Kurui & another v County Adjudication Officer, Elgeyo Marakwet County & another; Kisang (Interested Party) (Environment and Land Miscellaneous Application E001 of 2023) [2024] KEELC 1610 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1610 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023

L WAITHAKA, J

MARCH 8, 2024

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE A REPRESENTATIVE SUIT TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ORDER 1 RULE 8 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF SECTION 9 OF THE LAW REFORM ACT

BETWEEN

PAUL KOSGEI KURUI ..... 1ST APPLICANT

WILLIAM KIBIWOT CHEPTERIT ..... 2ND APPLICANT

AND

COUNTY ADJUDICATION OFFICER, ELGEYO MARAKWET COUNTY ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

WILLIAM KISANG ..... INTERESTED PARTY

RULING

1. Vide Notice of Motion/application dated 7th August 2023 the applicants herein seek:-

1. Leave to Institute a representative suit;

2. Leave to institute judicial review proceedings out of time.

2. As can be discerned from the grounds on the face of the application and the affidavit sworn in support of the application, the application is premised on the grounds that the applicants and the other persons the applicants wish to represent in the prospective suit, were aggrieved by the decision of the Land Adjudication Committee which awarded 88% of the estate of the late Chepokwo Chelanga (deceased) to one of the wives of the deceased leaving only 12% of the estate of the deceased to be shared by the members of the other families of the deceased; that the Land Adjudication Committee failed to take into account that the deceased had given a parcel of land to Luka Longole and that the decision of the Land Adjudication Committee was upheld by the Minister.

3. Terming the decision of the Land Adjudication Committee which was upheld by the Minister, on appeal, biased, discriminative, unfair, unjust and unconstitutional, the the applicants have explained that owing to delay in availing the proceedings of the case before the Minister, they were unable to challenge the decision of the Minister within the time provided for by law.

4. The interested party filed grounds of opposition dated 2nd October, 2023 in which he contends that the application offends the mandatory provisions of section 29 of the *Land adjudication Act*, Cap 284 Laws of Kenya as it purposes to prosecute an appeal against the decision of the Minister through the back door; that the application offends the mandatory nature of seeking leave to institute judicial review proceedings as encapsulated by Order 53 of the *Civil Procedure Rules*; that the intended substantive application for judicial review is not attached for the court to look at the intended matter coming up for judicial review as provided for by Order 53 of the *Civil Procedure Rules*; that the application is bad in law and fatally defective for want of compliance with the parent statutes; that the parties who were claimants in the case before the Minister are different from the applicants rendering the application fatally defective; that the application offends the provisions of *Limitation of Actions Act*, Cap 22 Laws of Kenya and that the application is an abuse of the court.

5. Pursuant to directions given on 31st October, 2023, the application was disposed off by way of written submissions.

6. On 23rd January 2024, when the matter came up for mention to confirm filing of submissions, counsel holding brief for Ms. Tigoi for the 1st and 2nd respondent informed the court that the 1st and 2nd respondents were not opposed to the application hence would not be filing any submissions.

7. The Interested Party had not filed submissions as at the time of writing this ruling.

8. On their part, the applicants filed submissions dated 11th December 2023. They have submitted that they have sufficiently explained the delay in challenging the decision of the Minister and established sufficient cause for the court to grant the orders sought.

Analysis and determination

9. The sole issue arising from the application and the response thereto is whether the applicants have made up a case for being granted the orders sought.

10. Concerning that issue, the application raises a question of law namely, whether the court has power to extend time to apply for judicial review proceedings under Section 8 of the *Law Reform Act* as read with Order 53 of the *Civil Procedure Rules*.

11. In answering that question, it is noteworthy that there are divergent views on that issue. For instance the Court of Appeal, in the case of *Wilson Osolo v John Ojiambo Ochola & Another* 1995 eKLR, stated:

> " 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 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 of the Laws of Kenya which gives some limited right for extension of time to the suits after expiry of a limitation period. But this Act also has no relevance here".

