



**Republic v Chief Land Registrar & another; Bank of Africa Kenya Limited (Exparte Applicant); Njoka & 2 others (Interested Parties) (Environment and Land Judicial Review Case E004 of 2024) [2024] KEELC 13689 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13689 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2024  
NA MATHEKA, J  
DECEMBER 10, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**ASSET RECOVERY AGENCY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**BANK OF AFRICA KENYA LIMITED ..... EXPARTE APPLICANT**

**AND**

**PETER NYAGA NJOKA ..... INTERESTED PARTY**

**HELLEN WANJIRU NYAGA ..... INTERESTED PARTY**

**T.S.S. INVESTMENT LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The application is dated 3<sup>rd</sup> May 2024 and is brought pursuant to Articles 10 (2), 23, 35, 40, 43, 47, 48 & 159 (2) of *the Constitution* of Kenya, Sections 6, 7, 9, 10, 11, 12 of the *Fair Administrative Action Act*, 2015, Sections 3, 13, 18, 19 of the *Environment and Land Court Act*, No. 19 of 2011, Section 73 (2) and (3) of the *Proceeds of Crime and Anti-Money Laundering Act* 2009, Section IA, 1B & 3A of the Civil Procedure Act CAP 21 Laws of Kenya, Order 53 of the Civil Procedure Rules, Section 80 of the *Land Registration Act*, 2012 seeking the following orders;

1. This application be certified urgent and heard ex-parte in the first instance.



2. This Honourable Court be pleased to issue, upon hearing and determination of these proceedings, judicial review orders as follows:
    - a. A declaration be and is hereby issued that the decision of the Respondent to place the restriction on the following properties violated Articles 10, 40 & 47 of *the Constitution* of Kenya, as read together with the Sections 77 of the *Land Registration Act*, and the principles of natural justice:
      - i. Mombasa Block/XVA/586,
      - ii. Mombasa Block/XXI/526, and
      - iii. Mombasa Block/XXI/527;
    - b. An order of certiorari be and is hereby issued to remove to this Court for purposes of quashing the decision of the of the Chief Land Registrar, the 1<sup>st</sup> Respondent to place a restriction in favour of the 2<sup>nd</sup> Respondent, the Assets Recovery Agency on the following properties:
      - i Mombasa Block/XV11/586;
      - ii. Mombasa Block/XXV/526, and
      - iii. Monbasa Block/XXI/527;
    - c. An order of mandamus is hereby issued to the 1<sup>st</sup> Respondent to reconstruct the Deed File in respect of the Land Parcel known as Mombasa Block/XVL1586.
    - d. An order of mandamus be and is hereby issued to the Respondent to vacate, remove and/or deregister the restriction placed on the following properties:
      - i Mombasa Block/XVIV586;
      - ii. Mombasa Block]XXV526, and
      - iii Mombasa Block/XXV527;
    - e. An order of mandamus be and is hereby issued to the 1<sup>st</sup> Respondent to register Mombasa Block/XV11/586 in the joint names of the and 2<sup>nd</sup> Interested Parties.
    - f. An order of prohibition be and is hereby issued prohibiting and/or restraining the Respondents from placing and/registering any further inflictions, cautions, and/or restrictions in any manner that violates the provisions of *Land Registration Act*, 2012 on the following charged properties:
      - i Mombasa Block/XVIV586,
      - ii. Mombasa Block/XX1/526; and
      - iii. Mombasa Block/XXV527,
  3. Any other orders that this Honourable Court may deem mete and just.
  4. Costs be borne by the Respondents jointly and severally.
2. This application is supported by the Affidavit of Idar Kasenge. That following the dismissal of the various applications for injunctions aforesaid paved way for the Bank to sell the charged property



- known as Mombasa Block/XVII/586 to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party by way of private treaty vide the Sale Agreement dated 1<sup>st</sup> February 2022 in exercise of its statutory power of sale. However, the Bank is unable to transfer the said property to the said Interested Parties because there is a restriction placed on the property by the 2<sup>nd</sup> Respondent prohibiting any dealings on the property. As early as by a letter dated 31<sup>st</sup> May 2022, the Bank applied to the 1<sup>st</sup> Respondent to why the restrictions had been placed on the property and to have the same removed, but the 1<sup>st</sup> Respondent refused, failed and/or neglected to remove the restrictions.
3. The 2<sup>nd</sup> Interested Party stated these Judicial Review Proceedings are sub judice. They filed Mombasa ELC Case No. E044 of 2023 against the Exparte Applicant on 1<sup>st</sup> December 2023 and within that suit they filed a motion for summary judgment to recover Kshs. 45,000,000.00 from the Exparte Applicant together with interest which is the purchase price they paid for property whose title they can never own nor can they obtain possession. That the 3<sup>rd</sup> Interested Party and others filed Mombasa ELC Case No. E049 of 2023 against the Exparte Applicant, themselves and others.
  4. The 1<sup>st</sup> Respondent stated that the Assets Recovery Agency (the 2<sup>nd</sup> Respondent herein) being part of a multiagency investigating team, vide a letter dated 30<sup>th</sup> March 2023 informed the Land Registrar Mombasa that they are investigating fraudulent activities and money laundering at Chase Bank of Kenya. (Annexed hereto and marked "ON-I" is a copy of the Letter Dated 31<sup>st</sup> March 2022). They requested the 1<sup>st</sup> Respondent to place a restriction on among others the suit properties and provide them with certified copies of lease, green card, consent, and transfer documents. The 1<sup>st</sup> Respondent proceeded to lodge and register a restriction on the suit properties. Consequently, the multi-agency team proceeded to seize all the register, deed files, records and/or documents pertaining the suit properties from the custody of the 1<sup>st</sup> Respondent. That upon completion of their investigations, the multi-agency investigation team inadvertently failed to return the said register, deed files, documents and/or records pertaining the suit property back to the custody of the 1<sup>st</sup> Respondent. That the said register, deed files, documents and/or records have not been availed to the custody of the 1<sup>st</sup> Respondent to date. To date no procedural application to either remove the said restriction or reconstruct the registers of the suit properties have ever been received from the Applicant or any other body and/or persons therefore, consequently the 1<sup>st</sup> Respondent has no authority to undertake any administrative action on the same suo moto.
  5. The 3<sup>rd</sup> Interested Party opposed the ex parte Applicant's Notice of Motion dated 3<sup>rd</sup> May 2024 on the following grounds that in so far as the application is titled and invokes the common law judicial review jurisdiction, the application is fatally defective because no leave was sought prior to filing the substantive motion and the order of certiorari is time barred.
  6. Assuming, without admitting, that the application is proper in form, it offends section 9(2) of the *Fair Administrative Action Act* given the statutory scheme in the *Land Registration Act* Cap 300. At any rate, the application is premised on the assumption that there are restrictions registered or that deed files are lost, without any evidence of such restrictions or loss of deed files. Moreover, the application is an attempt at getting a resolution, through judicial review, of hotly contested matters which are the subject of Mombasa ELC No. E049 of 2023 and Mombasa ELC No. E044 of 2023.
  7. This court has considered the application and the submissions therein. The purpose of judicial review was enunciated in the case of *Municipal Council of Mombasa vs Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007(2002) eKLR, where the Court of Appeal held that;

The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the



jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

8. It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. This position was adopted by the court in *Associated Provincial Picture Houses, Ltd. vs Wednesbury Corporation* (1947) 2 All E.R 680. As a result, it is only in exceptional circumstances that the court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in *Republic vs Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* (2013) eKLR, while citing the *Associated Provincial Picture Houses Ltd. vs Wednesbury Corporation* (supra) namely:

“where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is ‘so unreasonable that no reasonable authority could ever come to it.’”

9. The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision- making process as was held by Mumbi Ngugi J in the case of *Republic vs Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* (supra),

“That the purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question.”

10. It was incumbent upon the Applicant to demonstrate that the decision-making organ, in this case, the 1<sup>st</sup> Respondent acted ultra vires in placing the restriction. In the case of *Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* (2014) eKLR, the court held that;

“Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

11. Similarly, in the case of *Commissioner of Lands vs Kunste Hotel Limited* (1997) eKLR (E & L) 1 at page 249, the Court of Appeal stated that;

But it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”.



12. In Halsbury's Laws of England 4<sup>th</sup> Edition Volume 2 Page 508 where it is stated that;
- "Certiorari is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant 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 judicial discretion of the Court being a judicial one, must be exercised on the basis of evidence and sound legal principles".
14. The 3<sup>rd</sup> respondents opposed the application and raised a preliminary objection that the application has been brought out of time. In essence that Order 53 Rule 2 of the civil procedure rules as read with section 9(3) of the [law reform act](#) provides for a time limit of six months within which the application should have been filed.
15. Judicial review jurisdiction is a special jurisdiction which is neither Civil nor Criminal and it is governed by Section 8 and 9 of the [Law Reform Act](#) which is the substantive law while Order 53 of the Civil Procedure Rules sets out the procedural law. By those provisions the court is mandated to issue orders of mandamus, certiorari or prohibition in appropriate judicial review proceedings. That the matter is also subjudice.
16. Be that as it may, applications for prerogative orders have a limitation period. The [Law Reform Act](#) Cap 26 Laws of Kenya, provides as follows at Section 9 (3):
17. 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 proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings 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."
18. The above provision is echoed in the Civil Procedure Rules, 2010, which in Order 53 rule 2 provides as follows:
- "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 proceedings for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and the 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."
20. It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of the decision. The decision that is sought to be quashed is was made way back in 2022. The application was filed in 2024. The application is therefore out of time.
21. The Court of Appeal case in *Wilson Osolo vs John Ojiambo Ochola & Another* (1996) eKLR expressed itself 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.”

22. I am also guided by the case of Republic vs Chairman Amagoro Land Dispute Tribunal & Another Ex-parte Paul Mafwabi Wanyama (2014) eKLR wherein D. Maraga JA (as he then was) held that:

”The judicial review proceedings before the learned judge, which have given rise to this appeal were therefore special in nature and the leaned judge erred in importing provisions of the Civil Procedure Act and rules to proceedings governed by the said provisions of the Law Reform Act and Order 53 Civil Procedure Rules. We agreed with learned counsel for the appellants that the learned judge erred in extending time which he had no jurisdiction to do.”

23. I am aware that by dint of the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the rules. Following this provision, it may be arguable that time may be enlarged to make application for Judicial Review outside the 6 months’ limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provisions set out in Section 9(3) of the Law Reform Act (above), and it is trite law that rules made under statute, cannot override a statutory provision. The Law Reform Act itself has no provision for extension of time. I have seen no law, which can entitle me to enlarge time for the filing of an application for certiorari outside the 6-month limitation period. The applicant ought to pursue their claim in a civil matter if administrative procedures have failed as opposed to a judicial review. On the issue of this case being sub judice, I find that these proceedings the matters in issue in Mombasa ELC Case No. E044 of 2023 and E049 of 2023 are similar and touch on the same subject matter and similar parties. This matter is sub judice. I find this application is not merited and is hereby dismissed with costs to the Respondents.

24. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

