



**Republic v Deputy County Commissioner Makueni; Kavali (Exparte Applicant);
Kyeva (Interested Party) (Environment and Land Judicial Review Miscellaneous
Application E006 of 2023) [2024] KEELC 951 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 951 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

**ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E006 OF 2023**

TW MURIGI, J

FEBRUARY 21, 2024

**IN THE MATTER OF AN APPLICATION TO APPLY FOR LEAVE FOR JUDICIAL
REVIEW ON ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF THE MAGISTRATE'S COURT ACT

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT OF 1990

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT 2011

BETWEEN

REPUBLIC APPLICANT

AND

THE DEPUTY COUNTY COMMISSONER MAKUENI RESPONDENT

AND

PETER MUTUA KAVALI EXPARTE APPLICANT

AND

MALASI KYEVA INTERESTED PARTY



RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 13th August 2023 raised by the Respondent on the following grounds:-
 1. The Judicial Review application was filed outside the 6 months period limit provided for under the *Law Reform Act* and Order 53 of the *Civil Procedure Rules* and it is therefore an abuse of the court process.
 2. That the entire suit is frivolous, vexatious and a waste of the Court's judicious time.
 3. That the entire suit is an abuse of the court process.
2. On the basis of the above the Respondents urged the court to strike out the suit with costs.
3. The parties were directed to canvass the preliminary objection by way of written submissions.

The Respondent's Submissions

4. The Respondents submissions were filed on 21st August 2023. On their behalf, Learned State Counsel submitted that the parameters of judicial review remedies were set out in the case of *Municipal Council of Mombasa vs Republic & Umoja Consultant Ltd* C.A Civil Appesl No. 185 of 2001 and in *Pastoli vs Kabale District Local Government Council & Others* [2008] EA 300.
5. Counsel submitted that the only issue for determination is whether the claim by the Ex Parte Applicant is incompetent for having been filed out of time. It was submitted that the present application was filed 7 months after the impugned decision in Appeal to the Minister Case No 244 of 2022 was made on 2/9/2022. Learned State Counsel urged the court to dismiss the suit for being filed out of time. To buttress his submissions Learned State Counsel cited, the following authorities:-
 1. *Wilson Osolo v John Ojiambo & Another* [1996] eKLR.
 2. *Ako v District Commissioner Kisumu & Another*//// [1989] eKLR.
 3. *Raila Odinga & Others v Nairobi city Council* [1990 - 1994] EA 482.
6. As at the time of writing this ruling, the Ex Parte Applicant had not filed his submissions as directed by the court.

Analysis And Determination

7. Having considered the Preliminary Objection in light of the pleadings and the submissions by the Respondents, the only issue for determination is whether the Applicant's claim is incompetent for having been filed out of time.
8. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.



9. The principles as to what constitutes a Preliminary Objection were laid down by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, where Law JA stated as follows:-

“So far as I’m aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

10. Further on Sir Charles Newbold JA stated:-

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

11. In *Oraro v Mbaja* [2005] eKLR Ojwang J (as he then was) described it as follows:-

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

12. The Respondents Preliminary Objection is based on the grounds that the judicial review application is incompetent for having been filed out of time. The issue of limitation of time is a pure point of law which can determine the matter without having to consider the merits of the case. The Notice of Preliminary Objection raised by the Respondents fits the description of a Preliminary Objection set out in the Mukisa Biscuits Case (*Supra*).

13. Section 9(3) of the *Law Reform Act* provides for the time frame within which an application for an order of Certiorari should be made and states as follows;

“In the case of an application for an order for 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 is subject to an appeal, and a time is limited by the 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.”



14. The above provision is echoed in Order 53 Rule 2 of the *Civil Procedure Rules* which provides as follows;

“Leave shall not be granted to apply for an order of certiorari to remove to court 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 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.”

15. The above provisions are couched in mandatory terms that leave shall not be granted unless the application for leave is made not later than six months after the date of the decision.

16. In the case of *Republic v Mwangi Nguyai & 3 Others Ex – Parte Haru Nguyai* High Court Constitutional & Judicial Review Division Misc. Application No. 89 of 2008 the court stated as follows;

“Judicial review proceedings ought as a matter of public policy to be instituted heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognized that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order the affairs in light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to far that their investment or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes.”

17. Similarly, in *Republic v the Minister for Lands and Settlement & Others Mombasa HCMCA No. 1091 of 2006* the Court held that the legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.

18. In the present case, the impugned decision was made on 2nd September 2022. The instant application was filed on 7th March 2023, 5 days after the six month deadline. The Ex Parte Applicant averred that even though the decision is dated 2nd September 2022, the same was delivered on 24th November 2022. The Ex Parte Applicant did not adduce any evidence to show that the decision was delivered on 24th November 2022. The law is very clear that judicial review application should be made within six months after the date of the decision.

19. In light of the foregoing, this Court lacks jurisdiction to hear and determine an application for Certiorari outside the six months limitation period.



20. The upshot of the foregoing is that the Preliminary objection dated 13th August 2023 is merited and I uphold the same. Consequently, the judicial review application is hereby struck out with costs to the Respondent.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVRED VIA MICOSOFT TEAMS THIS 21ST DAY OF FEBRUARY 2024.

In the presence of:

Mwongela for the Ex Parte Applicant.

Ms. Njuguna for the Respondent.

Court assistant Kwemboi.

