



Musya (Suing as Legal Representative of the Estate of John Musya Musili) v Deputy County Commissioner Mumoni Sub-County & 4 others; Musili (Interested Party) (Environment and Land Miscellaneous Application E008 of 2023) [2024] KEELC 3429 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2023**

**LG KIMANI, J
APRIL 24, 2024**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUSANDIN
THE MATTER OF THE CONSTITUTIONAL RIGHTS PURSUANT TO
ARTICLE 47 OF THE CONSTITUTION OF KENYAANDIN THE MATTER
OF SECTION 4 & 7 OF THE FAIR ADMINISTRATIVE ACTION ACT**

BETWEEN

**NICHOLAS MWENGA MUSYA (SUING AS LEGAL REPRESENTATIVE OF
THE ESTATE OF JOHN MUSYA MUSILI) APPLICANT**

AND

**DEPUTY COUNTY COMMISSIONER MUMONI SUB-COUNTY 1ST
RESPONDENT**

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION 3RD RESPONDENT

**CABINET SECRETARY-MINISTRY OF LANDS, HOUSING &URBAN
DEVELOPMENT NATIONAL GOVERNMENT 4TH RESPONDENT**

HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

AND

DANNY MBUVI MUSILI INTERESTED PARTY

RULING

1. The ex-parte applicant filed the Chamber Summons application dated 22nd day of September 2023 seeking the following orders:



- a. THAT the Honourable court be pleased to grant leave to the Applicant to apply for an order of certiorari outside the stipulated statutory period.
 - b. THAT the Honourable Court be pleased to grant leave to the Applicant to apply for the Judicial review order of CERTIORARI to remove into this Honourable Court and quash the decision of the 1st Respondent dated 24th day of February 2021 over Appeal Case No.20 of 2019.
 - c. THAT the Honourable Court be pleased to grant leave to the Applicant to apply for the Judicial review order of MANDAMUS to compel the 2nd and 3rd Respondents to effect registration of the suit property in favour of the Applicant.
 - d. The leave to apply for Judicial review operates as an injunction barring and restraining the interested party whether by himself, his agents or whomsoever from interfering with Parcel no.8976 Katse Adjudication Section situated in Mutanda location, Mumoni sub-county, Kitui County.
2. The Application is supported by the verifying affidavit of the Applicant, Statutory Statement and attached documents. The applicant sues on behalf of his father's estate as administrator. He deponed that his father, John Musya Musili was the owner of land parcel No. 8976 Katse Adjudication Section situated in Mutanda Location, Mumoni sub-county, Kitui County through purchase. When the area was declared an adjudication section, the applicant stated that the interested party claimed that the suit property was sold to their grandfather and not to his father and that he ought to get a share of the property. The dispute was heard and ended up in the appeal to the Minister No 20 of 2019 that was heard by the 1st respondent and awarded a portion of the suit land to the Interested party.
 3. The ex-parte applicant claims that there was bias in the hearing of the matter and that the 1st Respondent failed to make relevant considerations in their determination of the dispute. The ex-parte applicant states that his father's rights were violated under Section 4 of the Fair Administrative Act and Article 47 of *the Constitution* of Kenya for being ultra vires and contrary to Section 80 of the *Land Registration Act* and urged the court to exercise its discretion in his favour.

The Interested Party's response.

4. The interested party filed a reply to the application stating that he had no intention of evicting the applicant's family, but he had notified the police to stop them from cutting trees in parcel 8976 which was ordered to remain in his name. He contends that the disputed land belongs to his father Musili Wathua who acquired it from Munuve Nzili through cordial and cultural relations.
5. When Munuve Nzili died in early 1963, his sons Muthangya and Kivaki complained to Musili that they did not benefit from the land and demanded Ksh.3,500 in order to be part of the agreement made by their father. John Musili paid the Ksh.3,500/= and the 2 brothers were each to refund him Ks.1000/= to share the cost but he refused the refund after their father's death.
6. When their father was alive, he stated that there was no dispute between the parties and that according to the judgment of the appeal to the Minister adopted from the minutes of the clan meeting held on 25/6/2017 where the land was to be sub-divided, the applicant was given 50% of the land and the remaining 50% to be shared among the Respondent, Kwinga Musili was and Lenah Kalunda Musili, confirming that the land was ancestral.



