



Republic v Senior Scheme Manager Mwea Irrigation Settlement & 2 others; Kimani & another (Exparte Applicants) (Judicial Review E002 of 2023) [2024] KEELC 5567 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
JUDICIAL REVIEW E002 OF 2023
JM MUTUNGI, J
JULY 31, 2024
IN THE MATTER OF APPLICATION FOR JUDICIAL
REVIEW FOR ORDERS OF CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF FARMERS CHANGES MADE BY THE SENIOR SCHEME MANAGER
MWEA IRRIGATION SETTLEMENT ON 1/08/2021, 3/08/2021 AND 23/03/2022.**

BETWEEN

REPUBLIC APPLICANT

AND

**SENIOR SCHEME MANAGER MWEA IRRIGATION SETTLEMENT 1ST
RESPONDENT**

EUNICE WANJIKU WAINAINA 2ND RESPONDENT

STANLEY WAINAINA GUTU 3RD RESPONDENT

AND

JOHN NDUNG’U KIMANI EXPARTE APPLICANT

FRANCIS WAWERU KIMANI EXPARTE APPLICANT

RULING

Background

1. This Ruling is in respect of the 1st Respondent’s Notice of Preliminary Objection dated 25th October 2023 seeking to strike out the Applicant’s Notice of Motion dated 15th June 2023, on the grounds:



1. The Application expressly offends the provisions of Section 9 (3) of the *Law Reform Act*.
2. The Application expressly offends the provisions of Order 53 Rule 2 of the *Civil Procedure Rules*.
2. The background of this suit is that the Applicant filed the Notice of Motion dated 15th June 2023 seeking for orders:
 1. An order of certiorari to move to this Honourable Court and quash the farmers' changes by the Senior Scheme Manager Mwea Irrigation Settlement Scheme dated 3/08/2021.
 2. An order of mandamus do issue to compel the Scheme Manager Mwea Irrigation Settlement to cancel all resultant subdivision of Rice Holding No 1529 Mwea Section and to revert to the original registration as per the finding of the Advisory Committee dated 13/12/2012.
 3. Costs.
4. Such further or other relief as the Honourable Court may deem fit, just and expedient to grant.
3. The motion filed by the Applicant is supported by the affidavit sworn by John Ndung'u Kimani and Francis Waweru Kimani, along with a detailed statement of facts. The Applicants depone that they are the legitimate registered proprietors of one acre each within Rice Holding No 1529 in the Mwea Section. They explain that this property was initially owned by the late Wainaina Wanjiru and that following Wanjiru's death, his chosen representative, Ibrahim Kimani Wainaina, initiated Wang'uru Miscellaneous Succession Cause No 16 of 1997. This Succession Cause divided the property into two parts: Rice Holding No 1529A and 1529B, with the former being registered under Stanley Wainaina Kimani's name (who is also now deceased).
4. The Applicants further detailed that a family consensus was reached whereby Stanley Wainaina Kimani would hold his portion of the Rice Holding in trust, not only for himself but also on behalf of other family members. As a result of this consensus and the findings of the Advisory Committee dated 13/12/2012, Rice Holding No 1529A was further subdivided into four separate shares. This subdivision resulted in the Applicants and Stanley Wainaina Kimani receiving one acre each while their sister, Phyllis Njeri Wainaina, was allocated half an acre. They also claimed that the 1st Respondent, in collusion with the 2nd Respondent, committed fraud by making unauthorized changes to the Rice Holding records on 7/06/2021, 3/08/2021, 11/11/2021 and 3/03/2022. As a result of these changes, Rice Holding No 1529 was wrongfully assigned to Stanley Wainaina Gatu, Margaret Wangui Njumbi, and Eunice Wanjiku Wainaina, the widow of Stanley Wainaina.
5. The Court, on 23rd November 2023, gave directions that the Preliminary Objection be disposed of first and canvassed by way of written submissions. The 1st Respondent filed their written submissions on 29th February 2024, and the Ex parte Applicants filed theirs on 29th April 2024.
6. The issue that arises for determination regarding the 1st Respondent's Notice of Preliminary Objection is whether the Court lacks jurisdiction to entertain the matter given that the applicants did not adhere to the statutory requirement that an application for leave as in the present matter must be filed within six months from the date the impugned decision was made.
7. The Applicants for their part take the position that they applied and obtained leave to commence Judicial Review proceedings against the Respondents. The Applicants argued the Court exercised its discretion to grant leave because the Court was satisfied that the application for Judicial Review was well founded and deserved to be considered on merits.



