



Mayowe v Attorney General & 2 others; Mutiria (Interested Party) (Environment and Land Miscellaneous Application E021 of 2023) [2025] KEELC 705 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 705 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E021 OF 2023
LG KIMANI, J
FEBRUARY 20, 2025
IN THE MATTER OF AN APPLICATION FOR
JUDICIAL REVIEW FOR AN ORDER OF CERTIORARI
AND
IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF
KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010.
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015
AND
IN THE MATTER OF ARTICLE 22,23 AND 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

FRANCIS MUNYOKI MAYOWE APPLICANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT
THE PRINCIPAL SECRETARY, MINISTRY OF LANDS AND
PHYSICAL PLANNING (THROUGH COMMISSIONER KYUSO SUB-
COUONTY) 2ND RESPONDENT
THE CHIEF LAND REGISTRAR 3RD RESPONDENT

AND

ELIJAH MWINGANJIRA MUTIRIA INTERESTED PARTY



RULING

1. The applicant filed Chamber Summons dated 29th November 2023 seeking the following orders:
 1. Spent
 2. That leave be granted this to the ex-parte applicant to bring forth into this Court the decision of the Minister for Land Dated 28/9/2022 and communicated to the Applicants on 10/8/2023 for the purpose of being quashed.
 3. That the leave granted in (2) above do operate as a stay of the Minister's decision aforesaid.
2. The Application was supported by the affidavit and statement of facts of the Applicant. He deposes that he is the owner of Parcel 5407 Kyuso/Kugundu Tharaka Adjudication Section which he has owned peacefully until the area was declared an adjudication section.
3. When adjudication began, the Applicant was declared and registered as the owner of Land Parcel No.5407 Tharaka Adjudication Section. The Interested Party herein filed a case at the Committee stage No.115 where he was given the suit land.
4. Being dissatisfied with the Committee's decision, he appealed to the Objection Board where he was granted the land. The interested party appealed to the Minister and the appeal was heard on 11/8/2022.
5. The Applicant claims that the Minister's decision was not delivered and was not communicated to him until 10/8/2023. He stated that after hearing the case the DCC did not give a date for the ruling and that he only came to learn of the decision of the Deputy County Commissioner when the Interested Party to occupy the land.
6. Upon writing a letter to the 2nd Respondent, the Deputy County Commissioner to be provided with the proceedings and the decision, the same was not acknowledged nor replied to. He therefore had to write a letter to the Director of Land Adjudication in Nairobi to obtain proceedings which he did after a long wait.
7. The Applicant protests that the 2nd Respondent did not allow witnesses to swear or allow them to ask the witnesses questions. He also complains that he asked the DCC to visit the land but the request was denied.
8. Further, the Applicant faults the 2nd Respondent for introducing new evidence which was not mentioned by any of the parties to the proceedings beforehand, therefore, the Applicant's grievance is that his right to a fair hearing by an impartial tribunal has been violated.

The Respondents' Preliminary Objection.

9. State Counsel representing the Respondents filed a Notice of Preliminary Objection dated 15th January 2024 on the grounds that the Chamber Summons herein is statute barred and offends the mandatory provisions of Section 9(2) and (3) of the Law Reform Act and Order 53 rule 2 of the Civil Procedure Rules, 2010. They further claim that this Honourable Court is divested of jurisdiction to hear and determine this matter since the time for lodging the proceedings has lapsed.



The Applicant's Replying Affidavit

10. The Interested party filed a replying affidavit sworn on 17th February 2024, in response to the Respondent's preliminary objection stating that the application was filed within time because the judgment/decision sought to be quashed was communicated to him on 10/8/2023.

The Interested Party' Replying Affidavit to the Preliminary Objection

11. The Interested Party filed a replying affidavit to the Respondents' Preliminary Objection. He deposed that the Appeal was heard with the Applicant and himself present.
12. He also states that they were all given an opportunity to call their witnesses, and at the end of the hearing, a date was communicated when the decision of the Minister was to be given.
13. On 28th September 2022, the Interested party states that the 2nd respondent delivered the decision and the same was communicated to them. It is his argument that the Applicants have not given any proper reason for the inordinate delay since there is no evidence of the letters being delivered to the Deputy County Commissioner Thagicu and that delay defeats equity

