IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, NAMBUYE & WARSAME, JJ.A.)

CIVIL APPEAL NO. 251 OF 2006

BETWEEN

REPUBLIC.....APPELLANT

AND

ATTORNEY GENERAL1ST RESPONDENT

DISTRICT COMMISSIONER, KITUI DISTRICT.....2ND RESPONDENT

THE PERMANENT SECRETARY

MINISTRY OF LANDS AND HOUSING.....3RD RESPONDENT

KITHUVA KILIKU & BROTHERS.....4TH RESPONDENT

EX PARTE

1. MAITHYA MUVIWA

2. MALOMBE MUVIWA

(Being an appeal from the Judgment and decree of the of the High Court of Kenya at Nairobi (Wendoh, J.) dated 9th June, 2006

in

High Court Misc. Application No. 48 of 2005

****

JUDGMENT OF THE COURT

This is an appeal by **MAITHYA MUVIWA** and **MALOMBE MUVIWA** (the appellant) against the Judgment and Decree of the High Court (Wendoh, J) delivered on the 9th June, 2006 in which the learned judge dismissed the appellant's judicial review application. Aggrieved by the judgment, the appellant lodged a notice of appeal on the 22nd June, 2006 and followed it up by filing the appeal now before us on the 3rd November, 2006.

Briefly the background of this appeal is that on 14th January, 2005 the appellant filed an *ex-parte* chamber summons seeking leave to apply for an order of certiorari to remove to the High Court and quash the entire proceedings and record relating to an appeal to the Minister Kauwi adjudication section Appeal Case. No. 217 of 1987. The appellant also sought leave to apply for mandamus directed against the 3rd respondent to remove the restriction registered as entry No. 2 against land parcel known as Mutonguni/Kauwi/2150. The appellant was granted leave to apply for the aforementioned orders and they filed the application on 4th February, 2005.

The Hon. Attorney General entered appearance for the 1st, 2nd and 3rd respondents and also filed grounds opposing the application wherein he contended that appellant's the judicial review proceedings was fatally defective and incompetent because the leave was obtained irregularly outside the statutory six months provided for in law.

The matter proceeded for hearing and the learned judge after hearing the parties rendered her judgment on the 9th June 2006. In her judgment, the learned judge agreed with the Hon. Attorney General that the application seeking leave to apply for an order of certiorari was made after the six months statutory limitation and it was therefore incompetent. The learned judge proceeded to strike out the entire application. Aggrieved by the decision of the High Court the appellant filed the appeal now before us. The appellant's Memorandum of Appeal listed five grounds of appeal as follows:-

> ***a) The learned judge erred in law and in fact that the application for leave to apply for judicial review was filed outside the statutory period of six months without any contrary evidence to that appeal.***
>
> ***b) The learned judge erred in law and in fact in relying on assumption that District Commissioner Kitui made his decision before 21st July, 2004 whilst there was no evidence to support the same.***
>
> ***c) The learned judge erred in law and in fact that the application for leave to apply for judicial review was filed two 2 days before lapse of the statutory period whilst time starts to run from the date of notice to the registrar and/or when the proceedings were instituted on or about 13th January, 2005.***
>
> ***d) The learned judge erred in law and in fact by failing to consider the application on its merits.***
>
> ***e) The judgment of the court cannot be supported in law or in fact.***

The parties filed written submissions which were highlighted before us by counsel for the parties. The appellant submitted that the learned judge held that the date of 21st July, 2004 that appeared on the appeal to the Minister Kauwi Adjudication Section, was not the date that the ruling was made without relying on any evidence. The appellant argued that the learned judge made an assumption that the ruling on the appeal must have been made before the 21st July, 2004 which is the date that the proceedings were certified as true copies. The appellant contended that there was no tangible evidence to support the assumption made by the learned judge. The appellant argued that it was fatal for a court to make judgment based on an assumption and not evidence. The appellant submitted that in any event the six months limitation is only applicable for an order of certiorari and not mandamus which they had also sought.

The appellant submitted that the Judge erred in failing to consider the application on its merits. They argued that the issue in contention was the ownership of a parcel of land known as Mutonguni/Kauwi/2150 which they owned yet the appeal made to the Minister, Kauwi Adjudication Section held that the land belonged to the 4th respondent. The appellant argued that the learned judge did not consider the application on its merits and hence the real issues between the parties were not determined and they will always be aggrieved by that decision. The appellant further argued that the learned judge failed to consider the merit of their application for an order of mandamus to compel the 3rd respondent to remove the restriction registered against the parcel of land, since an order of mandamus is not limited by the six months period.

The 1st, 2nd and 3rd respondents also filed submissions. The respondents submitted that the learned judge correctly found that the application for leave to institute judicial review proceedings was made outside the six months statutory period for the relief of certiorari. They argued that the appellant had assumed that the date of the ruling was 21st July, 2004 which was not the case because this was the date that the proceedings were certified as true copies of the original. They further argued that the appeal must have been determined earlier on 21st July, 2004.

We have duly considered the record, the written and oral submissions by learned counsel and the authorities cited. We believe that the only issue that turns for our consideration is whether the learned judge was right in striking out the application for Judicial Review for the reason that the leave was sought outside the statutory period of six months. Order 53 Rule 2 of the Civil Procedure Rules provides 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."***

There is a replica provision such as the one herein above under Section 9(3) of the Law Reform Act. It is therefore important to determine when the impugned ruling of the appeal before the Minister Kauwi Adjudication Section was made. We have looked at the record of appeal and indeed we are obliged to agree with the learned judge that the date of 21st July, 2004 appearing on the proceedings before the Minister Kauwi Adjudication Section is the date that the proceedings were certified as true copies of the original and not the date of the ruling. It is therefore not clear when the ruling was made.

Though the appellants have stated that it was incumbent upon the respondent to provide evidence of when the ruling was made, we do not agree with them. It is our considered opinion that once the respondents have raised the issue of the date of the ruling and rightly stated that the date appearing on the proceedings is the date of certification of the ruling and not the date of the ruling as had been alleged by the appellant in paragraph five of the verifying affidavit, the burden of proof must then shift to the appellant to prove when the actual date when the ruling was made. We therefore agree with the learned judge that the appeal must have been determined earlier than 21st July, 2004 and therefore the application for leave having been filed on 4th January, 2005 was outside the six months statutory period provided for under Section 9 (3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

The appellant also argued that the learned judge should still have considered the merit of the order of mandamus which is not affected by the aforementioned provisions of law. What we understand the appellant to be saying is that even though the decision of the Minister Kauwi Adjudication Section could not be quashed and was therefore still valid the court should have considered whether to compel the 3rd respondent to remove the restriction. With respect we think that submission is illogical. By inviting the court to consider the issue of the

mandamus we are of the view that the appellant would be inviting the court to carry out an academic exercise whose results would not have been of any assistance to the appellant. The restriction in question was registered on 17th November, 1989 to prevent any dealings with the land until the appeal pending before the Minister was determined. The appeal having been determined in favour of the 4th respondent of what benefit would it have served for the court to consider the merit of the order of mandamus.

We think we have said enough to demonstrate that the appellants have not demonstrated any basis for us to interfere with the decision of the trial Court. Accordingly, the appeal fails and it's dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered this 22nd day of February, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISRAR