



Chabari v District Land and Adjudication Officer Meru South Maara District & 3 others; Karimi (Interested Party) (Environment and Land Judicial Review Case E001 of 2023) [2024] KEELC 1128 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1128 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023
CK YANO, J
FEBRUARY 29, 2024**

BETWEEN

JACKSON M’RECHE CHABARI EXPARTE APPLICANT

AND

THE DISTRICT LAND AND ADJUDICATION OFFICER MERU SOUTH MAARA DISTRICT 1ST RESPONDENT

THE DEPUTY COUNTY COMMISSIONER 2ND RESPONDENT

THE LAND REGISTRAR MERU SOUTH SUB-COUNTY 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

AND

JANE IGOKI KARIMI INTERESTED PARTY

RULING

1. This ruling relates to a notice of motion application dated 25th July 2023 by the Ex-parte Applicant seeking leave to commence judicial review proceedings out of time and thereafter leave to apply for judicial review orders of certiorari and prohibition. The application is brought under Article 23 (3) (f), 40 and 50 of *the constitution* and sections 26, 27, 28 and 29 of the *Land Adjudication Act* and Order 53 Rules 1 & 2 of the Civil Procedure Rules and all other enabling provisions of the law.
2. The application is supported by the affidavit of Jackson M’Reche Chabari, the applicant sworn on 24th July, 2023 and is premised on the grounds on the face of the motion. The Ex-parte Applicant avers that he was an appellant in Appeal Case No.232 of 2021 before the minister against the interested Party in respect to land parcel No. 117 Lower East Magutuni Adjudication Section. That the appeal was heard by the Deputy County Commissioner, Maara Sub-County on behalf of the Minister and dismissed



- the appeal on 23rd June, 2021. The applicant avers that he applied for the proceedings immediately, but the Minister declined to supply the same and by the time the same were supplied and certified on 22nd June, 2023, the statutory period to file judicial review proceedings had lapsed. It is the applicant's contention that the intended suit has high chances of success and that the delay was not deliberate.
3. In his affidavit in support of the application, the applicant has annexed copies of the appeal, a letter dated 11th June, 2021, proceedings and a letter dated 8th September, 2022.
 4. The Respondents opposed the application through a notice of preliminary objection dated 19th October, 2023 on the grounds that the application is fatally defective, misconceived, mischievous and otherwise an abuse of the court process and therefore unsustainable in the circumstances. The Respondents contend that the application offends the provisions of Order 53 Rule 3 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 proceedings for purpose of it being quashed, unless the application for leave is made not later than 6 months after the date of such proceedings. Further, that the application offends the provisions of Section 9(3) of the [Law Reform Act](#), Cap 26 Law of Kenya which provides for a mandatory statutory time limitation of 6 months' in respect to applications for prerogative orders.
 5. The application is also opposed by the interested party who filed a Replying Affidavit dated 7th November 2023 wherein she states that the application is without merit, vexatious and should be dismissed. That the applicant has not explained the reason for bringing this application after inordinate delay. That delay defeats equity. The interested party avers that the applicant has not attached the letter requesting for the proceedings and judgment. Further, that the applicant has not explained to the court the action he took for a whole year after applying for the proceedings until the time he filed this application.
 6. The interested party states that every party to the proceedings was given an opportunity to be heard and the applicant cannot fault the Minister for applying his discretion and or finding that the interested party's evidence was weightier than the applicant's. That the applicant has not demonstrated any procedural defects, illegality or impropriety in the proceedings before the 2nd respondent or any inaction of the law and procedure committed to warrant entertaining of this application. The interested party states that neither the 2nd Respondent nor herself committed any abuse of power that requires to be sanctioned by the court. She prays for the application to be dismissed with costs.
 7. The application was canvassed by way of written submissions. The Applicant filed his submissions dated 21st November 2023 through the firm of Ojwang Sombe & Co. Advocates while the Respondents filed theirs dated 24th November 2023 through the Honourable Attorney General.

Applicant's Submissions

8. The applicant's counsel gave a brief background of the case and submitted that with the enactment of the 2010 constitution, our courts have held that time for filing judicial review proceedings can be extended. It was submitted that the provisions of Section 8 and 9 of the [Law Reform Act](#) and Order 53 of the Civil Procedure Rules should be interpreted with flexibility in the application of the law to the circumstances of a particular case with the sole intention of achieving substantive justice for the parties and especially where no prejudice will be occasioned to any of the parties. The applicant's counsel submitted that no statute can be enacted with the sole intention of doing injustice to parties. The applicant's counsel cited Articles 47 and 20(3) (a) of [the Constitution](#) and gave a history of the dispute herein, and submitted that the provision for extension of time in cases where a strict adherence to limitation manifests a miscarriage of justice. That parties ought to be granted extension of time for



justice to be seen and to be heard. It was submitted that the period from the time the judgment was pronounced by the 2nd respondent on 23rd June 2021 to the time the applicant filed this application was occasioned by the delay on the part of the 2nd Respondent in failing to supply the applicant with proceedings.

