



Republic v Land Dispute Tribunal Committee & another; Njagi (Interested Party); Karanja (Exparte Applicant) (Judicial Review 2 of 2023) [2024] KEELC 6829 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
JUDICIAL REVIEW 2 OF 2023**

JM MUTUNGI, J

OCTOBER 17, 2024

IN THE MATTER OF APPLICATION BY NEMESIO NJAGI KIURA FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, PROHIBITION, AND MANDAMUS

AND

IN THE MATTER OF NGARIAMA/THIRIKWA/254

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL AWARD

AND

IN THE MATTER OF THE PRINCIPAL MAGISTRATE KERUGOYA LTD CASE NO. 32/2008

BETWEEN

REPUBLIC APPLICANT

AND

LAND DISPUTE TRIBUNAL COMMITTEE 1ST RESPONDENT

PRINCIPAL MAGISTRATE KERUGOYA 2ND RESPONDENT

AND

JANE WAKUTHII NJAGI INTERESTED PARTY

AND

NEMESIO NJAI KARANJA EXPARTE APPLICANT



RULING

1. This Ruling is in respect of the 1st and 2nd Respondents' Notice of Preliminary Objection dated 3rd November 2023 seeking to strike out the Applicant's Notice of Motion dated 5th September 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 Interested Party also filed a Notice of Preliminary Objection dated 28th February 2024 on the grounds that;
 1. The award and decree sought to be quashed were issued in 2008, more than fifteen years from the date of challenge in court, which contravenes the provisions of Order 53 Rule 2 of the Civil Procedure Rules.
 2. The decree sought to be quashed was executed a long time ago. The title of parcel number Ngariama/Thirikwa/254 closed on subdivision, and resultant portions were transferred to third parties who are not parties in this suit. Adverse orders cannot be issued against persons who have not been heard.
 3. The Judicial Review proceedings are bad in law, time-barred, and without merit, and they should be dismissed and/or struck off with costs.
3. The background of this suit is that the Applicant filed the Notice of Motion dated 5th September 2023 seeking orders:
 1. That the Honourable court be pleased to grant the writ of mandamus, prohibition and certiorari orders to remove into the High Court and quash the award by the Land Dispute Tribunal and/or decree/order adopted by the court in LDT Case No. 32/2008 and L.R Ngariama/Thirikwa/254 revert back to the original owner Nemesio Njagi Karanja the Ex-parte Applicant.
 2. The costs of the application be provided.
4. The Applicant's Motion was predicated on the attached affidavit sworn by Peter Nemesio Njagi Karanja. In the Affidavit, he averred that he was the original registered proprietor of land parcel Ngariama/Thirikwa/254 (suit land). He stated that the Interested Party had previously filed a complaint relating to the suit land before the Land Disputes Tribunal, and the case was decided against him. The decision of the Land Dispute Tribunal was then upheld by the Court in LDT Case No. 32 of 2008. He claimed that he was not given a fair chance to present his side of the case during the initial hearing, and he prays that the land be returned to him and the subdivisions made after the decision to be cancelled.
5. On 8th April 2024, the court gave directions that parties canvass the Notice of Motion dated 5th September 2023 together with the Preliminary Objections taken by the 1st and 2nd Respondents and the Interested party.
6. I have reviewed the Preliminary Objections, the Ex parte application, the affidavits in support of the application, and the submissions from the parties. The main issue to be decided in this application



is whether the Preliminary Objections raised by the Respondents and the Interested Party have merit and whether these Judicial Review proceedings are sustainable. At the time of preparing the Ruling the *ex parte* Applicants submissions were not on record.

7. In the Case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, the Court of Appeal established the principle as to what constitutes a valid Preliminary Objection. To be valid a Preliminary Objection must be based on a point of law and must be founded on undisputed facts. If establishing the facts would require presenting evidence, then a Preliminary Objection would not be sustainable. In the Case of Mukisa Biscuit Manufacturing Co. Ltd Case (supra) Law, JA stated the following:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of Limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to the arbitration.”

8. In the present matter, both the Respondents and the Interested Party have hinged their Preliminary Objection on the argument that the Applicant should have complied with Order 53 Rule 2 of the Civil Procedure Rules and Section 9 (3) of the *Law Reform Act* Cap 26 Laws of Kenya. The question of whether or not the Applicant had complied with a mandatory statutory requirement goes to the court's jurisdiction to entertain the suit. If it is found that the Applicant had not, then the Court lacks the jurisdiction to entertain the suit. If the Court were to proceed to hear and adjudicate the suit when it lacked jurisdiction, its decision would be null and void.

9. Order 53 (2) of the Civil Procedure Rules provides for the timeline for seeking the writ of certiorari. It provides as follows:

[Rule 2.] Time for applying for certiorari certain cases.

"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. Order 53 has its underpinning in Sections 8 and 9 of the *Law Reform Act* (Cap 26 Laws of Kenya). Section 9(3) of the *Law Reform Act* provides as follows:

- (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.