The Applicant's Written Submissions

14. It is the Applicant's submission that while the impugned decision is indicated to have been delivered on 28/9/2022, it was only communicated to the Applicant on the 10/8/2023. Counsel submitted that there is evidence that he sought to know the outcome of the decision earlier but was not issued with the proceedings.
15. On the Preliminary Objection, the Applicant submits that if the respondent's dispute the date that the decision was made known to the Applicant, then this is a factual matter and cannot constitute a preliminary objection which is meant to be in the nature of a demurrer. Counsel for the Applicant relied on the decision of this same Court in the case of Republic v. Attorney General & 2 others Kayanda ex-parte Mwanzia where the Applicant became aware of the decision later than the date it was actually made and the application was held to be filed within time.
16. Counsel for the Applicant also relied on the holding in the case of Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR) where it was held that a preliminary objection should not be a sword to win an case which should otherwise be decided judicially as they prayed that the Respondent's Preliminary Objection be dismissed with costs.

The Respondents' Submissions

17. State Counsel for the Respondents submitted that the preliminary objection is properly based on a pure point of law as is required by the standard set in the case of Mukisa Biscuit Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696 .
18. It was also submitted that the applicant seeks to file for orders of judicial review outside of the statutory timelines of Section 9(3) of the *Law Reform Act* and Order 53(2) of the Civil Procedure Rules, 2010. They submit that the delay is inordinate, unjustifiable and inexcusable, as they relied on the cases of Kibichii Mogotio & 2 others vs. District Land Registrar Baringo(2015)eKLR and Joseph R. Kithinji & 3 others-vs-Rukuriri Tea Factory Company Ltd(2018)eKLR
19. It was further submitted that the Applicant has not availed any evidence that the decision of the 2nd Respondent was actually communicated to him on the 10th of August 2023. They therefore submit that the entire application ought to fail as a consequence while citing the decision in the case of David



The Interested Party's Submissions.

20. Counsel for the Interested Party also submitted that the application is time barred by virtue of Section 9(3) of the Law Reform Act and Order 53(2) of the Civil Procedure Rules, 2010. They submit that the delay was inordinate and that delay defeats equity.
21. Counsel was of the view that it was the Applicant's obligation to follow up on the proceedings of the Minister after the hearing and that the letters exhibited that were written to the respondent do not have an acknowledgement stamp.
22. It is therefore their submission that the application is an abuse of the Court process and should be dismissed with costs.

Analysis and Determination

23. The Applicant herein seeks leave to file an application for judicial review orders of certiorari to quash the decision of the 2nd Respondent dated 28/9/2022 and communicated to the applicants on 10/8/2023. The application is brought under Order 53 Rules 1 and 2 of the Civil Procedure Rules. The Respondents have raised a preliminary objection that the application offends the mandatory provisions of Section 9(2) and (3) of the Law Reform Act and Order 53 rule 2 of the Civil Procedure Rules, 2010.
24. The Court has considered the application herein, the replies filed, the preliminary objection and the submissions by Counsel for the parties. The court considers that the issue for determination is whether the application herein is filed out of time and whether the applicants are entitled to the orders sought.
25. Under Order 53 Rules 1 and 2 of the Civil Procedure Rules the application herein ought to be made ex parte before the judge in chambers. The said rule states as follows;
 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.
 2. An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by....
26. An application for leave to file an application for certiorari ought to be filed within six months from the date of the decision sought to be quashed. This is as provided under Section 9(3) of the Law Reform Act which provides that:

“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.”



27. Similarly 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:

“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.”

28. A cursory look at the proceedings in the appeal before the 2nd respondent in appeal to the Minister No. 410 of 2022 shows that the appeal was heard on 11/8/2022 and the decision was rendered on 28/9/2022. The Chamber Summons herein dated 29/11/2023 was filed in court on 30/11/2023. This was obviously outside of the time provided under Section 9(3) of the Law Reform Act and Order 53(1) of the Civil Procedure Rules (2010).

29. The Court on 3rd December 2023 directed the Applicants to serve the application herein on the Respondents for hearing of the application inter partes. Upon service, the Respondents filed a preliminary objection that the application offends the mandatory provisions of Section 9(2) and (3) of the Law Reform Act and Order 53 rule 2 of the Civil Procedure Rules, 2010.

30. It is important to deal with the preliminary objection first before dealing with the substantive application. According to the Black’s Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

31. The above legal position has been made graphically clear in the now famous case of Mukisa Biscuit Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696 where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then elaborated that:-

“A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. ”

32. The Court is of the view that the preliminary objection raises a pure point of law, stemming from statutory provisions and does not require an in-depth analysis of contested facts. The said view is supported by the provisions of Section 9(3) of the Law Reform Act and Order 53(1) of the Civil Procedure Rules (2010) set out in full above.

