



**Republic & another v Wanjohi (Sued as the Administrator of the Estate of the Late John Wanjohi Gakunya) & another; Thuo (Suing on Behalf of Samuel P.G Thuo) (Exparte Applicant) (Environment and Land Judicial Review Case E2 of 2023) [2024] KEELC 853 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 853 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E2 OF 2023  
MAO ODENY, J  
FEBRUARY 21, 2024**

**BETWEEN**

**REPUBLIC ..... 1<sup>ST</sup> APPLICANT  
SUING ON BEHALF OF SAMUEL P.G THUO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PATRICK MURAYA WANJOHI (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JOHN WANJOHI GAKUNYA) ..... 1<sup>ST</sup> RESPONDENT  
NAKURU LANDS REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MICHAEL THUO (SUING ON BEHALF OF SAMUEL P.G THUO) ..... EXPARTE APPLICANT**

**RULING**

1. This ruling is in respect of an amended Notice of Motion application dated 20<sup>th</sup> August 2023 by the Ex-parte Applicant seeking the following orders:
  - a. Spent
  - b. That the court issues order of mandamus to compel the Nakuru Chief Land Registrar to rectify the suit land register (Bahati/Bahati/Block 1/1392); by canceling title issued to John Wanjohi Gakunya and restore and re-register the applicant Samuel P.G Thuo as the proprietor.
  - c. That the title deed for registered land number Bahati/Bahati/Block 1/1392 issued to John Wanjohi Gakunya be declared as void.



- d. That the findings of the Bahati Land Dispute Tribunal and the adoption of the award vide the decree issued by Hon. H. Baraza Resident Magistrate (Nakuru Law Court) in Land Dispute Number 6 of 2008 be set aside.
  - e. That the honorable court be pleased to grant any further order that it may deem fit and just in the circumstances.
  - f. That the costs of this application to abide the outcome of the substantive motion.
2. The 1<sup>st</sup> Respondent filed a preliminary Objection dated 29<sup>th</sup> September 2023 on 6<sup>th</sup> October 2023 on the following grounds:
- a. That this suit is statutory time-barred under Section 7 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya which states:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if first accrued to some person through whom he claims, to that person”
  - b. That this suit offends the provisions of Section 9(2) & (3) of the *Law Reform Act* Cap 26 of the Laws of Kenya.
  - c. That flowing from the above, this honorable court lacks jurisdiction to entertain an otherwise incompetent suit and the first respondent shall urge this honorable court to uphold points of law and strike out this suit with costs to the 1<sup>st</sup> Respondent.
3. The 1<sup>st</sup> Respondent also filed a replying affidavit sworn on 27<sup>th</sup> September 2023 where he deponed that the Ex- parte applicant is guilty of laches as he has filed the matter thirteen years after the course of action arose hence the court lacks jurisdiction to hear and determine this suit pursuant to the *Limitation of Actions Act*.
4. It is the 1<sup>st</sup> respondent’s case that the Ex -parte applicant’s suit is incompetent as he failed to seek for orders of certiorari removing into this court for purposes of quashing the proceedings and decision of Hon. H. Barasa in Land Dispute No. 6 of 2008. That the ex parte applicant has sought for an order of mandamus without seeking for an order of certiorari since he knew that the said order was out of time.
5. The 1<sup>st</sup> respondent further deponed that the Ex- parte applicant has disguised the orders of certiorari by seeking to set aside the findings of Bahati Land Dispute Tribunal and the adoption of the said award vide the decree issued by Hon. H. Barasa Resident Magistrate in Land Dispute No. 6 of 2008.
6. The 1<sup>st</sup> respondent states that prayer No. 4 on the Notice of Motion cannot be granted as it offends the provisions of Order 53 Rule 2 of the Civil Procedure Rules as the suit property Bahati/Bahati Block 1/1392 has been subject of various court proceedings since 1984 when a dispute arose between John Wanjohi Gakunya and Samuel P.G Thuo who litigated in Civil Case 987 of 1990, Nakuru HCC Appeal No. 53 of 1991 and Land Dispute Case No. 6 of 2008.
7. The 1<sup>st</sup> respondent stated that the dispute was finalized in Land Dispute Case No. 6 of 2008 and that all the parties were represented and that the claim that the decision was made in the absence of Peter Gachanja Thuo was misleading. That after the award was given, transfer documents were executed and John Wanjohi Gakunya was gazetted as the owner via gazette notice No. 9947 on 24<sup>th</sup> October 2008.



8. The 1<sup>st</sup> respondent deponed that the deceased's family have been in possession of the suit property since the 1980's and were issued with a title on 18<sup>th</sup> May, 2005 and urged the court to dismiss the application with costs.
9. The Ex-parte applicant filed grounds of opposition to the preliminary objection on the grounds that this is a continuing trespass hence the issue of Limitation of Actions does not arise and that the land was illegally and unprocedurally transferred to the 1<sup>st</sup> and 2<sup>nd</sup> respondents in 2009 vide a decree in Land Dispute No. 6 of 2008.