The Respondents' grounds of opposition

7. State counsel for the Respondents filed Grounds of opposition dated 14th December 2023 on the following grounds:
 1. THAT the application offends the provisions of section 9(2) and (3) of the Law Reform Act CAP 26 of the Laws of Kenya.
 2. THAT the application is an abuse of the court process and subject to dismissal.

The Hearing of the Application

8. The hearing of the application proceeded orally on the 21st of February 2024 and counsel for the applicant reiterated the contents of the application and relied on the authority in the case of R v. Kenya Revenue Authority Commissioner ex-parte Keycare Real Advisory Ltd(2019)eKLR and the case of R vs County Government of Embu ex parte Peterson Kamau Mutia (2022) eKLR. She submitted that in an application for leave to apply for judicial review, one of the requirements is that the court ought not to delve deeply into the arguments of the parties but ought to make a cursory perusal of the evidence before the court and make a decision as to whether the application should be allowed.
9. The second requirement was submitted to be whether the applicant has shown that he was affected by the challenged decision. She stated that the suit property belongs to the applicant's father and his estate.
10. It was submitted that the third element was whether the applicant has an arguable case. Counsel relied on the case of R v. Kenya Revenue Authority Commissioner ex-parte Keycare Real Advisory Ltd(Supra) where it was stated that an arguable case raises a serious issue that ought to be resolved by way of a Judicial review application. Counsel for the Applicant submitted that the applicant has raised 5 serious issues of open bias, violation of Article 47 of the Constitution and the Fair Administrative Act, acting ultra vires, failure to make relevant considerations and making of irrelevant considerations in the determination of the proceedings which all require a full hearing to be determined.
11. Counsel submitted that the impugned decision was made by a public body and that it is in the interest of Article 48 of the Constitution on access to justice that the application be allowed.
12. M/S Ndundu State counsel for the Respondents relied on their grounds of opposition filed submitting that the application offends the provisions of section 9(2) and (3) of the Law Reform Act CAP 26 of the Laws of Kenya on the statutory time limit, submitting that the impugned decision was made on 24th February 2021 while this application was filed on 27th September 2023. She also relied on Order 53(2) of the Civil Procedure Rules(2010), stating that there is no provision under the Law Reform Act for expansion of time as the provision is couched in mandatory terms.
13. State counsel also noted that the reason given for not filing the present application within the period stipulated was that they were pursuing copies of the proceedings of the Minister's appeal. However, no effort was shown to have been made to obtain the proceedings. Further, the deceased died on 14th May 2022 as per the grant, more than one year from the date of the impugned decision. Further, Counsel noted that the impugned proceedings were certified on 6th August 2021 and therefore the applicant had the said proceedings in possession to enable them to file the application earlier.
14. The Interested party Danny Mbuvi Musili appeared in person and relied on his reply that was filed in court.
15. In rebuttal, counsel for the Applicant relied on the holding in the case of R vs Kenya Revenue Authority ex parte Stanley Mombo Amuti(2018) eKLR where the court found that when faced with



a similar application that considers that the Judicial Review is about violation of rights and freedoms under *the Constitution*, the Court has the discretion to do so. The applicant also cited Article 159 of *the Constitution* on the administration of justice without undue regard to the technicalities.

16. She also clarified that the proceedings were certified on 6th September 2023 and not in 2021 as stated by counsel for the Respondent and concluded that in the interest of Article 48 of *the Constitution*, the applicant ought to be granted the prayers sought.

Analysis and Determination

17. The first prayer in the application dated 22nd September 2023 seeks leave to file for a judicial review order of certiorari out of the 6-month limitation period. Section 9 of the *Law Reform Act* and Order 53(1) of the Civil Procedure Rules (2010) provides for leave of court in the filing of an application for judicial review and states that:

“Applications for mandamus, prohibition and certiorari to be made only with leave.

1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
18. Order 53 Rule 2 provides for time limit for applying for leave to apply for an order of certiorari in certain cases and states that;

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.