12. Following promulgation of the Constitution of Kenya, that position has since evolved with a majority of the courts holding that the court has discretionary power to extend time for leave to apply for judicial review proceedings. For instance, in the case of *Republic v. Kenya Revenue Authority Ex parte Stanley Mombo Amuti* (2018) eKLR Mativo J, (as he then was) distilled the law on that issue thus:-

> " Section 9 (3) of the *Law reform Act* provides as follows:-
>
> > " 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."
>
> 24. The above provision is replicated in Order 53 Rule 2 of the *Civil Procedure Rules*, 2010 in the following words:-
>
> > [Order 53, rule 2.] Time for applying for certiorari in certain cases.
> >
> > > " Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding 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."
>
> 25. Our courts which have adopted a strict interpretation of the above rule have based their determination on the interpretation of the word shall in the above provisions which they held bestows a mandatory obligation. The Court of Appeal in *Ako v Special District Commissioner, Kisumu & Another* held that the prohibition is absolute and any other interpretation or view of the

particular provision would be doing violence to the very clear provisions of sub-section (3) of Section 9 of the *Law Reform Act*.....

26. A further argument adopted by the courts is that the provisions of Order 50 Rule 6 of the *Civil Procedure Rules*, 2010 are inconsistent with the provisions of Section 9 (3) of the *Law Reform Act*. In *Raila Odinga & Others v Nairobi City Council* it was held that:-

    (i) the Rules under the Act cannot override the clear provisions of Section 9 (2) of the *Act*;

    (ii) an act of Parliament cannot be amended by subsidiary legislation;

    (iii) Parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it.

27. Further, in *Republic v Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai* it was held that the provisions of a subsidiary legislation can under no circumstances override or be inconsistent with any act of Parliament be it the one under which they are made or otherwise. Also relevant is Section 31 (b) of the *Interpretation and General Provisions Act* which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament.....

29. Apparently recognizing the difficulty caused by the above provisions which imposes a stringent limitation, Odunga J. by way of obiter in *Republic v Mwangi Nguyai & 3 Others* observed that it was high time section 9 of the *Law Reform Act* was amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice and gave the example of situations whereby a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the limitation period.

30. In *Ako v Special District Commissioner, Kisumu & Another* (cited above), the Court of Appeal was emphatic that "it is plain that under sub-section (3) of section 9 of the *Law Reform Act* leave shall not be granted unless application for leave is made inside six months after the date of the judgment." The Court of Appeal proceeded to hold that the prohibition is statutory and is not therefore challengeable under procedural provisions of the *Civil Procedure Rules*, which permits for enlargement of time. A similar position was held by the Court of Appeal in *Wilson Osolo v John Ojiambo Ochola & Another* 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."

31. The above decisions which adopted a rigid construction of the above provisions were rendered before the promulgation of the 2010 *Constitution*. It should be recalled that sections 8 and 9 of the *Law Reform Act* are borrowed from common law principles which traditionally governed exercise of Judicial Review jurisdiction. Order 53 of the *Civil Procedure Rules*, 2010 is borrowed from these provision.

32. The questions that warrants a candid interrogation is whether the argument that the court upholds a statutory provision which is based on traditional common law Judicial Review principles can now hold sway on the face of our current constitutional dispensation. The *Constitution of Kenya*, 2010, fundamentally changed the legal landscape in this country. This court cannot shut its eyes on express constitutional dictates as discussed below and determine a matter purely on common law principles.

33. Article 47 provides for the right to a fair Administrative Action. To give effect to Article 47, Parliament enacted the *Fair Administrative Action Act*. On the face of the above constitutional provision and the right to access justice guaranteed under Articles 48, the right to enforcement of the Bill of Rights under Article 22, and the authority of the court to uphold and enforce the Bill of Rights under 23, the question that arises is whether a citizen who has explained reasons for not approaching the court within time allowed by the court can be denied access to justice on the basis of the above provisions (which are borrowed from the traditional common law Judicial Review jurisdiction).

34. Section 7 (1) of Part two of the sixth schedule to the *Constitution* provides that:-

> "(1) All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."

35. All law must conform to the constitutional edifice. It follows that the provisions of sections 8 and 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules* must be conform to the *Constitution* or be construed with such adaptations, alterations, modifications so as to conform with the *Constitution*.

