



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)
CIVIL APPEAL NO. 158 OF 2007

BETWEEN

MOHAMED ABUSHIRI MUKULLU APPELLANT

VERSUS

- 1. THE MINISTER FOR LANDS AND SETTLEMENT1ST RESPONDENT**
- 2. THE DIRECTOR OF LAND
ADJUDICATION AND SETTLEMENT2ND RESPONDENT**
- 3. THE REGISTRAR OF LANDS, KWALE DISTRICT 3RD RESPONDENT**
- 4. MASSUD ABDALLA MHEMBA4TH RESPONDENT**
- 5. ALBERTO SOPRANO5TH RESPONDENT**
- 6. KWALE COUNTY COUNCIL6TH RESPONDENT**
- 7. THE DEPARTMENT OF DEFENCE7TH RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Maraga, J.)
dated the 9th day of March, 2007*

in

Misc. Civil App. No. 1091 of 2006)

JUDGMENT OF THE COURT

The appellant, **Mohamed Abushiri Mukullu** through his advocates, **Messrs Steven Kithi & Company**, on 10th December, 2006 filed an ex parte Chamber Summons application dated 31st July,

2006 seeking leave of court to apply for the judicial review orders of certiorari, prohibition and mandamus out of time. The subject of the application concerned the adjudication of several plots and parcels of land located on Wasini Island. His contention was that the respondents had irregularly applied the Land Adjudication Act (**Cap 284**) to the Wasini Island despite the said Island being part of the 10 mile Kenyan Coastal Strip, whose title is governed by the Land Titles Act (**Cap 282**), despite the appellant having had title to several portions of the Island long before the commencement of the adjudication process, including his appeals and objections thereto, and despite the respondents acting irregularly and in breach of the rules of natural justice. The decisions sought to be quashed were given in 1980 and 1984.

The appellant explained the delay of about 22 years in bringing forward the application before the High Court on account of frustration by senior members of the provincial administration, even leading to his arrest on allegedly trumped up charges for pursuing his claim over the land. He was eventually forced to flee from the country until the year 2002 when the regime change in Kenya enabled him to return. He prayed that upon grant of such leave, his application be heard and determined, and hopefully, the respondents be compelled to register the original plots and subdivisions of the subject land in his name and to issue him with the title deeds thereto. In his submissions before **Maraga, J.** (as he then was), the appellant relied on the case of **Republic v Judicial Commission into The Goldenberg Affair and 3 Others, Ex Parte Malulu & Others** [2004] eKLR in which the High Court held that the 6 months limitation within which to present an application for certiorari only applied to judgments, orders, decrees, convictions or other proceedings of an inferior court and that the time limit under **Section 9(2)** of the Law Reform Act and **Order 53 Rule 2** does not include anything covered by the *ultra vires* rule, nullities or decisions made without jurisdiction.

The High Court after hearing the appellant denied the application for leave, opting to depart from the reasoning in the Goldenberg case pronouncing itself thus:

“.....With profound respect I am unable to follow that decision. What the Ex-parte applicant in this application is asking me to do is to add my voice to the contention that except in the cases of decisions of subordinate courts and statutory tribunals orders of certiorari can and should now issue with abandon to question decisions of public officers, statutory bodies and any other bodies emendable to the judicial review jurisdiction even after several decades. If the few applications I have seen recently are anything to go by, that decision is now being cited as a carte blanche solution to all manner of indolence and in other cases like this one to resurrect matters long decided and forgotten. If this application were to succeed I cannot see why the past decisions of all the Land Adjudication Committees and Land Adjudication Appeals Tribunal in the whole country cannot come up for review. I cannot think of anything more absurd if that were to be allowed.

Whereas I have no doubt in my mind that courts will deal with each application on its own merit I deprecate the notion that the courts should in the first place entertain such applications. This is because in my humble view there is no legal basis for doing so.....”

The appellant was aggrieved by the decision and appealed to this Court setting out three grounds of appeal:

“1. That the learned judge erred in law by refusing to follow the principle of stare decisis without any or any proper reason.

2. That the learned judge erred in law and in fact in holding that if he were to grant leave to the appellant herein it would open up a Pandora’s box vis-à-vis all decisions of Land Adjudication Committees and Land Adjudication Appeals Tribunals countrywide thereby setting public policy and order at defiance, when in fact, only those adjudications irregularly carried out within

the ten-mile strip would be affected.