19. The impugned decision of Katse Adjudication Section Minister’s Appeal 20/2019 was made on 24th May 2021 while the present application was filed in court on 27th September 2023 over 28 months after the making of the decision in the appeal.
20. The application herein is brought under Article 47 of *the Constitution*, Order 53 of the Civil Procedure Rules 2010 and Section 7 of the Fair Administrative Actions Act. It is noted that none of the above provisions of the law provides for the extension of time to file an application for certiorari outside of the six months provided for above. Counsel for the applicant submitted from the bar that the delay in filing the application herein outside of the legally stipulated period of 6 months was caused by the fact that the applicant was still in the process of obtaining proceedings in the appeal. Counsel further stated that at the time when the applicant was pursuing the proceedings he had not instructed their firm to act in the case. Further, Counsel admitted that the reasons for the delay in filing the application are not deponed to in the supporting affidavit.
21. Counsel for the Respondents opposed the application arguing that it offends the provisions of section 9(2) and (3) of the *Law Reform Act* CAP 26 of the Laws of Kenya on the statutory time limit. The said provisions of the law are quoted verbatim above.



22. While dealing with the question of extension of time for filing an application for judicial review, Mativo J (as he then was) rendered himself as follows in *Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti* [2018] eKLR

“ 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 an 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.

23. The court went on to state further that;

“ 41. It is therefore my conclusion that in an application for an 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*.

24. From the foregoing it is clear that this court has the power to extend the time for filing an application for leave to apply for an order of certiorari and the said power is discretionary. The Supreme Court in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR quoted its decision in the case of *Nicholas Kiptoo Arap Korir Salat v. IEBC and 7 Others*, Sup Ct. Application 16 of 2014 established the principles to be applied in exercising the discretionary power to extend time:

“ Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of the Courts which litigants have to lay a basis [for] where they seek [grant of it..... The Court further decided that:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in the exercise of such discretion:

1. extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;



3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 4. where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. whether the application has been brought without undue delay; and
 7. whether in certain cases, like election petitions, the public interest should be a consideration for extending time.”
25. In the present case, the period of delay is 22 months from the end of the 6 months allowed by the law. Although Counsel attempted to explain the delay, she conceded that the said explanation was not contained in the applicant's supporting affidavit. Having perused the supporting affidavit, the court comes to the inevitable conclusion that the applicant did not by way of affidavit explain the delay in filing the application for leave to bring the proceedings herein.
26. The factual truthfulness of the explanation given by Counsel for the applicant fails to convince the court for the reason that the statement was not made under oath and the source of that information is not disclosed. Counsel confirmed that at the time when the applicant was supposedly looking for the proceedings the law firm had not been instructed to represent him.
27. The court further observes that the deceased John Musya Musili whose estate is represented by the applicant died on 14th May 2022 almost one year after the impugned decision of the Minister was rendered. The applicant has not shown that the deceased had any intention of challenging the decision of the Minister by way of judicial review and has not shown any acts carried out by the deceased in pursuit of that intention.
28. Further, the applicant was issued with the limited grant of letters of administration on 20th July 2022 but filed the present application on 27th September 2023, over a year after the said grant. That delay is also not explained.
29. The court has considered the period of delay in filing the application herein and considers the delay to have been inordinate and excessive. The said delay was not explained by the applicant and it is not shown if indeed the reason given by Counsel was the real reason the application was not filed within the stipulated period. The court thus finds that the applicant has not shown that he has a good reason for failing to file the application within the time allowed by the law.
30. For the above reasons, the court finds that prayer (a) of the application dated 22nd September 2023 has no merit. Consequently, the court finds that prayer (b) seeking leave to apply for the Judicial review order of Certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent dated 24th day of February 2021 over Appeal Case No.20 of 2019 cannot be granted as sought.
31. The court further finds that in the absence of an order of certiorari quashing the decision of the 1st Respondent dated 24th day of February 2021 in Appeal Case No. 20 of 2019, the prayer sought for an injunction and for leave to apply for the Judicial review order of mandamus to compel the 2nd and 3rd Respondents to effect registration of the suit property in favour of the Applicant cannot be granted.
32. In the court's view, the reason for granting leave to institute judicial review proceedings is to ensure that an applicant is only allowed to proceed to the substantive hearing if the Court is satisfied that there



is a case fit for further consideration. This position was confirmed in the case of Republic v County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical And Dental Clinic & 6 others [2022] eKLR cited by Counsel for the Applicant, the Court held that:

“The reasons for leave were explained by Waki J. (as he then was) in Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996 and the dictum in that decision is that leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

33. The court thus finds that the entire application dated 22nd September 2023 lacks merit and the same is hereby dismissed with no order as to costs for the reason that the nature of the application herein is ex parte in the first instance.

Dated, delivered and signed this 24th day of April 2024

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

The ruling read in open court and virtually in the presence of:

C/A Musyoki

Omari for the Applicant

The Interested party in person

No appearance for the respondents

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