**Ndaba v National Irrigation Authority & 2 others (Environment and Land Miscellaneous Application E009 of 2023) [2024] KEELC 4797 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4797 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2023**

**JM MUTUNGI, J**

**JUNE 13, 2024**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS FOR CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE LAND ACT 2012**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**BETWEEN**

**SOLOMON MUKONYO NDABA ..... APPLICANT**

**AND**

**NATIONAL IRRIGATION AUTHORITY ..... 1ST RESPONDENT**

**JOSEPHAT KINYANJUI ..... 2ND RESPONDENT**

**DAVID MBUGUA ..... 3RD RESPONDENT**

**RULING**

1. This Ruling is in regard to the Applicant's Chamber Summons' application dated September 19, 2023. By the application the Applicant sought leave to institute Judicial Review proceedings against the Land Dispute Tribunal's Award. The Summons was predicated upon the provisions of article 159 of the Kenya *Constitution*, 2010, order 53 rule 1 (1), (2) and (4) of the *Civil Procedure Rules, 2010* and sections 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya.

2. The Application is based on the grounds that the award was made on May 22, 2000 and that neither he nor his guardian was notified, served, or made a party to the proceedings. The Applicant states that he and his guardian were denied the opportunity to be heard and to defend the matter, and as such, he prays that the orders therein be quashed and the status quo ante be restored. The Applicant claims that

he recently returned home and learned about the award and further claims that it is crucial that he be provided with an opportunity to be heard to prevent unjust condemnation and substantial financial loss.

3. The application is supported by an affidavit sworn by Solomon Mukonyo Ndaba, the Applicant, who reiterates the grounds in support of the application and affirms that Rice Holding No. 1643 was initially owned by his father. However, due to the National Irrigation Authority terminating his father's tenancy, the Applicant inherited the holding under his mother's guardianship on August 2nd, 1993. He averred that the Land Dispute Tribunal conducted a hearing pertaining to Rice Holding No. 1643 on 25th April 2000 and issued its award on May 22, 2000. In the award, the Land Dispute Tribunal divided the Rice Holding into 3 portions. The Applicant argues that he discovered that the suit property had been subdivided when he wrote the letter dated May 4, 2023 to the National Irrigation Authority seeking to discharge the guardianship of his mother.

4. The Application is opposed through a Replying Affidavit sworn by Josphat Kinyanjui Mukonyo dated October 6, 2023. The Respondent's grounds of opposition to the Summons are that the applicant's assertion that the proceedings were conducted without his knowledge and that of his mother were untrue. He states that the Applicant and his mother appealed against the Award made by the Land Dispute Tribunal to the Provincial Land Dispute Appeals Committee *vide* Appeal No. 182 of 2000 and that the Applicant being dissatisfied with the holding of the Appeals Committees, the Applicant and his mother further filed an Appeal at the High Court in Nyeri *vide* HCCA No. 149 of 2003, which they withdrew and subsequently filed a suit against the 2nd and 3rd Respondents, *vide* Embu High Court Civil Case No. 92 of 2009, which was transferred to Kerugoya Environment and Land Court and which was heard and determined. The Respondents state that the Applicant never appealed against the said Judgment. It is the Respondents position that the Applicant and his mother have been litigating Rice Holding No. 1643 for more than 20 years and that the Applicant has not given sufficient reasons for the delay in filing the Judicial Review proceedings.

5. For the foregoing reasons, the Respondents urge the Court to dismiss the Applicant's application for leave with costs.

6. The parties canvassed the application by way of written submissions. I have considered the application, the affidavit in support and the Replying Affidavit in opposition, and I have considered the submissions by the parties. The issue for determination in this application is whether the Applicant has made a case to justify the Court to extend the time limited by 0rder 53 for grant of leave to institute Judicial Review proceedings.

7. Before considering the merits of the competing positions as advanced by the parties, it is necessary to set out the factual background and history of the matter, which briefly is as follows:-

    1. In 1993, the settlement sub-committee of the National Irrigation Board appointed Solomon Mukonyo Ndaba, under the guardianship of Milkah Wambui Ndaba, his mother, as the tenant of Rice Holding 1643.

    2. On April 14, 2000, the Land Disputes Tribunal adjudicated a land dispute regarding Rice Holding No. 1643, and its decision thereof was that the Rice Holding be subdivided into three portions; 1 ½ acres to be inherited by Josphat Kinyanjui: 1 ½ acres to be inherited by David Mbugua and 2 acres by Solomon Mukonyo. The Applicant and Milkah Wambui Ndaba, being aggrieved by the decision, filed Appeal Case No. Kirinyaga/182/2000 at the Provincial Land Disputes Appeals Committee, which upheld the Land Dispute Tribunal's decision. Aggrieved by the decision of the Provincial Land Dispute Appeals Committee, the Applicant and Milka Wambui Ndaba proceeded to the High Court of Kenya at Nyeri, where

they filed their memorandum of appeal and later withdrew it on September 19, 2000 on the basis that the Applicants and the Respondents sat as a family and resolved the dispute. The Applicant and his mother yet again instituted Embu High Court Civil Case No. 82 of 2009 against his father, the 2nd and 3rd Respondents, seeking inter alia a permanent injunction restraining the Defendants from interfering with Rice holding No. 1643 and a declaration that they (the Applicants herein) were the lawful licensees and tenants of the Rice holding. The Applicant's suit was heard and dismissed on the basis that the Court could not permanently injunct the 2nd and 3rd Respondents from utilizing their respective portions of land without there being an order either setting aside the award of the Tribunal and its adoption as an order of the Court and the subsequent dismissal of the decision of the Appeals Committee. The learned judge held that the proper route for the Applicant and his mother would have been to appeal the decision of the Appeals Committee and/or to file for Judicial Review to have that award quashed. The Applicant is now before this Honorable Court seeking leave to file Judicial Review proceedings against the Tribunal's award dated 22nd May 2000.

8. Order 53, rule 1(1) of the *Civil Procedure Rules, 2010* provides for the procedure where an Applicant desires to obtain an order of *mandamus*, prohibition and/or *certiorari*. Such an application may only be made with the leave of the Court.

9. Order 53 rule 4 requires that the application for leave to apply for an order of certiorari be made not later than six months from the date of the impugned decision and or order was made. Rule 4 of order 53 provides as follows:-

   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.

10. The above provisions dictate that an Applicant must first obtain leave, and where he seeks an order of certiorari, the application for leave must be made within six months of the issuance of the order, decree and/or award.

11. Similarly, article 159 (2) (d) ofthe *Constitution* of Kenya 2010 enjoins Courts to determine cases without undue regard to technicalities. Article 159 ofthe *Constitution* cannot however be resorted to override the express provisions of the statute especially where the provisions of the particular laws are couched in mandatory terms, as in the case of the provisions of section 9 (3) of the *Law Reform Act* (cap 26) which provides the applicable substantive law in regard to applications in regard to prerogative orders. The applicant, therefore, cannot seek refuge under article 159 (2) (d) ofthe *Constitution* under the present circumstances.

12. The Applicant invoked and sought to rely entirely on the provisions of order 50 rule 6 in his submissions. Order 50 rule 6 of the *Civil Procedure Rules 2010* grants the Court power to enlarge time and provides as follows:-

   Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the Court orders otherwise.

13. The Respondents Counsel has argued that the provisions of Order 50 Rule 6 of the *Civil Procedure Rules 2010*, which grant the court power to enlarge time, cannot override the express provisions of a statute and would therefore be inapplicable in the instant case where section 9(3) of the *Law Reform Act* limits the period within which an application for leave to institute Judicial Review proceedings must be brought.

14. Section 9(3) of the *Law Reform Act* provides that:

Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that application for an order of mandamus, prohibition, or certiorari shall, in specified proceedings, be made within six months or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

15. Re an application by *Gideon Waweru Githunguri* (1962) EA 520 where Rudd, Ag. CJ held that:

> "It follows that rules of court cannot defeat the clear provisions of sub-section (3) which imposes an absolute period of limitation in the case of an application for an order of *certiorari* to remove any judgement, order, decree, conviction or other proceeding for the purpose of being quashed so that leave shall not be granted unless the application for leave is made not later than six months after the date of such judgement, order, decree, conviction or other proceedings."

16. In the Case of *Republic v Public Administrative Review Board & another* (2019) eKLR Mativo J (as he then was) explained that in a Judicial Review application a Court exercises discretion in determining whether the orders sought are deserved by the Applicant. He stated as follows:-

> "Broadly, in order to succeed in a Judicial Review proceeding the Applicant will need to show either: the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or actions that has been taken is beyond the powers (in latin ultra vires) of the person or body responsible for it.
>
> Certiorari issues quash a decision that is ultra vires. Review on a writ of certiorari is not a matter of right, but of Judicial discretion. A Petition for a writ of certiorari will be granted only for compelling reasons. Certiorari is a discretionary remedy which a Court may refuse to grant even when the requisite grounds for it exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a Judicial one must be exercised on the basis of evidence and sound legal principles."

17. I am in full agreement with the exposition of the applicable law by the Learned Judge in regard to the applicable legal principles in Judicial Review proceedings.

18. From the evidence and material presented in this matter it is clear and evident that there was an award made by the arbitration tribunal following a reference by the District Magistrate's Court at Wang'uru. It is note worth that under the Irrigation (National Irrigation Scheme) Regulations 1977 (now revoked) disputes relating to succession of deceased Riceholdings within the Scheme were referred to the Magistrate's Court for determination.

19. The award as per the record was made on 25/4/2000 and endorsed and adopted by the Court on 22/5/2000. The award shared the Riceholding amongst the sons of Solomon Mukonyo (deceased) as follows – Josphat Kinyanjui 1 ½ Acres, David Mbugua 1 ½ Acres and Solomon Mukonyo Ndaba (son of Ndaba Mukonyo) under guardianship of his mother Milka Ndaba 2 Acres. The record further shows the exparte Applicant and his mother appealed the Tribunals award to the Provincial Land Disputes Appeals Committee but the Appeals Committee on 19th October 2000 upheld the decision of the Tribunal.

