



**REPUBLIC OF KENYA**

**High Court at Kerugoya**

**Judicial Review 5 of 2012**

**JOSEPH NGURE GATHUMBI .....APPLICANT**

**VERSUS**

**MWEA DIVISION LAND DISPUTES TRIBUNAL .....1<sup>ST</sup> RESPONDENT**

**WANG'URU SRM'S COURT .....2<sup>ND</sup> RESPONDENT**

**KIRINYAGA DISTRICT LAND SURVEYOR .....3<sup>RD</sup> RESPONDENT**

**AND**

**JANE WAMBUI GATHUMBI .....1<sup>ST</sup> INTERESTED PARTY**

**GRACE WANGECI GATHUMBI .....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

This Judicial Review Application was originally filed in the High Court of Kenya at Embu a High Court Judicial Review Application No. 2 'B' of 2007 on 20<sup>th</sup> November 2007 seeking leave for the applicant (**JOSEPH NGURE GATHUMBI**) to be granted an order of certiorari to remove to this Court and quash the decision of the Kirinyaga District Land Disputes Tribunal relating to the applicant's Title No. MWERUA/KAGIO/2907 in its arbitration proceedings and award dated 16<sup>th</sup> October 2006 and the subsequent decision of the Senior Resident Magistrate at Wang'uru Court (2<sup>nd</sup> respondent) adopting the said award as it's judgment dated 23<sup>rd</sup> November 2006 and the resultant decree in that Court's Arbitration case No. 32 of 2006. The applicant further sought leave to apply for an order of prohibition preventing the 3<sup>rd</sup> respondent from even accepting and/or registering any dealings or transactions by or at the behest of the interested parties relating to Title No. MWERUA/KAGIO/3582 and 3584 resulting from the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The applicant also sought leave to apply for an order of certiorari to remove to this court and quash all the entries made in the Kirinyaga District Land Register giving effect to the sub-division of the applicant's Title No. MWERUA/KAGIO/2907 and transfer of two (2) of the resultant parcels namely Title No. MWERUA/KAGIO/3582 and 3584 to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties respectively and lastly, that the grant of the said leave do operate as a stay of registration by the 3<sup>rd</sup> respondent of any intended dealings or transactions relating to Title Numbers MWERUA/KAGIO/3582 and 3584 in the Land Register until the hearing and final determination of the substantive application to be filed pursuant to the said leave.

The applicant did appear before Justice Khaminwa on 21<sup>st</sup> November 2007 and obtained leave with a further order that the said leave do operate as a stay and the Notice of Motion be filed within 21 days.

The said Notice of Motion was duly filed on 10<sup>th</sup> November 2007 together with the statement of facts and verifying affidavit and was based on the following five (5) grounds namely:-

1. That the Land Disputes Tribunal established by the **Land Dispute Act No. 18 of 1990** (now repealed) had no jurisdiction to determine disputes concerning land registered under the **Registered Land Act Chapter 300** (now repealed) and therefore the decision of the same Tribunal (1<sup>st</sup> respondent) was ultra vires, null and void ab initio and illegal.
2. That the 2<sup>nd</sup> respondent acted unlawfully and in excess of jurisdiction by adopting the said decision as its own judgment and issuing a decree.
3. That the 3<sup>rd</sup> respondent acted without jurisdiction by accepting and registering documents giving effect to the ultra vires and null decisions of his co-respondents thereby unlawfully interfering with the applicant's Title No. MWERUA/KAGIO/2907 by making unlawful entries in the Land register and giving effect to the sub-division of the said land and the transfer of two (2) resultant portions to the interested parties.
4. That the respondent breached the principles of natural justice by purporting to make weighty decisions with regard to the applicant's property without giving him a hearing.
5. That the interested parties have actively been advertising parcel numbers MWERUA/KAGIO/3582 and 3584 resulting from the unlawful sub-division of the applicant's Title so as to defeat justice.