### **Ex- Parte Applicant's Submissions**

10. Counsel submitted that the Ex- parte applicant was the registered owner of land parcel No. Bahati/ Bahati Block 1/1392 until the year 2009 and that the Applicant was neither aware nor a party to the suit. That his son discovered the irregularity in the transfer of the suit in 2020 when he took over the management of the Applicant's estate due to health issues.
11. Counsel submitted that the 1<sup>st</sup> respondent trespassed onto the suit property without the consent of the Ex- parte applicant and relied on the case of *Eliud Njoroge Gachiri v Stephen Kamau Nganga* [2018] eKLR and submitted that his claim is for fraud and trespass which is a continuous tort therefore was not time barred.
12. Counsel also relied on the cases of *County Government of Laikipia v James Kimani Mburu & 2 others* [2019] eKLR, *Samuel Odhiambo Oludhe & 2 Others v Jubilee Jumbo Hardware Limited & another* [2018] eKLR and submitted that it is not clear how the suit property was transferred to the 1<sup>st</sup> respondent which shows that there was collusion between the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
13. Mr. Musili submitted that the ex parte applicant is an innocent proprietor who is entitled to the protection of his right to property under Article 40 of *the Constitution* of Kenya and that the 1<sup>st</sup> respondent should not hide under the *Limitation of Actions Act* to illegally take away the Applicant's parcel of land.
14. Counsel relied on Section 26 of the *Land Registration Act*, the cases of *Chemei Investments Limited v The Attorney General & Others Nairobi* Petition No. 94 of 2005 (unreported), *Arthi Highway Developers Limited v West End Butchery Limited and others* [2015] eKLR, *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR and submitted that Section 26 protects title holders from unscrupulous persons and that the applicant had led evidence that he had not sold the property to the 1<sup>st</sup> defendant and therefore the 1<sup>st</sup> respondent got the land un procedurally.

### **1<sup>st</sup> Respondents Submissions**

15. Counsel identified two issues for determination namely:
  - a. Whether the preliminary objection is merited?
    - a. Whether suit is time barred.
    - b. Whether the suit offends the provisions of Section 9(2) & 3 of the *Law Reform Act* Cap 26 of the Laws of Kenya.
  - b. Whether the application dated 20<sup>th</sup> August 2023 by the ex parte applicant is merited.



16. On the first issue, counsel relied on the case of *Republic v Eldoret Water & Sanitation Company Limited Ex parte Booker Onyango & 2 Others* [2007] eKLR and submitted that the 1<sup>st</sup> respondent's preliminary objection only raises issues of pure points of law.
17. Mr. Maina also relied on the case of *Avter Singh Bhamra & anor v Oriental Commercial Bank* HCC No. 53 of 2004 and submitted that the ex parte applicant's preliminary objection is on the ground that the suit is time barred which issue goes to the jurisdiction of the court.
18. It was Mr. Maina's submission that litigation over the suit property begun over 39 years ago and that it has been fifteen years since the final decree in the matter was given. Counsel relied on Section 7 of the *Limitation of Actions Act*, the cases of *Mehta v Shah* [1965] EA 321, *Gatboni v Co-operative Creameries Ltd* [1982] KLR 104 and submitted that the ex parte applicant's argument that he discovered the said trespass in 2020 is not true because the 1<sup>st</sup> respondent has been on the land since the 1990's and that his father also had adequate notice of what had transpired back then.
19. It was counsel's further submissions that from the decree in Land Dispute No. 6 of 2008, the applicant was present when the decision was rendered and admits that it has been fourteen years since the 1<sup>st</sup> respondent allegedly trespassed onto the suit property but has failed to demonstrate the steps he took after the alleged trespass took place.
20. Counsel relied on Section 9(3) of the *Law Reform Act*, Order 53 Rule 2 of the *Civil Procedure Rules* and submitted that the applicable law for setting aside or review of a judgement or decree of a court is section 80 of the *Civil Procedure Act* and therefore the nature of prayer No. 4 of the ex parte applicant's application cannot be granted.
21. On the second issue counsel submitted that an order of mandamus compels performance of a public duty which is imposed on a person or a body of persons and therefore the decision by the Bahati Land Dispute Tribunal that was adopted by the court was not brought before this court for quashing and therefore an order of mandamus cannot issue.

### **Analysis and Determination**

22. The issues for determination are whether the suit offends the provisions of Section 9(2) and (3) of the *Law Reform Act*, whether the findings of Bahati Land Dispute Tribunal and the subsequent adoption of the award issued by Hon. H. Baraza in Land Dispute No. 6 of 2008 should be set aside and whether an order of mandamus should issue to compel the Nakuru Land Registrar to cancel the title issued to John Wanjohi Gakunya and register it in the name of Samuel P.G Thuo.
23. It is not disputed that the Nakuru Magistrate's Court in Land Dispute Case No. 6 of 2008 adopted the findings and the award of the Bahati Land Disputes Tribunal which was annexed to the application which was issued on 24<sup>th</sup> June 2008. It is this order that the Ex- parte applicant is seeking to be set aside and the court issues an order of mandamus to compel the Land Registrar to rectify the register and cancel the title deed issued to John Wanjohi Gakunya and restore it to Samuel P. G Thuo.
24. The 1<sup>st</sup> respondent argued that the orders sought by the Ex parte applicant in his amended Notice of Motion offend the provisions of Section 9 (2) and (3) of the *Law Reform Act* which 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.