20. The exparte Applicant and his mother being dissatisfied by the decision of the Provincial Appeals Committee appealed the decision to the High Curt vide Nyeri HC Civil Appeal No. 149 of 2003 but the Appellants on 19/9/2007 made a request to withdraw the appeal before the Judge on the basis that they had as a family resolved their differences. The request was granted and the appeal was marked as withdrawn with costs to the Respondents. The *exparte* Applicant nevertheless did not leave it at that as he and his mother *vide* a plaint dated 13th February 2009 filed a suit at Embu High Court being Civil Case No. 82 of 2009 seeking injunctive relief and a declaration that they were the lawful licensees of Riceholding No. 1643. This suit was heard and the mother of the exparte Applicant who was the 1st Plaintiff and the exparte Applicant's father who was sued as the 3rd Defendant but had the suit against him withdrawn, testified in support of the Plaintiffs case. The 2nd and 3rd Respondents were the 1st and 2nd Defendants in the suit. The suit was ultimately dismissed by Olao J who heard the matter after it had been transferred from Embu High Court to Kerugoya ELC Court after the establishment of the Court.

21. I have reverted to the foregoing background to contextualise the matter. My understanding of the exparte Applicant's reason for the delay in bringing these proceedings is that the award made in 2000 by the elders was made without his involvement or the involvement of his mother who was registered as his guardian. The record, however, shows the exparte Applicant and his mother (who was the guardian) appealed against the award to the Provincial Appeals Committee and that after the Appeals Committee upheld the elders award, they made an appeal to the High Court at Nyeri which they subsequently withdrew only to once more file a fresh suit at the Embu High Court which was transferred to Kerugoya ELC Court where it was heard and finally determined. Having regard to the sequence of events, I am not able to agree that the exparte Applicant was not aware of the proceedings before the Land Disputes Tribunal, the Appeals Committee, and before the High Court. At the Tribunal, the record shows his father gave evidence and that following the determination by the Appeals Committee, the exparte Applicant and his mother preferred an appeal to the High Court, where they were represented by an Advocate. In the subsequent suit that the exparte Applicant and his mother filed, they were equally represented by an Advocate. In all the proceedings the exparte Applicant's mother was at least a participant and as the nominated guardian of the exparte Applicant represented his interest.

22. In the circumstances and having regard to all the attendant circumstances, I am not persuaded that this would be an appropriate case where the Court can exercise its discretion in favour of the Applicant. The Applicant in my view had the opportunity and had access to Court. The Scheme Manager of the Mwea National Irrigation Scheme properly referred the succession of the Ricehoding dispute to Wang'uru Magistrate's Court for adjudication under the *Irrigation (National Schemes General Regulations) 1977* and properly acted on the Court's decision. The exparte Applicant as per the record was represented and participated in all the proceedings before the various fora.

23. In my view the instant application before this Court is belated and attempt to turn the clock back to year 2000 when the dispute was resolved and start all over again. At the time the *exparte* Applicant

filed the appeal before the Appeals Committee, there was nothing to stop him from applying for Judicial Review if he considered that the process through which the adjudication was made was flawed. The exparte Applicant subjected himself to the process and even appealed against the decision of the Appeals Committee. The decision of the Appeals Committee under Section 8(8) of the *Land Disputes Tribunal Act*, cap 303A (now repealed) was final for all purposes and was not appealable to any Court of Law other than on a point of Law. The exparte Applicant having withdrawn the appeal before the High Court meant that the decision of the Appeals Committee was final in all respects. Justice cannot be pursued on the basis of "trial" and "error". A party is allowed to have one bite of the cherry such that one cannot pursue a chosen cause and when they come to a "culdesac" or dead end cannot turn back to the beginning to start the cause all over again. That is not permissible and hence the relevance of the saying that litigation has to come to an end.

24. In the instant matter the decision of the Land Disputes Tribunal has been given effect and implemented and the farmer's changes have been made in the records of the National Irrigation Authority. Riceholding No. 1643 no longer exists it was subdivided in conformity with the decision of the Tribunal. The lapse of over 23 years from the date the award was given is too long ago for any Court to extend time to allow for the challenge of such award particularly in a matter such as this, where it is apparent the parties exercised their rights of appeal and only have come back when that avenue turned out to be unsuccessful. It would be unjust to the Respondents to require them to endure another round of litigation when it is clear the dispute was determined over 20 years ago with the participation of all concerned.

25. Considering the totality of all the evidence and material placed before the Court, no proper basis has been laid by the Applicant to warrant the exercise of the Court's discretion to extend time to commence Judicial Review proceedings. The application is devoid of any merit and is dismissed with costs to the Respondents.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 13TH DAY OF JUNE 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**