The respondent and the interested parties were duly served and the interested parties response was to file a preliminary objection to the Notice of Motion filed herein on 10<sup>th</sup> December 2007 on the following two grounds:

1. That the application dated 10<sup>th</sup> December 2007 offends the mandatory provisions of the Civil Procedure Rules.
2. That the application dated 10<sup>th</sup> December 2007 is frivolous, vexatious and otherwise an abuse of the court process.

When this Notice of Preliminary objection came up for hearing, counsels for the parties agreed to proceed by way of written submissions which they duly filed and the case was transferred to this court as it involves a Land Dispute.

I have looked at the proceedings in this matter as well as the submissions of counsels.

From the submissions of counsels for the interested parties, it is their case that under **Order 53 Rule 2 of the Civil Procedure Rules**, the leave granted by Justice Khaminwa on 21<sup>st</sup> November 2007 ought not to have been granted because the application for leave was not filed within six months of the order sought to be quashed. Reference was also made to **Section 9 (3) of the Law Reform Act** which states that in an application for an order of certiorari to remove and quash any judgment, order, decree conviction or other proceedings, leave shall not be granted unless the application for leave is made not later than six months after the judgment, order, decree, conviction or other proceedings. Therefore, since the award sought to be quashed was made on 23<sup>rd</sup> November 2006 and that leave was sought on 21<sup>st</sup> November 2007 (a year later) the Notice of Motion dated 10<sup>th</sup> December 2007 cannot stand and ought to be struck out.

The position taken by the interested parties herein is supported by the respondents who also refer

to the provisions of **Section 9 (3) of the Law Reform Act** as well as **Order 53 (2) of the Civil Procedure Rules**. Further, the respondents argue that an order of prohibition cannot issue in this case since the 3<sup>rd</sup> respondent has already registered the transaction relating to title numbers MWERUA/KAGIO/3582 and 3584 resulting from the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Lastly the respondents argue that the verifying affidavit and statements in support of the Notice of Motion offend the mandatory provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules.

Counsel for the applicant's submissions may be summarized briefly as follows:-

1. That since the Land Dispute Tribunal had no jurisdiction over the dispute subject matter of this application, its decision was null and void and therefore, the court was not forbidden from granting leave to apply for Judicial Review outside the six (6) months period.
2. That since Justice Khaminwa did duly grant leave, this court cannot now re-visit that issue and should now only confine itself to the merits or otherwise of the Notice of Motion dated 10<sup>th</sup> November 2007.
3. That this Court has unfettered powers and authority to do justice.

Looking at the rival submissions herein, the following are not really in dispute:

1. That this Judicial Review application arises out of a land dispute involving the interested parties (as plaintiffs) and the applicant (as defendant) filed in Kirinyaga District Land Dispute Tribunal.
2. That the case at the Kirinyaga Land District Tribunal was filed by the interested parties while a similar case over the same property was pending at Kerugoya Senior Resident Magistrate's Court being SRM Civil Suit No. 110 of 2006 in which the interested parties were the plaintiffs and the applicant was the defendant.
3. That the dispute involved a parcel of Land Title Number MWERUA/KAGIO/2907 registered in the names of the applicant.
4. That the Kirinyaga Land Dispute Tribunal proceeded to order that the Title NO. MWERUA/KAGIO/2907 be subdivided into three portions as follows:-
  - (a) Title No. MWERUA/KAGIO/3582 - registered in names of the 1<sup>st</sup> interested party./
  - (b) Title No. MWERUA/KAGIO/3583 - left in applicant's names.
  - (c) Title No. MWERUA/KAGIO/3584 - registered in the names of the 2<sup>nd</sup> interested party.
5. That the decision of the Kirinyaga Land Dispute Tribunal was issued on 16<sup>th</sup> October 2006 and adopted by the Resident Magistrate's Court at Wang'uru as a judgment of the Court on 23<sup>rd</sup> November 2006.
6. That the application seeking leave to apply for certiorari and prohibition was filed and granted on 21<sup>st</sup> November 2007.

At this point in time, this Court is only concerned with the preliminary objection raised by the interested parties and the respondents challenging the leave and stay granted by Justice Khaminwa on 21<sup>st</sup> November 2007.

Under **Order 53 Rule 2** of the **Civil Procedure Rules**, it is provided that 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 proceeding or such shorter period as may be prescribed by any Act.

Similarly, **Section 9 (3)** of the **Law Reform Act** provides that in an application for order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of being quashed, leave shall not be granted 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 under any written law.

I have considered the rival submissions in this matter and also looked at the cited authorities. It is clear to me from a reading of the various authorities, that the High Court has reached different opinions with regard to the time limit of six months within which leave to apply for certiorari should be applied as mandated by **Order 53 of the Civil Procedure Rules and Section 9 (3) of the Law Reform Act**. Some Judges have held that this time limit provided by the **Law Reform Act and Order 53 of the Civil Procedure Rules** should be over looked and that the Court should exercise its inherent jurisdiction and quash any illegality. See for example:

**1. REPUBLIC VS EX-PARTE KAKA NZIOKA H.C.C MIS CIVIL**

**APPLICATION NO. 1217 OF 2003**

**2. MACHEO LTD VS JOSEPH WAFULA KHAOYA KITALE H.C.C.C NO. 141 OF 2007.**

On the other hand, other Courts have held that the six months period within which an application for leave to apply for orders of certiorari can be brought is mandatory and cannot even be enlarged. See for example:

**1. AKO VS SPECIAL DISTRICT COMMISSIONER KISUMU AND ANOTHER 1989 K.L.R. 163.**

**2. OYOO AND FIVE OTHERS VS SYONGO AND TWO OTHERS 2005 I K.L.R. 423**

In the **AKO** case (supra), the Court of Appeal puts it in very clear terms as follows:-

***“It is plain that under Sub-section (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 judgment. The prohibition is statutory and is not therefore challengeable under the Procedural Provisions of the Civil Procedure Rules, more specifically Order 49 Rule 5 which permits for enlargement of time”***

The Court went further in the same case and stated as follows:-

***“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 Sub-Section 3 of Section 9 of the Law Reform Act”.***

I take the route taken by the Court of Appeal in the **AKO** case (supra) which in any case is also binding on me.

The intention of the legislature was that a party wishing to obtain the remedy of certiorari must move to Court within six months of the decision that is to be quashed being made. This will promote orderliness and is not only good public policy but is also in conformity with the constitutional provision that Justice shall not be delayed.

The applicant's counsel has also submitted that the six months provision under the **Law Reform Act and Order 53 of the Civil Procedure Rule** are mere technicalities and further, that the Court should

invoke the overriding objective principle set out under **Sections 1A and 3A of the Civil Procedure Rules**. However, it has been held by the Court of Appeal that the Civil Procedure Rules do not apply in Judicial Review proceedings. In the case of **COMMISSIONER OF LANDS VS KUNSTE HOTEL C.A. CIVIL APPEAL NO. 235 OF 1995**. The Court of Appeal held:

***“When the High Court is exercising jurisdiction under Order LIII of the Civil Procedure Rules, it is neither civil nor criminal but a special jurisdiction donated by Sections 8 and 9 of the Law Reform Act. The provisions that apply to the Civil Proceedings are not available in the Judicial Proceedings”.***

It is clear from the above that the six months requirement for leave to apply for certiorari cannot be regarded as mere technicalities as suggested by counsel for the applicant. The issue of overriding objective (***the O2 principle***) has also been raised by counsel for the applicant. However, it is clear from the Court of Appeal’s decision in **CITY CHEMIST AND ANOTHER VS ORIENTAL COMMERCIAL BANK C.A. CIVIL APPEAL NO. 302 OF 2008 (NBI)** that the overriding objective approach which is a new approach, is not meant to totally up-root well established principles or precedents and the Court’s exercise of judicial authority must be devoid of whim and caprice. The six months limitation period within which to apply for orders of certiorari is couched in mandatory terms under both the **Law Reform Act and Order 53 of the Civil Procedure Rules** and is therefore a well established legal principle.

Having considered all the above and bearing in mind that the decision sought to be quashed by certiorari was issued by the Kirinyaga Land Disputes Tribunal (Mwea Division) on 16<sup>th</sup> October 2006 and adopted by the Resident Magistrate’s Court at Wang’uru on 23<sup>rd</sup> November 2006 as a judgment of the Court, the leave granted by the Court on 21<sup>st</sup> November 2007 to apply for certiorari was well beyond the six months provided for by Law. That leave ought not to have been granted.

In the case of **AGA KHAN EDUCATION SERVICE KENYA VS REPUBLIC AND THE A.G C.A CIVIL APPEAL NO. 25 OF 2003**, the Court made it clear that in obvious cases where an order of certiorari is being sought and it is clear that the decision being sought to be quashed was made more than six months prior to the applicant’s coming to Court, then such an application has no prospects at all of succeeding and any leave granted can be set aside.

In this case, therefore, the leave granted in so far as it relates to the remedy of certiorari, was not available to the applicant. I would therefore up-hold the preliminary objection and set aside the leave granted on 21<sup>st</sup> November 2007 but only as it relates to certiorari.

The applicant also sought the remedy of prohibition. There is no time limit for the remedy and therefore the preliminary objection raised by the interested parties with regard to limitation cannot succeed.

The issue that has concerned me here is whether, having found that the remedy of certiorari cannot be available to the applicant, the Court can nevertheless allow the applicant to canvass the issue of prohibition bearing in mind that the two remedies were sought in the same application. I find the answer to that in **H.W.R WADE & C.F. FORSYTH in their 9<sup>th</sup> Edition of ADMINISTRATIVE LAW at Page 604** where they state as follows:-

***“Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain it’s execution. But either remedy may be sought by itself, where only prohibition is applied for to prevent the enforcement of an ultra vires decision, as happened in the last –cited case, the effect is the same as if certiorari had been granted to quash it; for the Court necessarily declares it’s invalidity before prohibiting it’s enforcement. Prohibition is a remedy strictly concerned with excess of jurisdiction”.***

It is my understanding, therefore, that even though I have found that certiorari is not available to the applicant, the applicant can still pursue the other remedy of prohibition.

The preliminary objection raised by the interested parties herein and their submissions thereon were principally on the basis that the leave granted herein was well beyond the time limit prescribed by law.

But as I have already found, only the remedy of certiorari has been caught up by law. The remedy of prohibition has not.

Ultimately therefore, I uphold the preliminary objection only as it relates to the remedy of certiorari. I dismiss the preliminary objection on the remedy of prohibition and hereby direct that the parties do take a date for the substantive application to be heard on the order of prohibition as prayed for in the Notice of Motion dated 10<sup>th</sup> December 2007.

There shall be no orders as to costs.

**B. N. OLAO**  
**JUDGE**  
**ELC**  
**17/1/2013**

17/1/2013

Coram - JUSTICE B. OLAO  
CC – Muriithi

Mr. Kimani for Applicants – absent

Miss Chimau for Respondents – present

Mr. Munene for Ngige for the Interested parties – present

Ruling delivered in open Court this 17<sup>th</sup> day of January 2013.

**B. N. OLAO**  
**JUDGE**  
**ELC**  
**17/1/2013**

COURT: Parties may now take a date for hearing of the substantive application in so far as it relates to prohibition.

MR. MUNENE: We can come for hearing on 19/2/2013.

MISS CHIMAU: That is so.

COURT: Hearing 19/2/2013. Hearing notice to the applicants.

**B. N. OLAO**  
**JUDGE**  
**ELC**  
**17/1/2013**