9. Learned counsel for the applicant submitted that there are various decisions of the superior courts pointing to the shift from the interpretation of Section 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules under the old constitution to a more proactive mode of interpretation of those sections under the Kenya Constitution 2010. The applicant's counsel relied on the case of Republic – vs- Public Procurement Administrative Review Board Ex-parte Syner Chmie [2016] eKLR and cited article 48 of the constitution which commands the state to ensure that all persons are facilitated to access justice without any impediments. They also cited Article 20(3) (a) of the constitution which commands that in applying the provision of bill of rights in case of Article 47 on right to fair administrative actions which is invoked by the applicant in this case. The applicant's counsel also relied on the case of Pastoli v Kabale District and others [2008] 2 EA 300 and cited Articles 23, 24 and 159 of the constitution and Section 7(2) and 8 of the Fair Administrative Actions Act and submitted that the discretion vested in the court is dependent upon various circumstances which the court has to consider, among them the need to do real and substantial justice to the parties to the suit and in accordance with court and reasonable judicial principles. The applicant's counsel relied on the case of Pharmaceutical Manufacturers Association of South Africa Ex-parte President of South Africa, Republic v Kenya Revenue Authority Ex-parte Stanley Mambo Amuti [2018] eKLR; Republic v speaker of the Senate and another Ex-pare afrison Export import Limited and Another [2014]eKLR.
10. With regard to the preliminary objection raised by the Respondents, the applicant's counsel submitted that the situation presented defeats the essence of a preliminary objection as it entails production of evidence to disprove facts. They relied on the case of Republic v Speaker of Nairobi County Assembly & 4 Others Ex-parte Maurice Otieno Gari [2021]eKLR and Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA. The applicant's counsel urged the court to grant the applicant leave as prayed in the application among other prayers thereof.

Respondents' Submissions

11. In their submissions, the Respondents also cited Order 53 Rule 2 of the Civil Procedure Rules, Section 9 of the Law Reform Act and relied on the case of Rosaline Tubei & 8 Others v Patrick K. Cheruiyot & 3 Others [2014] eKLR, Republic v Council of Legal Education & Another Ex-parte Sabiha Kassamia & Another [2018] eKLR and Wilson Osolo v John Ojiambo Ochola & Another and submitted that the wording of Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules 2010 are mandatory and do not provide for extension of the statutory timelines of six months. It is further submitted that judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights.

Analysis And Determination

12. I have considered the application, the responses and the rival submissions. The issue for determination is whether the applicant is entitled to the orders sought.
13. Judicial review jurisdiction is a special jurisdiction which is neither Civil nor Criminal and it is governed by Section 8 and 9 of the Law Reform Act which is the substantive law while Order 53 of the Civil Procedure Rules sets out the procedural law. By those provisions the court is mandated to issue orders of mandamus, certiorari or prohibition in appropriate judicial review proceedings.



14. The *Land Adjudication Act* provides on how disputes are to be resolved including an appeal to the minister. It is apparent that the applicant herein did pursue that right of appeal. He has now invoked the provisions of the *Law Reform Act* and the Civil Procedure Rules, which entitle a party, to apply for prerogative orders including orders of certiorari. I have no doubt in my mind that the applicant is entirely within his rights to pursue that avenue.
15. However, applications for prerogative orders have a limitation period. The *Law Reform Act* Cap 26 Laws of Kenya, provides as follows at Section 9 (3):
- “In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”
16. The above provision is echoed in the Civil Procedure Rules, 2010, which in Order 53 rule 2 provides as follows:
- “Order 53 Rule 2 – Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and the 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.”
17. It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of the decision. The decision that is sought to be quashed is dated 23rd June, 2021. The application was filed on 25th July, 2023. The application is therefore out of time. There is nevertheless a prayer within this application for time to be extended, so that the ex-parte applicant can proceed to apply for the order of certiorari out of time.
18. The Court of Appeal case in *Wilson Osolo v John Ojiambo Ochola & Another* [1996] eKLR expressed itself thus;
- “It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from Section 9(3) of the *Law Reform Act*. Whilst the time limited for doing something under the civil procedure rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case the *Law Reform Act*.” There is no provision for extension of time to apply for such leave in the *Limitation of Actions Act* (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.”



19. I am also guided by the case of Republic v Chairman Amagoro Land Dispute Tribunal & Another Ex-parte Paul Mafwabi Wanyama [2014] eKLR wherein D. Maraga JA (as he then was) held that:

“The judicial review proceedings before the learned judge, which have given rise to this appeal were therefore special in nature and the learned judge erred in importing provisions of the Civil Procedure Act and rules to proceedings governed by the said provisions of the Law Reform Act and Order 53 Civil Procedure Rules. We agreed with learned counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do.”

20. I am aware that by dint of the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the rules. Following this provision, it may be arguable that time may be enlarged to make application for Judicial Review outside the 6 months' limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provisions set out in Section 9(3) of the Law Reform Act (above), and it is trite law that rules made under statute, cannot override a statutory provision. The Law Reform Act itself has no provision for extension of time. I have seen no law, which can entitle me to enlarge time for the filing of an application for certiorari outside the 6-month limitation period.

21. I have been unable to see what law one can base an application to extend time for the commencement of judicial review proceedings. I do not even think that the often-quoted cure for all, Article 159 (2) (d) of the Constitution, which requires courts to administer Justice without undue regard to procedural technicalities, can be of assistance, since I don't think that provisions of limitation of time, can fall within the domain of technical rule of procedure. In my view, they are part of substantive and not procedural law, and cannot fall within the ambit of Article 159 (2) (d) of the constitution. The case of Republic v Public Procurement Administrative Review Board Ex-parte Syner Chmie (supra) relied on by the applicant was not seeking leave to file judicial review proceeding out of time. It was an application for leave to file judicial review on proceedings which were within the timeline of 6 months and for stay.

22. I do not see how this application can succeed. I decline to extend time for commencement of judicial review and further decline to grant the orders sought. This application is hereby dismissed but I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH FEBRUARY, 2024

In the presence of:

Court Assistant – Martha

Ms. Ochola for Ex-parte Applicant

Ms. Kendi for Respondents

No Appearance for Interested Party

C.K YANO,

JUDGE

