



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**LAND AND ENVIRONMENT COURT**  
**JUDICIAL REVIEW NO.34 OF 2011**

REPUBLIC.....APPLICANT

**AND**

THE PRINCIPAL MAGISTRATE'S COURT MURANG'A.....1ST RESPONDENT  
REGISTRAR OF LANDS MURANG'A.....2ND RESPONDENT  
PETER MWANGI KAGWANJA.....1ST INTERESTED PARTY  
MONICA KATHINA JUMA.....2ND INTERESTED PARTY  
DAVID WAWERU NJOROGE.....3RD INTERESTED PARTY

**EXPARTE:**

MILKA NYAMBURA WANDERI

ALICE WAITHERA MWANGI

**R U L I N G**

The application before court is dated 18/7/2011 and commenced by way of chamber summons under order LIII rule 1(1), 2 & 4 of the Civil Procedure Rules and Section 8(2) and 9 of the Law Reform Act Cap 26 Laws of Kenya. The applicant prays for leave to file for Judicial Review Orders of ***Certiorari*** removing into this Honourable Court for purposes of being quashed the Decree/Order of the 1st respondent herein namely the Resident Magistrate J. Gathuku dated the 30th December, 2010 and issued on the 3rd February 2011 directing that *the Land parcel known as Parcel No.LOC.19/RWATHIA/487 be registered in the names of Peter Mwangi Kagwanja and Monica Kathina Juma and authorising the Executive Officer of the court to be signing all necessary documents pertaining to land parcel Loc.19/Rwathia/487 and Ordering the Lands Registrar to transfer land parcel Loc.19/Rwathia/487 into the names of Peter Mwangi Kagwanja and Monica Kathina Juma and issue them with a land title deed and standing over the matter generally .*

The applicants have further applied for leave to commence judicial review proceedings for an Order of ***Certiorari*** removing to this Honorable Court for purposes of being quashed the decision of the 2nd respondent namely the Registrar of Lands – Murang'a dated 15th October, 2010 removing the caution entry No.3 on the title register lodged by Milka Nyambura Wanderi on the 6th of May 2010 *and an Order of Certiorari* removing to this Honorable Court for purposes being quashed the decision of the 2nd

respondent namely the Registrar of Lands – Murang'a dated 8th of March, 2011 to issue title in respect of LOC.19.RWATHIA/487 in the joint names of Peter Mwangi Kagwanja and Monica Kithina Juma.

The applicant has also specifically sought for An **Order of Prohibition** restraining the 2nd respondent namely the Registrar of Lands – Murang'a from effecting any further transfer or making any entry or issuance of further title deeds to any 3rd parties pursuant to the title issued in the name of the 1st and 2nd interested parties in respect of LOC.19/RWATHIA/487. The applicant further prays for leave to apply for an Order Of Mandamus compelling the 2nd respondent namely the Registrar of Lands – Murang'a to issue notice as per law required and to carry out investigations into the reasons for lodging the caution entered by the 1st applicant dated 6th May, 2010 and to cancel the title issued to the 1st and 2nd interested parties pursuant the consent order entered into the record of the land registry in respect of LOC.19/RWATHIA/487 on the 8th of March, 2011. **In the alternative** the applicant prays that the 2nd respondent namely the Registrar of Lands – Murang'a be compelled to reinstate the caution lodged by the 1st applicant on the 6th of May, 2010 and removed on the 15th of October, 2010 pending resolution of the dispute in High Court Civil Case No.130 Of 2010: Milka Nyambura Versus Rev. David Waweru & Anor. Currently pending determination in Nyeri High Court. Lastly the applicant prays that the grant of leave herein does operate to stay all or any further action by the 2nd respondent in respect of the title to parcel of land known as LOC.19/RWATHIA/487 issued in the joint names of Peter Mwangi Kagwanja & Monica Kathina Juma pending the hearing and determination of the application for Judicial Review and to restrain any action or interference with the suit property by the 1st, 2nd and 3rd pending the hearing and determination of the applicants claim in respect of **trust** and or **adverse possession** over the suit property in High Court Suit No.130 of 2010: **Milka Nyambura & Anor. -VS- Rev. David Waweru & Another**, pending before the High Court of Kenya.

The application is supported by the affidavit of Milka Nyambura and several grounds whose import is that the applicants filed a suit in the High Court at Nyeri on the 15th of October 2010 whereupon they obtained orders restraining the 1st and 3rd interested parties from trespassing into, entering, interfered with or in any manner whatsoever preventing the plaintiff's from entering into, accessing or carrying out any construction or erecting any structures or purporting to sell, alienate subdivide the suit property. The order was allegedly served upon the 3rd interested party herein Rev. David Waweru on the 11/10/2010. The suit was filed by originating summons seeking a declaration of trust.

The 3rd interested party entered appearance in the matter as the 1st defendant and filed a replying affidavit on the 14/10/2010, however the 1st interest party did not file any response in the originating summons.

The originating summons was accompanied with a chamber summons application dated 4/10/2010 which was listed for hearing on 19/10/2010 but could not proceed as the 1st interested party herein who was the 2nd defendant in the originating summons had not filed his papers and could not be reached for service. The 3rd interest party herein was present in court when the interim orders were extended. On the 8/12/10 the applicants and 3rd interest party filed a consent to inter alia extend the interim orders until the 14/3/2011. On the 14/3/2011, the matter was adjourned and interim orders extended to 7th June 2011. The 3rd interested party was present in court.