8. The application for leave is made *ex parte* and where such leave is granted at the *ex parte* stage cannot constitute a bar to the Respondent to challenge the leave granted if grounds to do so exist. In the instant matter leave was granted to the *ex parte* Applicant on 31st May 2023 to institute Judicial Review Proceedings. The 1st Respondent by way of the aforesaid Preliminary Objection has contended that the Judicial Review Proceedings are in contravention of Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the *Civil Procedure Rules* that speak to the period within which Judicial Review Proceedings should be commenced and how.
9. The Preliminary Objection was canvassed by way of written submissions. I have reviewed and considered the submissions of the 1st Respondent in support of the Preliminary Objection and those of the *ex parte* Applicant in opposition. The 1st Respondent in their submissions maintained that Order 53 Rule 2 of the *Civil Procedure Rules* and Section 9(3) of the *Law Reform Act* pursuant to which the proceedings were brought provided mandatorily that Judicial Review Proceedings must be initiated before the expiry of 6 months from the date of the impugned decision. In support of their submission the 1st Respondent relied on the Court of Appeal case of *Ako v Special District Commissioner Kisumu & another* (1989) eKLR and *Republic v Council of Legal Education & another, Ex parte Sabilia Kassamia & another* (2018) eKLR where the Courts were emphatic that it was mandatory for the Judicial Review Proceedings to be brought within the statutory period.
10. The *Ex parte* Applicants for their part submitted that the Court having granted the *ex parte* Applicants leave to institute the proceedings should invoke Article 159 2(d) of the *Constitution* which enjoins the Courts to administer Justice without undue regard to procedural technicalities. The Applicants further cited Article 48 of the *Constitution* which guarantees citizens access to Justice to underpin the need for the Court to ensure substantive Justice was rendered to all persons. The Applicants further opined the Court could under Order 50 Rule 6 of the *Civil Procedure Rules* exercise its discretion to extend and enlarge time within which the application for leave ought to have been filed.
11. On 31st May 2023 when the Court granted leave, it is instructive that the Court only granted the *ex parte* Chamber Summons in terms of Prayer 3 of the application. Under prayer (2) the Applicants prayed for an order:-
 2. That the Honourable Court be pleased to enlarge the time in which this application is brought beyond the mandatory Six (6) months provided by the Law.
12. This prayer was not granted by the Court which meant that the issue of the competency of the substantive application could be challenged on the basis that the proceedings were instituted in contravention of the Law.
13. In the present Preliminary Objection the singular issue for determination is whether the Judicial Review proceedings were commenced outside the prescribed limitation period and therefore unsustainable. The Applicants brought the Judicial Review Proceedings under Order 53 Rule 1, 2 and 3 of the *Civil Procedure Rules* and Section 8 and 9 of the *Law Reform Act*, Cap 26 Laws of Kenya. The application therefore did not invoke the provisions of the *Fair Administrative Action Act*, 2015 and therefore the provisions of the *Fair Administrative Action Act*, 2015 and for that matter Article 47 of the *Constitution* would have no application in the present matter.
14. In the Court of Appeal Case *Ako v Special District Commissioner Kisumu & another* (1989) eKLR cited by the 1st Respondent in support of their objection the Court stated:-

“It is plan that under subsection (3) of Section 9 of the *Law Reform Act* Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the



Judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically Order 49 rule 5 which permits for enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of Section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the Court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of subsection (3) of Section 9 of the Law Reform Act.”

Order 53 Rule 2 of the Civil Procedure Rules and Section 9(3) of the Law Reform Act, Cap are worded and couched in mandatory terms as hereunder:-

Order 53 Rule 2:-

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.

Section 9(3) Law Reform Act:-

3. 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 the 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.

15. . The Courts have adopted the interpretation of the Court of Appeal as espoused in the Ako Case (*supra*) in applying the above provisions in regard to Judicial Review Proceedings. In the Case of Republic v Council of Legal Education & another Expate Sabiha Kassamia & another (2018) eKLR the Court stated:-

“In view of my conclusions hereinabove, and my finding that Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, 2010 are couched in mandatory terms and hold that the Preliminary objection succeeds.”

16. It is evident that the statute and the Rules under which instant application was brought, provide in mandatory terms on the issue of applications for Judicial Review regarding the period beyond which an application for leave may not be brought. The provisions do not allow for exercise of discretion to extend time and hence Order 50 Rule 6 of the Civil Procedure Rules cannot be invoked to enlarge time. The Fair Administrative Action Act 2015 has no time limitation for instituting Judicial Review Proceedings, and may be, the case would have been different had the Applicants had predicated their case on the provisions of the Fair Administrative Action Act, 2015. The Applicants however brought their case under the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules which have



imposed a time restriction within which Judicial Review Actions must be initiated. This being a Court of Law cannot operate outside the Law and has to have fidelity to the Law and the *Constitution*.

17. In the matter before the Court the Applicants by their application dated 9th May 2023 sought to challenge the 1st Respondents decisions made on 1st August 2021, 3rd August 2021, 11th November 2021 and 23rd March, 2022. The last of those decisions was made more than six (6) months before the Applicants filed their application dated 9th May 2023 on 10th May 2023 seeking leave to commence Judicial Review Proceedings. The application was filed out of time and the proceedings were therefore unsustainable.
18. The Preliminary Objection succeeds with the result that the Judicial Review application is struck out with no order as to costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 31ST DAY OF JULY 2024.

J. M. MUTUNGI

ELC -JUDGE