11. It is the position of the Respondents and the Interested Party that the *ex parte* Applicant instituted the Judicial Review proceedings out of time and contrary to the provisions of Order 53 (2) and Section



- 9(3) of the [Law Reform Act](#) which prescribe that the suit ought to have been commenced within 6 months of the decision being challenged.
12. The Court of Appeal in the Case of Wilson Osolo -Vs- John Ojiambo Ochola & Another (1996) eKLR stated thus:-
- “It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the [Law Reform Act](#). Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the [Law Reform Act](#)”. There is no provision for extension of time to apply for such leave in the [Limitation of Actions Act](#) (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.”
13. In the Case of 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.”
14. In the Case of Republic –vs- 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 to 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.”
15. In the instant matter the impugned decision by the Land Disputes Tribunal was made in 2008 and was adopted by the Principal Magistrate’s Court at Kerugoya on 14th August 2008. The exparte Applicant applied vide Misc. Civil Application No. 180 of 2011 at Embu High Court for leave to appeal against the orders of the Principal Magistrate’s Court and for stay of execution of the decree of the Magistrate’s Court but the application was dismissed by H. I. Ong’udi, J on 19th July 2012. The Applicant has further instituted various other actions in various Courts as detailed in the annexures exhibited in the Replying Affidavit sworn by Jane Wakuthii Njagi (the Interested Party) on 29th September, 2023 in opposition to the exparte Applicant’s Notice of Motion. What the annexures illustrate is that the



- exparte Applicant was at least aware of the decision/order of the Tribunal and the Magistrate's Court as he sought to appeal and to stay execution of the same as at 2011 if not earlier. It is also noteworthy the beneficiaries of the orders he was challenging were his wife and his own children and that it could not be possible that he was unaware of the case/dispute before the Land Dispute Tribunal.
16. The Applicant has contended that he sought and was granted leave to initiate the Judicial Review proceedings by the Court and thus the question of grant of leave after the expiry of the statutory period does not arise. The leave granted by the Court was at the exparte stage and there was no legal bar preventing the Respondents from raising the issue in their opposition to the proceedings. The Respondents could properly challenge the grant of the leave and in that regard the Respondents were entitled to raise a Preliminary Objection that the Judicial Review proceedings were initiated in contravention of Order 53 Rule (2) of the Civil Procedure Rules and Section 9(3) of the [Law Reform Act](#) which limit the period within which such proceedings may be brought.
 17. The Preliminary Objections were in my view properly raised by the Respondents. They were on a point of Law and therefore satisfied the criteria of what constitutes a valid Preliminary Objection as established in the Case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (supra). Without any doubt the Applicant sought to initiate the instant Judicial Review proceedings long after the period of Six (6) months allowed by the statute and the Rules had expired. The proceedings were time barred and are nullity. The Court cannot entertain a suit that is filed outside the period of limitation.
 18. As expressed by the Court of Appeal in the Case of Wilson Osolo –vs- John Okiambo Ochola & Another (supra) the Court has no discretion to extend time limited by statute in this case the [Law Reform Act](#). The Court therefore could not validly grant leave for the proceedings to be commenced outside the Limitation period of Six months. In the instant matter not even the invocation of Article 159 of [the Constitution](#) and/or Section 1B [Civil Procedure Act](#) could salvage the situation. To re enforce this argument I can do no better than refer to the decision of my brother, Angote, J in the Case of Cyrill J Haroo & Another –vs- Uchumi Services Ltd (2014) eKLR where he stated thus:-

42. A suit filed contra-statute cannot be saved by the oxygen principle or the provisions of Article 159 of [the Constitution](#). In the Case of Siasa Pasua & 2 Others –vs- Mbaruk Khamis Mohamed & Another (2012) eKLR Ojwang, J. (as he then was) had this to say about provisions of Article 159(2)(d) of [the Constitution](#).

“The obligation placed upon the Courts by [the Constitution](#)'s requirement (Article 159(2) (d), that they render justice without any regard to procedural technicalities, does not in my opinion, negative the orderly scheme of litigation provided for by the Civil Procedure Rules; and the Law in respect of Originating Summons is by no means nullified.”
 19. I ascribe to the above position and it is my position that the [Law Reform Act](#) Section 9(3) provides the substantive Law in regard to how Judicial Review proceedings may be commenced while Order 53 Rule (2) sets out the procedure. The time limit as fixed by the statute cannot be varied by the Court without running afoul of the statute. The Act did not make any provision for the extension of the time and hence the Court has no discretion.
 20. I am aware that the Fair Administrative Actions Act, 2015, has done away with the requirement that Judicial Review proceedings should be commenced within a period of Six months but in the present matter the Applicant predicated his application under the provisions of the [Law Reform Act](#) and Order 53 Rule (3) of the Civil Procedure Rules. The Fair Administrative Actions Act, 2015 therefore has no application in the instant matter.



21. On the basis of my analysis and evaluation it should have become evident that the Preliminary Objections taken by the Respondents are for allowing as they have merit. The Applicant without any doubt commenced the Judicial Review proceedings well out of time. The proceedings have been brought contrary to the statutory provisions are incompetent and are for dismissal.
22. I uphold the Preliminary Objections and order the Notice of Motion dated September 5, 2023 dismissed.
23. I however take note the parties are basically family and for that reason order that each party shall bear their own costs of the suit.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 17TH DAY OF OCTOBER 2024.

J. M. MUTUNGI

ELC - JUDGE