33. The Court notes that the Appeal to the Minister No. 410 of 2022 was heard on 11/8/2022 and the appeal involved the suit parcel of land. The decision is shown to have been delivered on 28/09/2022. The Applicant claims that the Minister’s decision was not delivered and was not communicated to him until 10/8/2023. He stated that after hearing the case the DCC did not give a date for the ruling and that he only came to learn of the decision of the Deputy County Commissioner when the interested party came and tried to occupy the land.

34. Upon writing a letter to the 2nd Respondent, the Deputy County Commissioner to be provided with the proceedings and the decision, the same was not acknowledged nor replied to. He therefore had



to write a letter to the Director of Land Adjudication in Nairobi to obtain proceedings which he did after a long wait.

35. The Interested Party in his affidavit stated that both parties were present during the hearing of the case and that on 28th September 2022 the Minister gave the decision and the same was communicated to them. The Interested Party did not state when and how the parties were notified that the decision would be rendered on 28th September 2022 and whether the parties were present during the reading of the decision. He also did not tell the court how the said decision was communicated to the parties. He only stated that on 28th September 2022 the minister gave his decision and the same was communicated to them. He did not state whether or not the Applicants were present when the decision was rendered.
36. The Court notes that after hearing the parties on 11/8/2022, the 2nd Respondent did not indicate on the record of proceedings the date on which the decision was to be rendered. The 2nd Respondent did not file a replying affidavit to rebut the Applicant's averment that the parties were not given a date when the judgement would be rendered and to confirm the exact date on which the decision was rendered.
37. The letters attached to the Applicants' supporting affidavit dated 01/12/2022 and 03/08/2023 show that the Applicant was following up on issuance of copies of proceedings and judgement and it is not clear whether at that point they were aware that the judgement had been rendered.
38. Mativo J(as he then was) observed in the case of Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] eKLR that leave to file for orders of judicial review is a discretionary power of the Court, which should be exercised having regard to the Constitutional basis for judicial review orders. This court is inclined to give the Applicant the benefit of doubt and hold that he was not aware of and were not notified of the date on which the decision/judgment of the 2nd Respondent was to be rendered.
39. The court is thus persuaded that the Applicant was not aware of the delivery of the decision in the Appeal to the Minister case number 410 of 2022 on 28/09/2022 and only became aware of the decision when the certified copies of the proceedings and judgement were supplied to him on 10/08/2023.
40. This court has considered the Court of Appeal decision in the case of Dominic Musei Ikombu v Kyule Makau [2019] eKLR where it was found that the six months limitation period under Section 9(3) of the Law Reform Act and Order 53 Rule (2) of the Civil Procedure Rules starts running on the date when the parties become aware of the decision under challenge. The Court stated that;

“This Court has however held the view that one can only challenge a decision that is within his/her knowledge. Holding otherwise would be irrational as it would be expecting a party to possess super human powers to know the contents of a decision long before it is delivered. It would also create fertile ground for corruption and other underhand maneuvers where a party would collude with the decision maker or their staff intending to frustrate the judicial review process, to hide or otherwise ensure that a decision is not availed to the parties until the statutory 6 months limitation period has expired.

This Court has addressed this point in several decisions and held that the six months should start running from the date the impugned decision is communicated to the affected parties or when they become aware of it. In Republic VS. Kenya National Highways Authority & 2 others ex parte Amica Business Solutions Limited [2016] eKLR, this Court pronounced itself as follows:-

“In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were



aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties.” (Emphasis supplied).”

41. From the foregoing, the court is satisfied that the Applicant became aware of the 2nd Respondent’s impugned decision on 10th August 2023 and the Chamber Summons application for leave dated 29th November 2023 was therefore filed within the statutory period.
42. The final orders of this court are that the ex-parte applicant’s chamber summons dated 29th November 2023 has merit and orders as follows:
 1. Leave be and is hereby granted to the Applicant to bring forth into this Court the decision of the Minister for Land dated 28/9/2022 and communicated to the Applicants on 10/8/2023 for the purpose of being quashed.
 2. The leave granted in (2) above do operate as a stay of further execution of the Minister’s decision aforesaid.
 3. The applicant shall file and serve the substantive Notice of Motion within 21 days from the date of the Court’s order.
 4. Each party to bear their own costs of this application

READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 20TH DAY OF FEBRUARY 2025.

In the presence of:

No appearance for the Applicant.

No appearance for the Respondents.

No appearance for the Interested Party.

Court Assistant: Michael

HON. LADY JUSTICE L. G. KIMANI

JUDGE