36. As the Supreme Court of Appeal of South Africa observed

> "All statutes must be interpreted through the prism of the Bill of Rights."

Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in

Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Other that

> "the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."

The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the *Constitution* which is the supreme law, and all law, including the common law, derives its force from the *Constitution* and is subject to constitutional control.

37. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of the court to in such cases guided by the purposes, values and principles of the *Constitution* and the constitutional dictate to develop the law on that front. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. It would require a compelling reason that would pass an Article 24 analysis test to deny a litigant the right to approach the court. Where a party applies for extension of time as in this case, the court should exercise its discretion and examine the period of the delay and the reasons offered for the delay.

38. Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). Fourth, section 7 of the *Fair Administrative Action* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the *act* provides for grounds for applying for Judicial Review. Fifth, Article 159 commands courts to administer justice without undue regard to procedural technicalities.

39. In *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another* discussing the same provisions, I observed that court decisions should boldly recognize the *Constitution* as the basis for Judicial Review. Additionally, court decisions should boldly recognize access to courts of a fundamental right guaranteed under the *Constitution* which can only be limited in a manner that can pass constitutional muster. It is a constitutional dictate that in applying the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or

fundamental freedom. Talking about developing the law, Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of decisions. Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

40. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the *Constitution*.

41. It is therefore my conclusion that in an application for extension of time such as the one before me, all that an applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay. It will also be a consideration that the impugned decision seeking to be challenged violates or threatens to violate the Bill of Rights or violation of the *Constitution*.

42. Provisions limiting access to courts must be read in a manner that conforms with the constitution. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the *Constitution* must prevail. Suffice to say that the ex parte applicants have in the recitals in the heading to their application invoked Articles 21 (1), 23 (3) (f), 25 (c), 27 (1), 47 (1), 49 (1) (d) & 50 (2) of the *Constitution*.

43. It is well settled that whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of `discretion' by Lord Mansfield in *R. v. Wilke* that `discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, `but legal and regular'.

44. 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. Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case* stated as follows:-

> " Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any

other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

45. Article of the *Constitution* vests judicial authority in the courts to be exercised in accordance with the principles enumerated therein. These principles include protecting purposes and principles of the *Constitution* and administering justice without undue technicalities. Writing on judicial power, Chief Justice John Marshall wrote the following on the subject:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law

46. In addition, the discretionary powers of the court are constrained by the objectives of the *Constitution* to grant access to justice. 'Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard— what is 'just and equitable' — which calls for an overall assessment in the light of the factors mentioned in [the *Constitution* or a statutory provision], each of which in turn calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends. There is nothing arbitrary or capricious about exercising a discretion in order to give effect to a constitutional right...."

13. Based on the persuasive authority of *Republic v. Kenya Revenue Authority Ex parte Stanley Mombo Amuti supra* which captures the current development of the law on the question as to whether the court has power to extend the time provided for in law for applying for judicial review, I am of the considered view that the court in discharge of its inherent power to do justice to parties has power to extend the time to apply for judicial review provided that the applicant satisfies the court that there are sufficient grounds for extending time.

14. Having determined that the court has power to extend time within which to apply for judicial review, the question to determine is whether the applicants have made up a case for exercise of the discretionary power vested in this court in their favour.

15. Concerning that question, I note that the applicants seek leave to challenge the decision of the Minister on Appeal yet they do not allege any wrongdoing by the Minister or fault the decision of the Minister.

16. Whilst there is a nexus between the decision of the Minister and that of the Land Committee, the applicants have not offered any explanation as to why they did not challenge the impugned decision of the Land Committee.

17. Being of the view that the decision of the Land Committee is distinct and separate from that of the Minister, I find the intended proceedings, in as far as they are premised on the proceedings of the Land Committee as opposed to the decision of the Minister, to be incapable of forming the basis of the intended proceedings.

18. For the foregoing reason, I find the applicants' application, dated 7th August, 2023 to be lacking in merits and dismiss it with costs to the interested party.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 8TH DAY OF MARCH 2024

L. N. WAITHAKA

JUDGE

Ruling read virtually in the absence of;-

Applicant – Absent

Respondent – Absent

Interested party - Absent

Court Asst.: Christine