On the 8/3/2011, during the pendency of the suit in High Court Civil Case No.130 of 2010 (O.S) and during subsistence of court orders within his knowledge, the 3rd interested party transferred the suit property to the 1st interested party by signing a consent agreement on the 23/12/2010 filed in Murang'a SPMCC No.442 of 2010 between Peter Kaguanja & another -VS- Rev. David Waweru.

Upon the consent, the 2nd respondent, Registrar of Lands in Murang'a caused to be removed a caution placed on the suit property by the 1st applicant on the 6th May 2010. On the 8/3/2011 the 1st interested party and the 2nd interested party caused the court order to be entered in the Land Register which order transferred land to the interested parties. The consent order was reduced to a judgment and a decree was issued by the court pursuant to the consent order. In a nutshell the genesis of this matter is the consent order and decree given and issued on 30/12/2010 and 3/2/2011 respectively.

The ex parte applicant seeks leave to commence Judicial Review proceedings against the 1st and 2nd respondents. The grounds for issuing Judicial Review orders of **Certiorari**, **Mandamus** and **Prohibition** were clearly spelt out in the celebrated case of **Kenya National Examination Counsel, Exp. Geoffrey Gathenji Njoroge C.A. CA No.266 of 1996**. It was held that an order of certiorari can quash a decision already made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons. The issue to be considered in this matter is whether the Principal Magistrate had jurisdiction to entertain suit NO.442/2010 at Murang'a. The claim was based on breach of agreement and the plaintiffs were praying for specific performance of a contract and the ex parte applicant has not demonstrated that the magistrate lacked either statutory or pecuniary jurisdiction to entertain the suit. The said applicant has not shown that the magistrate had no power to record the consent entered into by the parties. This court finds that the consent entered into by the 1st, 2nd and 3rd interested parties cannot be set aside by judicial review as the same was an agreement between the parties and can only be challenged through an application to set aside the consent in the court that issued the said order and the same can be done only on grounds of fraud or mistake.

On the issue of rules of Natural Justice, the ex parte applicant was not a party to the suit in Murang'a Senior Principal Magistrate's Courts and therefore could not have been involved in the signing of the consent that was filed in court. The applicant's recourse could only have been to file an application to set aside the consent on grounds that the suit land was the subject of a matter in the High Court. It is trite law that judicial review orders are issued against a public body on grounds of illegality, procedural impropriety and irrationality. The applicant's complaint is not against the judicial officer but against individuals who allegedly fraudulently entered into a consent and transferred the suit land. The judicial officer in recording the consent did not act in **substantive ultra vires** as he acted within the scope of power granted to him by law and therefore no element of illegality has been established. Moreover he did not act in **procedural ultra vires** as the consent was entered into through the right requirement attached to the lawful exercise of the magistrates power to record the consent as rules of natural justice were complied with. The leading authority on the principle of procedural ultra vires is the decision of **Lord Reid in Anisminic Ltd v Foreign Compensation Commission(1969)1 ALL ER 208** where he states thus :

*..... there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.*

On this basis, the court finds that the applicants have not established a **prima facie** for an order of certiorari to quash the order of the Senior Principal Magistrate dated the 30/12/2010 and the decree issued on the 3/2/2011.

Since the decision of the Land Registrar Murang'a was the execution of the decision of the Principal Magistrate's Court Murang'a it follows that no **prima facie** case has been established for the court to allow the applicant to commence judicial review process against the Land Registrar as his action was merely in execution of a court order.

The decision of Principal Magistrate Court was made on 30/12/2010 and issued on 3/2/2011. The application for leave was made on the 19/7/2011 more than 6 months after the decision sought to be quashed was made. Order 53 rule 1(1) prohibits the grant of Judicial Review orders unless leave therefor has been granted in accordance with that rule. Moreover, Order 53 rule 2 prohibits the grant of leave for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for purpose

of 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. The court finds that the application for leave is time barred AS IT WAS MADE MORE THAN six months after the decision sought to be quashed. I agree with the argument by the interested party that judicial review orders operate within certain confines of specified laws which must be strictly followed. Failure to follow this time limits deprives one of the Judicial Review remedies. The argument that certiorari in prayer C of the chamber summons is timeous does not hold water as the process of issuance of title commenced with the decision of the magistrate.

Order 50 rule 1 does not assist the applicant in computation of time as it only applies to strictly Civil Procedure Rules and not rules on Judicial Review. The same does not apply to order 53 as in exercising the power to issue or not to issue Judicial Review Orders, the court is neither exercising civil nor criminal jurisdiction. It is exercising a *sui generis* jurisdiction and therefore the Civil Procedure Rules do not apply.

Section 9 (2) of the Law Reform Act Cap 26 Laws of Kenya sets the time limit for Judicial Review. Order 50 rule 1 of the Civil Procedure Rules do not apply to the Law Reform Act and therefore the applicant cannot invoke the same. Though **Article 159(2)** of the Constitution forbids the court from unduly relying on procedural technicalities, the issue of limitation in judicial review is not a procedural technicality as it goes to the root of the matter of the jurisdiction of the court and is provided for by statute and therefore cannot be dismissed casually, however the court can extend time to commence the proceedings out of time if requested and it is satisfied that ends of justice for the parties would be met in doing so.

The court has examined the matter in depth and finds that the application is statute barred and there is no request for extension of time. Moreover that the applicant has not demonstrated that there is any jurisdictional issue to be determined and that the grounds for Judicial Review orders such as irrationally, procedural impropriety and illegality are lacking. The application is therefore dismissed with costs.

***Dated, signed and delivered at Nyeri this 11th day of October 2013.***

**A. OMBWAYO**

**JUDGE**