3. That the learned judge erred in law by effectively holding that administrative acts carried out *ultra vires* can acquire legitimacy by the mere effluxion of time.”

The appellant therefore sought from this Court the following orders:

“1. That this appeal be allowed and the ruling of the High Court dated 9th March, 2007 dismissing the appellant’s application for leave to apply for orders of certiorari, prohibition and mandamus be set aside.

2. That the appellant herein be granted leave to apply for the orders of certiorari, prohibition and mandamus, and the appellant’s judicial review application be remitted back to the High Court for full hearing and determination of its merits.

3. That the respondents be condemned in costs both in this appeal and out of the said application for leave dated the 19th day of December, 2006 respectively.”

Mr. Kithi, learned counsel for the appellant appeared before us on 11th November, 2014 to argue the appeal. He submitted that the principle of precedent has the effect of compelling the courts of law to follow decisions of superior courts. He therefore faulted the High Court for refusing to follow the decision of the constitutional court in the Goldenberg Case (*supra*). He argued that the Goldenberg Case, was a decision of a High Court sitting as a Constitutional Court, and therefore such decision was binding on all other High Courts. He argued that the appellant’s application would show that the *ex parte* applicant had been deprived of the property as a result of the Minister misapplying a statute. He faulted the learned judge for relying on public policy, maintaining that the effluxion of time does not cure *ultra vires* acts. He submitted that the claim was based on the allegation that the Minister for Lands had acted without jurisdiction, and therefore urged that this appeal be allowed. There was no response since this was an appeal arising out of *ex-parte* proceedings.

We have carefully considered the record of appeal and submissions by learned counsel. The appellant’s application for leave dated 31st July, 2006 listed the main ground as the illegal or irregular application of statute over the subject properties, which translated to the appellant being effectually disinherited. The material annexed in support of the claim indicate that the appellant vigorously defended this claim before the committees whose jurisdiction he now denies. No attempt was made at the time to challenge the jurisdiction. The appellant claimed of having been arrested on trumped up criminal charges in 1988. The criminal case against the appellant, for which he was acquitted, was said to have been political. He sued the attorney general for malicious prosecution in 1990 which case was dismissed in 1994. He claimed to have suffered consistent harassment from the Police and Provincial Administration following his acquittal of the 1997 case, forcing him to seek political asylum in Tanzania and elsewhere some time in or about 1993. The court is not at this stage required to look at the merits of the case, save as they relate to the application for leave to file the application out of time. While jurisdiction as a matter of law can be raised at any point in litigation, best practice demands that it be raised at the earliest. A delay of 22 years in this case has not been justified.

The principle of *stare decisis* requires that, although not bound to do so, the court should follow a decision of a judge of equal jurisdiction unless the decision appears to be clearly wrong. In its vertical application, a court is bound by the decisions of a court superior to it. Horizontally, while it may be desired for the sake of certainty and consistency that the court does not deviate from decisions of the courts of the same rank, decisions by courts of concurrent jurisdiction are only of persuasive nature and cannot bind the court.

In Jasbir Singh Rai & 3 Others v Tarlochan Singh & 4 Others, [2013] eKLR, the Supreme

Court asserted that the rule of precedent promotes predictability, diminishes arbitrariness, and enhances fairness, by treating all cases alike. The doctrine of stare decisis holds that decisions of a higher Court, unless distinguished or overruled, bear the quality of law, and bind all lower Courts in similar or like cases.

The Constitutional and Judicial Review division of the High Court is merely a division of the High Court and is in no way designed to be superior to any other divisions of the High Court. This was the holding in **Peter Ng'ang'a Muiruri v Credit Bank Limited & 2 Others**, [2008] eKLR. The court in that case faced with a similar argument refuted the notion that the previous constitution had established what had been referred to as a “constitutional court”, adding that:

“...in Kenya we have a division of the High Court at Nairobi referred to as “Constitutional and Judicial Review” Division. It is not an independent court but merely a division of the High Court. The wording of section 67 of the Constitution which donates power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court.

...

...The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list...

Any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity...”

