will affect other third parties and therefore makes the order of mandamus not being and effective relief for the ex parte applicant.

This court has carefully considered the application and the submissions herein. The ex-parte applicant herein vide Kakamega HCC No. 58 of 1982 instituted suit against the Attorney General and Michael Adwanyika. It was the plaintiff's claim that on 7<sup>th</sup> August 1981, the 2<sup>nd</sup> defendant acting as a civil servant employed by the Ministry of Agriculture as a manager with their agricultural machinery services, took possession of the whole of the plaintiff land parcel number Marachi/Bujumba/981 and part of the plaintiff's parcel number Marachi/Bujumba/980 and fenced off the said land parcels. The said action was done without any notice to the Ex-parte Applicant or gazette notice about the compulsory acquisition in question. The effect of the aforesaid action was that the Ex-parte Applicant could not access entirely the remaining parcel of Marachi/Bujumba/980 and the whole of the Ex-parte Applicant's land parcel number Marachi/Bujumba/979.

Upon hearing the suit, to wit Kakamega HCC No. 58 of 1982, E. Gicheru J. Entered judgment on 22/7/1985 in favour of the ex-parte applicant to the effect that;

- a) The ex-parte applicant was awarded general damages to a tune of Kshs. 74,537/=.
- b) There was also an order that Respondents herein do open a direct road of access to the main road and to the water point from the acquired parcels of land. This would have enabled the ex-parte applicant to access his remaining land parcel No. Marachi/Bujumba/980 and the whole of Marachi/Bujumba/979.

However, since 1985, the Respondents herein have neglected and/or refused to satisfy the claim as decreed by the court. Consequently the Exparte Applicant applied for and was granted leave to apply for an order of mandamus to compel the Respondents herein to abide by the orders of the court in Kakamega HCC No. 58 of 1982. Parties agreed to canvass the application dated 14<sup>th</sup> November 2014 by way of written submissions. The following issues are for determination;

1. Whether the application is incompetent.
2. Whether the ex parte applicant is entitled to have orders sought.

Section 9(2) of the Law Reform Act Cap 26 Laws of Kenya provides the time limit for filing for judicial review orders. That section 9(2) of the Law Reform Act provides state as follows;-

*"9(2) subject to the provisions of subsection (3) rules made under subsection (1) may prescribe the 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 for which the application for leave relates."*

The Decree in Kakamega HCC No. 58 of 1982 in which the ex parte applicant intends it to be enforced by an order of Mandamus was made on 22<sup>nd</sup> July, 1983 and the applicant filed this instant application for judicial review on 14<sup>th</sup> July, 2014 without leave to file out of time. There has been an unexplained delay of over 30 years on the part of the ex parte applicant.

In the case of Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; (1990-1994) EA 482 the court held that;

*“Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s.9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court’s duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads “unless the High Court considers that there is good reason for extending the period within which the application shall be made” is ultra vires section 9(2) of the Act. Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose..As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred.”*

The court finds that, there is an unexplained delay on the part of the Exparte Applicant to file the application for judicial review orders of mandamus. This application is time barred. I find this application has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**