



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

JUDICIAL REVIEW APPLICATION

MISCELLANEOUS APPLICATION NO. 4 OF 2018

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT
TO ORDER 53 OF THE CIVIL PROCEDURE RULES 2010, LAWS OF KENYA**

AND

**IN THE MATTER OF LEAVE FOR THE ORDERS OF CERTIORARI TO QUASH A
DECISION BY THE 1ST RESPONDENT, RESTRICTION DATED 21ST JUNE, 2017
PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES, SECTION 8 & 9**

OF THE LAW REFORM ACT CAP 26 AND FAIR ADMINISTRATION

ACTION ACT OF 2015 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF LEAVE FOR THE ORDERS OF MANDAMUS PURSUANT
TO ORDER 53 OF THE CIVIL PROCEDURE RULES, SECTION 8 & 9 OF THE LAW
REFORM ACT CAP 26 AND FAIR ADMINISTRATION ACTION ACT OF 2015 OF**

THE LAWS OF KENYA FOR LIFTING/ REMOVAL OF THE RESTRICTION

AGAINST ALL THAT PARCEL OF LAND KNOWN AS LAND

REFERENCE NO. KAJIADO/ DALALEKUTUK/ 3700

AND

IN THE MATTER OF LIFTING AND/OR REMOVAL OF RESTRICTION

**PURSUANT TO THE PROVISIONS OF SECTION 78(1) OF THE LAND REGISTRATION ACT
OF 2012**

BETWEEN

DANIEL PIRANTO OLE NCHANI.....EX PARTE APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER KAJIADO

HON. M. C. WAMBUGU.....1ST RESPONDENT

ESTHER IPITE.....2ND RESPONDENT

THE LAND REGISTRAR

KAJIADO LAND REGISTRY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE DANIEL PIRANTO OLE NCHANI

RULING

What is before Court for determination is the 1st, 3rd and 4th Respondents' Notice of Preliminary Objection dated the 12th March, 2018 in opposition to the Ex parte Applicant's Notice of Motion dated the 13th February, 2018. The Notice of Preliminary Objection is based on the grounds that:

1. That the Application offends Order 53 rules (2) and (3) of the Civil Procedure Rules 2010 and ought to be dismissed with costs.
2. That the Application is frivolous, vexatious and misconceived.
3. That the Application is an abuse of Court process.

1st, 3rd and 4th Respondents' pray that the Application be dismissed with costs to the 1st, 3rd and 4th Respondents.

Both the ex parte applicant and the 1st, 3rd and 4th Respondents' filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Preliminary Objection dated the 12th March, 2018 including the submissions from the 1st, 3rd and 4th Respondents as well as the Ex parte Applicant, the only issue for determination is whether the Notice of Motion dated the 13th February, 2018 offends the provisions of order 53 Rule (2) and (3) of Civil Procedure Rules. Order 53 rules (2) and (3) of the Civil Procedure Rules 2010 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.

‘Rule 3 (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person upon such terms (if any) as the court may direct.

I note the ex parte applicant was granted leave on 6th February, 2018 to institute the instant judicial review proceedings within 21 days from the said date. I further note that the instant judicial review application was filed on 13th February, 2018 where the ex parte applicant is seeking the following orders:

‘1. An order of CERTIORARI to quash the 1st Respondent Circular and/or letter dated the 21st June, 2017 and the Restriction registered on 21st June, 2017.

2. An order of MANDAMUS compelling the 1st and 2nd Respondents to remove and/ or lift the Restriction pursuant to the provision of Section 78(1) &(2) of the Land Registration Act 2012 to all that parcel of land known as Land Reference No. KAJIADO/ DALALEKUTUK/ 3700.’

The 1st, 3rd and 4th Respondents contend that the leave to institute Judicial Review was granted contrary to the provisions of Order 53 rule 1 of the Civil Procedure Rules, as the application for leave was made later than six months after the date of the proceeding or decision that is sought to be quashed. They relied on the following judicial authorities: **Rosaline Tubei & 8 others Vs Patrick K. Cheruiyot & 3 others (2014) eKLR; Republic vs Mwangi Nguyai & 3 Others ex parte Haru Nguyai, High Court at Nairobi, Constitutional & Judicial Review Division, Miscellaneous Application No. 89 of 2008; Republic Vs The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006; Republic Vs Attorney General (on Behalf of Land Disputes Tribunal – Uasin Gishu) & 2 Others (2011) eKLR; and Gilbert Hezekiah Miya Vs Advocates Disciplinary Committee (2015) eKLR** to support their argument. The 1st, 3rd and 4th Respondents further argued that by registering the restriction over the ex parte applicant’s land they had adhered to the law in accordance with the Fair Administrative Actions. Act as well as the Land Act.

The ex parte applicant opposed the Preliminary objection and insisted they filed the instant judicial review application after obtaining leave to do so. They relied on the case of **Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696** and stated that the preliminary

objection did not meet the test set out in the said case.

In the Court of Appeal at Nyeri vide **Civil Appeal No. 211 of 2013 between Stephen Kibowen vs The Chief Magistrate's Court Nakuru, The Bahati Land Disputes Tribunal and Ruth Njoki Waweru**, Justices of Appeal Waki, Nambuye and Kiage held that the Court had discretion to grant leave to a party to file Judicial Review even if the action complained of occurred after the six months period envisaged in Order 53 of the Civil Procedure Rules and held thus: *' we agree with the opinion of the 3 Judge bench of the High Court in REPUBLIC vs. JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS EX PARTE MALULU & 3 OTHERS(supra) that 'nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle to the nature of nullities.'* We agree further that courts are possessed of an inherent jurisdiction not confined to order 53(now order 54) that can be invoked, whenever the courts are moved, to quash any nullities and illegalities. It would be an abdication of its duty for the court to which acts that are such nullities are exposed to fail to invalidate and quash them by appropriate orders and declarations. Since it is indisputable that the Land Disputes Tribunal had no jurisdiction to purport to determine ownership and to cancel the appellant's title to the land in question. We have no hesitation in finding that the tribunal's decision was ultra vires, made without jurisdiction and therefore null and void.'

I note in the current scenario, the Court had already granted leave to the ex parte applicant to institute Judicial Review proceedings, although the action complained of had occurred within a period of six months and one day. Further, I note that the 1st, 3rd and 4th Respondents indeed admit they had lodged a restriction over the ex parte applicant's parcel of land and insist they were within the law to do so. However, as per a letter dated the 21st June, 2017, the 1st Respondent directed the 3rd Respondent to enter a restriction over the ex parte applicant's parcel of land but did not grant him a hearing before doing so. In relying on the above cited Judicial Authority, and facts as presented above, I find that at this juncture the Preliminary Objection is unmerited and dismiss it with no order as to costs.

Dated signed and delivered in open court at Kajiado this 17th day of September, 2018.

CHRISTINE OCHIENG

JUDGE