This position was not altered by the promulgation of the new Constitution. The decision of the Goldenberg case was not therefore binding on Maraga, J. or indeed upon the High Court nor this Court. To uphold the appellant’s submissions to the contrary would perpetuate constitutional as well as judicial heresy regarding the jurisdiction and ranking of courts in this country.

For this reason, the first ground of appeal must fail, since the learned trial Judge had an obligation to examine the issues before him and to reach such decision as was justiciable in law in the circumstances, and the principle of stare decisis as far as the Goldenberg case was concerned was not binding upon the court, being a court of concurrent jurisdiction. We must restate the position that the Constitutional and Judicial Review Division of the High Court is just a division of the High Court. It does not enjoy superior status or jurisdiction than any other division of the High Court or a Judge of the High Court.

Did the judge in holding that if he were to grant leave to the appellant herein it would open up a Pandora’s box vis-à-vis all decisions of Land Adjudication Committees and Land Adjudication Appeals Tribunals countrywide thereby setting public policy and order of defiance, when in fact, only those adjudications irregularly carried out within the ten-mile strip would be affected.

The law does not exist in a vacuum. It is necessary that the court in arriving at its decisions take into account the prevailing circumstances in the society. The learned trial Judge in considering public interest and policy was therefore not misguided. Maraga, J. in denying the application for leave decried that the Goldenberg Case was being cited as a carte blanche solution to all manner of indolence to resurrect matters long decided and forgotten. He voiced his apprehension that if the application were to succeed, the past decisions of all the Land Adjudication Committees and Land Adjudication Appeals Tribunals in the whole country may come up for review. We do not think that the judge can be faulted

for taking into account the foregoing in reaching his decision. This view was however not the only reason for the refusal of the application. The learned Judge went further to offer his own interpretation of section (2) of the Law Reform Act and **Order 53 Rule 2** of the Civil Procedure Rules as considered in the case of **Kenya Breweries Ltd. v. Municipal Council of Mombasa & Others HC. Misc. Application No. 260 of 2001.** He reverted to this “public policy” basis in obiter stating that the limitation period serves to offer certainty of administrative decision, without which our economy would suffer. We agree with the judge that the special jurisdiction of judicial review would not be the proper forum for the appellant to pursue his rights at this stage – 22 years after the fact. Land in the Coast of Kenya is a delicate and explosive matter. The claim if successful is likely to set a dangerous precedent for similar transactions over the already sensitive issue of settlement and ownership particularly in all that area known as the Ten Mile Strip.

With regard to the 3rd ground of appeal, we are of the view that the appellant has failed to demonstrate in what way the Judge gave his seal of approval to administrative acts carried out ultra vires or that such acts can acquire legitimacy by mere effluxion of time. Specifically, the Judge did state, citing **The Commissioner of Lands v Kunste Hotel Limited, Nakuru Civil Appeal No. 234 of 1995 (CA)** that:

“.....Judicial Review Remedies are exceptional in nature and should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private disputes.”

Simply put, the Judge rightly opined that the legitimacy or otherwise of such decisions would best be challenged in another arena, other than in Judicial Review, to protect the interests of all those involved, some of whom may not be party to the suit.

It should also be noted that in deciding whether or not to grant leave, the judge exercises judicial discretion. If such discretion is exercised capriciously, whimsically or injudiciously, then the appellate court may intervene. We do not discern such an abuse of discretion by the judge. He rightly considered issues of public policy, time taken before launching the application, and whether Judicial Review proceedings was the proper forum for the appellant to ventilate his claim. These were all pertinent considerations.

Having examined the facts set out in the application for leave, and considering the arguments by counsel for the appellant, including the Goldenberg case, we would observe again that the High Court was not bound by the Goldenberg case, which, having been decided by the Constitutional Division of the High Court was only of persuasive value; the appellant’s application was admittedly filed over 20 years after the fact and is time barred, the appeal must of necessity fail.

For the reasons aforementioned, this appeal lacks merit and is accordingly dismissed with costs and the ruling of the High Court dated 9th March, 2007 dismissing the appellant’s application for leave to apply for orders of certiorari, prohibition and mandamus is upheld.

Dated and Delivered at Malindi this 12th day of February, 2015.

H.M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR