



Njeru & 2 others v Attorney General & 2 others; Mutiria (Interested Party) (Environment and Land Miscellaneous Application E019 of 2023) [2025] KEELC 662 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 662 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E019 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

ELIJAH MWENDWA NJERU 1ST APPLICANT
SIMON MUTHURI NJERU 2ND APPLICANT
NJERU MAYOWE KIRIGIA 3RD APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF LANDS AND
PHYSICAL PLANNING (THRO; COMMISSIONER THAGICU SUB-
COUNTY) 2ND RESPONDENT



AND

RULING

1. The Ex parte applicant filed the Chamber Summons dated 29th November 2023 seeking the following orders:
 1. Spent
 2. That leave be granted 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 is supported by the affidavit and statement of facts of Simon Muthuri Njeru, one of the Applicants on behalf of the other two applicants and on his own behalf. He deposes that the Applicants are the bona fide owners of land parcel Kyuso/Kugundu Tharaka Parcel 5409 registered in the name of Simon Muthuri Njeru, Kyuso/Kugundu Tharaka Parcel 5408 registered in the name of Elijah Mwendwa Njeru and Kyuso/Kugundu Tharaka Parcel 5410 registered in the name of Njeru Mayowe. They claim that the parcels of land had no dispute until the area was declared an adjudication section when the Interested Party laid claims.
3. The Applicants claim that at the Objection stage of the land adjudication process, they were awarded the land and the 3rd Respondent issued titles in their names. The interested party filed an appeal to the Minister and the same was heard on 11/8/2022 but the decision was not communicated to them until 10/8/2023.
4. They claim that the Deputy County Commissioner unprocedurally, unilaterally and illegally precluded evidence from the parties and did not allow witnesses to take oath before testifying and the parties were not allowed to cross-examine witnesses. The Applicants argue that their constitutional right to be heard was denied and that they were deregistered from being holders of the land parcels without being given an opportunity to defend themselves.
5. The Applicants state that they wrote a letter to the 2nd Respondent, seeking to be provided with the proceedings and the letter was not acknowledged nor replied to. They therefore had to write a letter to the Director of Land Adjudication in Nairobi to obtain proceedings which he did after a long wait.
6. The Applicant’s grievance is that his right to a fair hearing by an impartial tribunal has been violated.

The Respondents’ Preliminary Objection.

7. 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.



Applicants' Replying Affidavit

8. 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

9. The Applicants filed a replying affidavit to the Respondents' Preliminary Objection through Elijah Mwinganjira Mutiria, the Interested Party herein. He deposed that the Appeal was heard with the Applicants and himself present.
10. 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.
11. 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.

The Applicants' Written Submissions

12. 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.
13. Regarding the Respondents' Preliminary objection, the Applicants submit 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 as per the famous case of Mukisa Biscuit and R v. Eldoret Water and Sanitation Company Ltd ex parte Booker Onyango and 2 others (2007)eKLR.
14. 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 filed and the application was held to be filed within time.
15. 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

16. 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 where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law.
17. It was also submitted that the applicants seek 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



18. It was further submitted that the Applicants have not availed any evidence that the decision of the 2nd Respondent was actually communicated to him on the 10th of August 2023 citing the decision in the case of David Tanui & 3 others v. Deputy County Commissioner(Marakwet East) & 4 others; Peter Cheruiyot (Interested Party)(2022)eKLR.

The Interested Party's Submissions.

19. Counsel for the Interested Party also submitted that the application is time barred by 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.
20. Counsel was of the view that it was the Applicants' 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 of receipt stamp.

Analysis and Determination

21. The Applicants herein seek leave to file 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.
22. 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.
23. 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...
24. 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.”
25. 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.”

26. 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).
27. 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.
28. 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.....”
29. 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.”
30. 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.
31. The Court notes that the Appeal to the Minister No. 410 of 2022 was heard on 11/8/2022 and the appeal involved the three suit parcels of land. The decision is shown to have been delivered on 28/09/2022. The Applicant claims that the 2nd Respondent’s decision was communicated to them on 10/08/2023. The Interested Party in his affidavit stated that at the end of the hearing a date was communicated when the decision of the Minister was to be given. The Interested Party did not state which date was given at that point. 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.
32. 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 she did not give the parties a date when the judgement would be rendered and to confirm the exact date on which the decision was rendered.



33. The letters attached to the Applicants’ supporting affidavit dated 03/12/2022 and 03/08/2023 show that the deponent of the supporting affidavit 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.
34. 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’s the benefit of doubt and hold that they were not aware of the date on which the decision/judgment of the 2nd Respondent was rendered.
35. The court is thus persuaded that the Applicants were not aware of the delivery of the decision in the Appeal to the Minister case number 410 of 2022.
36. This court has considered the Court of Appeal decision in the case of Dominic Musei Ikombo 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).”

37. 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.
38. The final orders of this court are that the 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 apply for an order 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 Respondent.

Court assistant: Michael.

HON. LADY JUSTICE L. G. KIMANI

JUDGE