- (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 proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding 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.”
25. The court in the case of *Joseph Muriithi Nyaga v Embu County Government* [2021] eKLR held as follows on Section 9(2) of the *Law Reform Act*:
- “ 15. What is clear from Section 9(2) is that the 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. My understanding of this section is that it is the rules which are made to govern court proceedings which can (discretionally) provide for the time limit within which an application for mandamus (as the case herein) can be made. The only instance when section 9 limits such time is where an applicant seeks for orders of certiorari.”
26. It is evident that the Ex parte applicant has not sought for orders of certiorari and since Section 9 only limits time for seeking for orders of certiorari, ground 2 of the preliminary objection fails.
27. The 1<sup>st</sup> respondent in its preliminary objection stated that the suit is time barred under Section 7 of the *Limitation of Actions Act* which provides as follows:
- “ An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
28. It is my view that the present matter is not an action for recovery of land as it is a judicial review application seeking for among other orders of mandamus and therefore the provisions of Section 7 of the *Limitation of Actions Act* are not applicable.
29. The 1<sup>st</sup> respondent’s preliminary objection therefore lacks merit is dismissed.
30. On the second issue, the Ex- parte applicant is seeking that the findings of Bahati Land Dispute Tribunal and the subsequent adoption of the award issued by Hon. H. Baraza in Land Dispute No. 6 of 2008 be set aside.
31. The court in *Republic v Jubilee Party & another Ex parte John Kieru Wambui & another* [2021] eKLR held as follows:
- “ 5. The applicable law for setting aside or review of a judgment or decree of the court is section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.”



32. The Court of Appeal in *Ransa Company Ltd v Manca Francesco & 2 others* [2015] eKLR held as follows:

“Section 8(3) and 5 of the *Law Reform Act* is clear and bears no repeating. I hold firstly, that a court sitting on Judicial Review is dispossessed of inherent jurisdiction and must operate within the confines of Section 8 and 9 of the *Law Reform Act* and the then Order 53 of the *Civil Procedure Rules*.

Second, as this Court has held in a litany of cases, judicial review basically deals with the process used to arrive at a decision and not with the merits of the impugned decision.”

33. The basis of the Ex parte Applicant’s Notice of Motion is the decree issued by Hon. H. Baraza in Land Dispute Number 6 of 2008. The applicant is seeking that the said order be set aside which orders cannot be granted by a court sitting on judicial review as its jurisdiction is limited to the provisions of Section 8 and 9 of the *Law Reform Act*.

34. The Ex parte Applicant sought that an order of mandamus be issued to compel the Nakuru Land Registrar to cancel the title issued to John Wanjohi Gakunya and register it in the name of Samuel P.G Thuo.

35. The Magistrate adopted an award as provided for by the then Land Disputes Tribunal Act. The Magistrate was under a duty to only adopt the award as per the findings of the Tribunal, not to add or subtract any part of the award. If the Applicant was dissatisfied with the award, there were laid down procedures of Appeal to the Provincial Appeals Committee, to the Minister and to the High court. There is no evidence that this was done.

36. A copy of the green card annexed to the ex parte applicant’s application shows that on 18<sup>th</sup> May 2009, John Wanjohi Gakunya was registered as the owner of the suit property. This court sitting as a Judicial Review cannot order the cancellation and registration of the Applicant as an owner. Judicial Review is concerned with the process and not the substantive case to determine ownership of the suit land.

37. The court can only quash if such orders are sought and later issue an order of mandamus. The Applicant did not seek for quashing of the order and even if he had sought, the same could not issue the application was not filed within 6 months of the order and no leave was sought for extension.

38. In the case of *Five Forty Aviation Limited v Kenya Revenue Authority & 3 others* [2017] eKLR held as follows:

“It is trite in judicial review; the High Court is not concerned with the merits of the decision by a public or statutory body but rather undertakes a consideration of the procedures that were undertaken to arrive at the decision that is under challenge to ensure, the decision took into account rules of natural justice and due process. This much was stated by this Court in the case of;- *Ransa Company Ltd v Manca Francesco & 2 others*[2015] eKLR -

“As we all appreciate, a court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.”

39. The upshot is the Ex- parte applicant’s Notice of Motion dated 20<sup>th</sup> August 2023 lacks merit and is therefore dismissed with costs.



**DATED, SIGNED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF FEBRUARY 2024.**

**M. A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28<sup>th</sup> March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

