



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MUSINGA, SICHALE & KANTAL, J.J.A)

CIVIL APPEAL NO. 126 OF 2017

BETWEEN

JOSEPH GATHERU GATUNE.....APPELLANT

AND

REPUBLIC OF KENYA & 5 OTHERS.....RESPONDENTS

(Being an appeal from the ruling /order of the Environment and Land Court of Kenya at Kerugoya (Oloa, J.) dated 28th July, 2017

in

Civil Application No. 1 of 2017)

JUDGMENT OF THE COURT

The appellant, **JOSEPH GATHERU GATUNE** filed this appeal against the judgment of **Oloa, J.** dated 28th July, 2017. The **REPUBLIC OF KENYA, MWEA IRRIGATION SCHEME, SENIOR MAGISTRATE (SIC) WANGURU COURT, DAVID NDERITU, MICHAEL MURERIA and DANSON MACHARIA** were named as the 1st, 2nd, 3rd, 4th, 5th and 6th respondents respectively.

A brief background to this appeal is that the appellant (the then applicant) filed an application dated 28th June, 2017 on 30th June, 2017. In the application the appellant sought the following orders:

“1. That leave to file and apply for an order of certiorari be granted to the applicant to quash the decision and order of proceedings of the tribunal relating to the matter of rice holding No. 185 TEBERE UNIT being the Estate of LUKA GATUNE NDEGWA (deceased) as confirmed as a judgment of the court vide WANGURU CASE NO. 19 OF 1994.

2. That costs of this application be in the cause”.

Oloa, J. heard the application and on 28th July, 2017 dismissed it thus provoking this appeal.

In a memorandum of appeal filed on 29th August, 2017 the appellant listed 3 grounds of appeal which can be summarized as follows:

- 1) Failure to find that the appellant’s constitutional right to property had been violated,
- 2) Applying wrong legal principles, and
- 3) Failure on the part of the learned judge to exercise his mind judiciously thus causing an injustice.

On 15th January, 2018 the appeal came before us for hearing. There was no representation on behalf of the 1st and 3rd respondents inspite of service of the hearing notice upon the Attorney General.

In prosecuting the appeal, the appellant narrated the many failed attempts he has made in an effort to reverse the decision of the tribunal

made on 18th June, 1998 which he was dissatisfied with. According to him, his late father's land, (the late **Gatune Ndegwa**) was not to be given to any of his brothers, the 4th, 5th and 6th respondents.

In response, **Mr. David Nderitu** (the 4th respondent) spoke on behalf of himself and his two other brothers, the 5th and 6th respondents. According to the 4th respondent, the 4 acres of land owned by their late father was subsequent to succession proceedings divided into 4 equal parts and each one of them got 1 acre, to the exclusion of their sisters.

On behalf of the 2nd respondent, learned counsel Miss **Rosemary Mwangi** submitted before us that the records held by the 2nd respondent reflect the outcome of Succession Cause Misc. Case No. 19 of 1994 to the effect that each of the brothers owns 1 acre of land.

Olao, J. in dismissing the appellant's summons stated as follows:-

“The orders sought to be quashed were issued some twenty (20) years ago. The first order was by S.M. JUMA DISTRICT MAGISTRATE issued on 11th July, 1995 confirming the nomination of DAVID NDERITU GATUNE as successor to the rice holding No.185 TEBERE. The said magistrate issued another similar order on 18th June, 1998 when dismissing the Applicant's application to set aside that order.

This application seeking leave to file an application for orders of certiorari is well out of time. It is accordingly dismissed with no order as to costs.”

In so doing, the learned Judge cited the provisions of **Order 53 Rule 2** of the Civil Procedure Rules that state:-

“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 an act; and where the proceedings 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.”

In our view, the law is very explicit as to when one can file judicial review proceedings. It does not matter that the appellant is not trained in law and neither does it matter that he has engaged the court variously and without success. An application for Judicial Review has to be made before the expiry of 6 months from the date the order/ruling sought to be quashed was made. The appellant filed judicial review application seeking to quash a decision made 20 years earlier. He was clearly outside the 6 months rule as pointed out by the learned Judge.

We find no merit in this appeal which we hereby dismiss with costs to the 2nd, 4th, 5th and 6th respondents.

It is so ordered.

Dated and delivered this 21st day of February, 2018.

D. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR