Musango & 3 others v Deputy County Commissioner Makindu Sub-County, Makueni County; Siva & 7 others (Interested Parties) (Civil Appeal 105 of 2019) [2025] KECA 499 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 499 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 105 OF 2019

F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA

MARCH 21, 2025

BETWEEN

JOEL MUTUKU MUSANGO .... 1ST APPELLANT

DAVID MWANDAU .... 2ND APPELLANT

DANIEL KIILU MUSANGO .... 3RD APPELLANT

JOHN MWAU MUSANGO .... 4TH APPELLANT

AND

THE DEPUTY COUNTY COMMISSIONER MAKINDU SUB-COUNTY, MAKUENI COUNTY .... RESPONDENT

AND

DISMUS KASIO SIVA .... INTERESTED PARTY

NDUKU KASIO .... INTERESTED PARTY

CHARLES KASIO .... INTERESTED PARTY

SAMMY KASIO .... INTERESTED PARTY

DAUDI KASIO .... INTERESTED PARTY

JAMES KASIO .... INTERESTED PARTY

PETER KASIO .... INTERESTED PARTY

ESTATE OF KASIO SIVA (DECEASED) .... INTERESTED PARTY

(Being an Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mativo, J.) dated 13th May, 2017inHCC Petition No. 19 of 2015)

JUDGMENT

1. There was a long standing dispute over parcels 1303, 1281 and 1204 in Makueni County between the late Simon Musango Mwandau and the late Kasio Siva. Various agencies had been involved in the resolution of the dispute. One of them was the Deputy County Commissioner of Makindu who on 4th December 2015 determined that the parcels belonged to the late Kasio Siva. Following Machakos Succession Cause No. 162 of 2002 in the Estate of the late Kasio Siva, the suit properties had been shared among the beneficiaries of the deceased's estate. These are the 2nd to 8th respondents in this appeal. The decision of the Deputy County Commissioner (1st respondent) aggrieved the appellants who were the legal representatives of the estate of the deceased Simon Musango Mwandau.

2. Vide summons dated 24th February 2017 pursuant to Order 53 Rule 1(1)(2) and (4) of the Civil Procedure Rules, sections 3A and 95 of the *Civil Procedure Act* and Article 159(1) of *the Constitution*, the appellants were asked to file the substantive motion within 21 days.

3. The motion was filed within the 21 days. Vide a motion amended on 27th July 2017, pursuant to Order 53 rule 3(1) of the Civil Procedure Rules, the *Law Reform Act*, section 29 of the *Land Adjudication Act*, Article 159(1) of *the Constitution* and sections 7(1), (2)(a)(ii), (d) and 11(a) and (b) of the *Fair Administrative Action Act*, the appellants sought:

    i. an order of certiorari to issue to remove into the court and quash the judgment and order of the Deputy County Commissioner dated 4th December 2015;

    ii. an order of prohibition directed at the Deputy County Commissioner from acting on the said decision removing the restrictions that had been imposed on the parcels; and

    iii. the previous decisions by the Land Adjudication Officer giving the parcels to the late Kasio Siva be quashed and the parcels be registered in the name of the late Simon Musango Mwandau.

4. Dismas Kasio Siva (the 2nd respondent) opposed the motion vide the replying affidavit dated 28th September 2017. He stated that the said property belonged to his late father; that the respondents had been utilising it since the 1960s; that the appellants had attempted to gain entry by force which had resulted in many cases between the late Simon Musango Mwandau and his (respondent's) late father Kasio Siva; and that all the cases had been resolved in favour of his late father, leading to the registration of the suit property in his name. The respondent averred that the proceedings before the Land Adjudication Officer had been conducted properly and that before the Minister, the estate of the late Kasio Siva had been represented by legal representatives while the appellants were present for the estate of the late Simon Musango Mwandau. The Minister had upheld the decision of the Land Adjudication Officer, after following due process. The ruling was a public document and the appellants could not claim to be unaware of it.

5. In the supplementary affidavit dated 25th March 2018, the 2nd respondent stated that the respondents were denied an opportunity to respond to the leave application before leave was granted; that the appellants had sought judicial review orders against the Minister's decision that had been issued on 4th December 2015, about two years prior; and therefore, that they had the right to respond to the request for leave.

6. Subsequently, the respondents filed a notice of preliminary objection dated 7th May 2018 stating that the appellants' suit was statute barred as it offended section 9(3) of the *Law Reform Act* as leave was

not sought within six (6) months of the decision. Secondly, that the suit offended Order 53 Rule 2 of the Civil Procedure Rules.

7. The trial judge (C.G. Mbogo, J.) heard the preliminary objection and determined that the court lacked jurisdiction to hear and determine the matter before him. This was because the appellants had approached the court not by way of a constitutional petition under either Article 22 or Article 258 of *the Constitution* but by way of a miscellaneous application under Order 53 Rule 2 of the Civil Procedure Rules and section 9(3) of the *Law Reform Act*. The learned judge held as follows:

> "This court lacks jurisdiction to entertain this suit and it must down its tools. (See Owners of Motor Vessel
>
> "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1). Suffice it to say, the application has merits. In the circumstances, I hereby proceed to strike out the ex parte applicant's application with costs to the interested parties."

8. The reason why the learned judge allowed the preliminary objection was that appellants had brought the application for judicial review orders when the six months period provided under Order 53 Rule 2 of the Civil Procedure Rules and section 9(3) of the *Law Reform Act* had lapsed. In the memorandum of appeal dated 22nd March 2019, the appellants raised the following grounds:

> "i) The learned trial judge erred in law and fact in striking out the ex-parte applicants (appellants) application on a preliminary objection which preliminary objection had no merits.
>
> ii. The learned judge erred in law and fact in striking out the appellants' application for judicial review for being time-barred while the appellants had been granted leave for an extension of time to file for leave for orders of judicial review out of time.
>
> ii. The learned trial judge erred in law in striking out the appellants' application on a preliminary objection while the orders granting leave for extension of time to file for judicial review out of time had not been set aside.
>
> iv. The learned trial judge erred in law and fact by ignoring and or failing to consider the provisions of Article 23(3), Article 47, Article 48, and Article 159(1) of *the Constitution* of Kenya 2010 which provide access to substantive justice to all without impediments.
>
> v. The learned trial judge erred in law and fact in failing to find that the appellants' application for judicial review was also brought under the provisions of the *Fair Administrative Action Act*, 2015, and *the Constitution* of Kenya 2010 whereupon applications for judicial review are not limited to the provisions of the *Law Reform Act* only. The Fair Administrative Act and current Constitution have in effect modified the provisions of the *law Reform Act* and Order 53 of the *Civil Procedure Act*.
>
> vi. The learned trial judge erred in law and fact in failing to consider the merits of the application before him and the fact that the title deed in respect of the suit premises was fraudulently and unlawfully obtained. The suit premises had, all along the adjudication process, been declared the property of the deceased appellants' father, one Simon Mwandau (deceased).

vii. The learned trial judge erred in law and fact in failing to find that the appellants were all along the party in possession of the suit premises for many years and that depriving them of the property without a hearing would amount to gross injustice."

9. The appellants' complaint during this appeal was two-pronged.

   First, that the court did not notice that before the appellants sought leave to bring the application for judicial review orders, they sought leave to extend time as it was appreciated that the judgment to challenge the decision of the Deputy County Commissioner was delivered on 4th December 2015, over six months earlier. Secondly, that the learned judge had not considered that the amended motion for judicial review orders was brought not only under Order 53 (2) of the Civil Procedure Rules and section 9(3) of the *Law Reform Act* but also under the provisions of the *Fair Administrative Action Act* and Articles 23(3)(f), 47(1) and 159(d) of *the Constitution*; that it was wrong for the learned judge to shut out a litigant who had invoked those provisions which gave the court power beyond the Civil Procedure Rules and the *Law Reform Act* regarding time.

10. According to the respondents, the learned judge was correct as the judicial review application was subject to the six (6) months limitation period. On their part, the appellants' preliminary objection had been overtaken by events as leave had been granted by the court to come to court after the six (6) months.

11. We have considered the appeal, the grounds, the rival submissions and the cited authorities. We are required to reconsider and re-evaluate the evidence adduced before the trial court to be able to reach our own independent conclusions (See Susan Munyi v Keshar Shiani, Civil Appeal No. 38 of 2002).

12. We have gone through the record and have found that, on 24th February 2017 the appellants filed a chamber summons in which the following orders were sought:

"(i) That the time for applying for orders of Certiorari, Prohibition and Mandamus be enlarged and/or extended and the applicants be granted leave to seek leave to apply for the said orders of Certiorari, Prohibition and Mandamus.

ii. That the applicant be granted leave to apply for an order of certiorari to remove into the high court and quash the proceedings, the judgment and orders made by the Deputy Commissioner Makindu Sub-County, Makueni county on 4th December 2015 in appeal to the Minister case No. 13 of 1990 between Simon Musango Mwandau vs Kasio Siva.

ii. That an order of prohibiting against Deputy Commissioner and/or his agents be issued to prohibit the District Surveyor from entering and/or sub-diving plot No. 1303 Kalii Makindu Adjudication section.

ii. That an order of mandamus be issued compelling the commissioner of lands through the minister of lands and settlement to issue the title deed in respect of plot No. 1303 Kalii Makindu adjudication of the applicant on behalf of the estate of Simon Musango Mwandau.

ii. That the grant of leave do operate as stay against the said judgment and orders of the Deputy Commissioner Makueni county until the determination of the application for the orders of certiorari, prohibition and mandamus.

ii. That costs of this application be in the cause."

13. On 4th April 2017, learned counsel Mr. Muia for the appellants prosecuted the application before the learned judge. It was an ex-parte application. On 20th April 2017 the learned judge delivered a ruling allowing the application in terms of prayers 1, 2, 3, and 4. By prayer 1, the time for applying for orders of certiorari, prohibition and mandamus was enlarged and extended. There was no appeal against the order extending time beyond the six (6) months. We are of the view that, now that this was an ex parte order, it was open to the respondents, in the response to the substantive motion, to challenge the extension. It was not open to the learned judge, who had granted the extension, to ignore it and sustain the preliminary objection that had challenged the motion on the basis that it was brought after the expiry of six (6) months. In our considered view, the learned judge was wrong to dismiss the substantive motion on the basis of the preliminary objection. The learned judge could only deal with the question of the extension if it was challenged. Otherwise, he was required to deal with the substantive motion as amended on 27th July 2017.

14. In any case, even if the preliminary objection could be entertained in the manner the learned judge did, the six months limitation period could only apply to the order for certiorari since no limitation period is prescribed where an order of mandamus is sought. By allowing the preliminary objection and striking out the whole cause, the learned judge fell in error as he failed to take into account a relevant factor, which was that the relief for mandamus could not be disallowed on the ground of limitation period.

15. We consider that this finding is sufficient to dispose of this appeal. We therefore allow the appeal, and set aside the orders contained in the ruling delivered on 18th January 2019.

16. The substantive amended motion shall be heard afresh by a different judge.

17. We make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

F. TUIYOTT

JUDGE OF APPEAL

....

A. O. MUCHELULE

JUDGE OF APPEAL

....

G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR