Republic v Deputy County Commissioner, Kilungu Sub-County & 2 others; Mutwiwa (Exparte Applicant); Julius (Interested Party) (Environment and Land Judicial Review Miscellaneous Application E004 of 2024) [2025] KEELC 2898 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2898 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E004 OF 2024

EO OBAGA, J

MARCH 27, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

DEPUTY COUNTY COMMISSIONER, KILUNGU SUB-COUNTY .... 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

JOHN NDUNDA MUTWIWA ..... EXPARTE APPLICANT

AND

THERESIA NDUMI JULIUS ..... INTERESTED PARTY

JUDGMENT

1. The Ex-parte Applicant filed the Notice of Motion dated 19th April 2024 under the provisions of Sections 8 and 9 of the *Law Reform Act* and Order 53 Rules 1 and 2 of the Civil Procedure Rules, 2010. The Ex-parte Applicant seeks issuance of the following orders against the Respondents: -

    1. That an Order of Certiorari be issued to remove into this Honourable Court and quash the decision of the 1st Respondent in an Appeal to the Minister Case No. 372 of 2017 delivered on 3rd February, 2022 over Land Parcel No. 981 Kisekini Adjudication Section.

2. That an Order of Prohibition be issued prohibiting the 2nd Respondent from effecting and/or implementing the decision of the 1st Respondent in an Appeal to the Minister Case No. 372 of 2017 delivered on 3rd February, 2022 over Land Parcel No. 981 Kisekini Adjudication Section.

3. That costs of this cause to be borne by the Interested Party.

4. Such further and or other reliefs that this Honourable Court may deem just and expedient to grant.

2. The application is supported by the affidavit of John Ndunda Mutwiwa sworn 19th April, 2024. It is also premised on the grounds set out in the statutory statement and the verifying affidavit sworn by the Ex-parte Applicant on 22nd March, 2024. The deponent averred that the present suit relates to land Parcel No. 981 Kisekini Adjudication Section which his family has been using since time immemorial. That through the 1st Respondent's decision of 3rd February, 2022, the Minister ruled that ¾ of the land belongs to the Interested Party's family. He added that the said decision was obtained on 20th February, 2024. The same was annexed as Exhibit "JNM1".

3. The Ex-parte Applicant lamented that the 1st Respondent did not visit the site as he had been requested to do by the parties during the trial. He further lamented that contrary to what was stated by the 1st Respondent in his decision, there were no clan proceedings.

4. It was his contention that there were procedural flaws during the hearing of the Appeal to the Minister and that the eventual decision ended up awarding land to the Interested party when there was insufficient evidence to uphold the said findings. He further contended that the decision of the Minister was unreasonable and that no reasons had been given as to how and why he had arrived at his conclusions. He asserted that the hearing was done in haste and that he was not granted sufficient time to cross-examine the Interested Party which is contrary to the rules of natural justice.

5. The Ex-parte Applicant averred that the 1st Respondent put into account irrelevant considerations in reaching his final decision and as such, the decision is subject to the supervisory jurisdiction of this court. He urged the court to issue the orders sought in his application.

6. Opposing the application, the Deputy County Commissioner, Kilungu Sub-County Jane Katuse, swore a replying affidavit on 3rd October, 2024. She averred that the appeal to the Minister No. 372 of 2017 in respect of Plot No. 981 Kisekini Adjudication Section was heard on 17th January, 2022. She added that the Appellant, John Ndunda, did not avail any witnesses.

7. She further averred that Theresia Ndumi Julius and Raphael Nzavu Kyalo provided a copy of clan proceedings in their evidence without calling any witnesses. She contended that the 1st Respondent followed the laid-out procedure under Section 29 of the *Land Adjudication Act* and that both the Appellant and the Respondents gave their testimony and were cross-examined.

8. It was averred that the 1st Respondent proceeded to visit the suit property on 26th January, 2022 and it was determined that the Appellant's family occupies a quarter of the suit property as awarded by the clan. The deponent contended that the 1st Respondent accorded all the parties a fair hearing and made a determination on the appeal in accordance with Section 29 of the *Land Adjudication Act*. She further contended that the application is misconceived, that it is an abuse of the court process and that it should be dismissed with costs.

9. In the Ex-parte Applicant's submissions dated 1st July, 2023, Counsel submitted that the principles of natural justice were violated during the hearing of the Appeal to the Minister because the Ex-parte Applicant was not given sufficient time to cross-examine the Interested Party. Counsel further

submitted that the 1st Respondent did not visit the site as requested. A plea was made for the court to declare the decision as no decision.

10. A further submission was made that after declaring the 1st Respondent's decision a nullity, the Court should proceed to issue an order directing the 2nd Respondent to refrain from implementing the decision. Counsel urged the court to utilize its supervisory jurisdiction to grant all the orders sought by the Ex-parte Applicant.

11. In the Respondents' submissions dated 23rd October, 2024, State Counsel identified three issues for determination namely: -

    i. Whether the Ex-parte Applicant is entitled to the orders sought?

    ii. Whether the Petitioner has laid sufficient ground for grant of certiorari and prohibition orders?

    iii. Who should bear the costs?

12. Submitting on the first issue, Counsel contended that the Ex-parte Applicant had not demonstrated that the decision-making process was not justified as the parties were given a fair hearing by the 1st Respondent. It was contended that the Ex-parte Applicant was afforded time to cross-examine the Interested Party and vice versa. That the record does not show that the Ex-parte Applicant made an application for additional time to cross-examine.

13. Learned State Counsel went ahead to fault the proceedings herein contending that the application for leave to apply for an order of certiorari and prohibition was made outside the mandatory statutory period of six (6) months.

14. Submitting on the second issue, State Counsel argued that there was no cogent evidence demonstrating that the Ex-parte Applicant's right to a fair hearing was violated by the 1st Respondent. It was urged that the court should dismiss the application with costs.

15. There are only two apparent issues for determination as follows: -

    i. Whether the court herein has the jurisdiction to hear and determine the judicial review application herein?

    ii. Whether this court can determine the merits of the impugned decisions.

16. The application for leave to apply for judicial review orders of certiorari and prohibition herein dated 22nd March, 2024 was made pursuant to the provisions of Sections 8 and 9 of the *Law Reform Act*. Sections 9(2) and 9(3) of the *Law Reform Act* provide as follows: -

    (2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

    (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 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.

17. The above provisions outline a mandatory statutory period of six (6) months with which an application for judicial review can be made under the regime of the *Law Reform Act*. A statutory time limitation cannot be enlarged by this court as that is outside discretion of this court under its inherent jurisdiction.

18. The decision which the Ex-parte Applicant has sought to challenge was made by the 1st Respondent on 3rd February, 2022. The application for leave is dated 22nd March, 2024. There is a lapse of approximately twenty-five (25) months between the date of the decision and the date of the leave application. The leave application is clearly caught by the statutory time limitation.

19. In Odinga and others v Nairobi City Council [1990–1994] 1 EA 482, the court aptly held as follows: -

> " An application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose. The plaintiffs' application was made after a lapse of 14 months since the ground for the application arose and was therefore time barred.
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> The Rules of Court made under an Act cannot defeat or override the clear provisions of the Act. An Act of Parliament cannot be amended by subsidiary legislation. Thus the part of Order LIII, rule 2 as amended by Legal Notice number 164 of 1992 which read "unless the High Court considers that there is good reason for extending the period within which the application shall be made" was ultra vires section 9(2) of the *Law Reform Act* (Chapter 26)."

20. A similar position was taken by Mativo J. (as he then was) in Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another [2018] eKLR, where the court observed as follows: -

> " 29. The ex parte applicants invoked sections 8 and 9 of the *Law Reform Act* in their application, and the provisions of the Civil Procedure Rules. They cannot now turn around and claim that the same provisions they seek to invoke are not applicable in the circumstances of their case. Further, the application before me is governed by the same provisions of the law. It is not a matter of discretion. Discretion does not apply where the statute is clear. In any event, even if the law had granted a discretion in the matter before me, the applicants have not demonstrated any basis for the Court to exercise its discretion in their favour. Delay, no matter how short must be accounted for.
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> 30. It is also important to point out that the provisions of order 50 Rule 6 of the Civil Procedure Rules, 2010 which grant the Court power to enlarge time cannot override the express provisions the Statute, namely, section 9 (3) of the *Law Reform Act*. In this regard, I find useful guidance in the authorities cited by Mr. Oduor, namely, Re an application by Gideon Waweru Githunguri [1962] 1 EA 520 whereby the colonial Supreme Court held that the said section imposes an absolute period of limitation...
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> 31. In view of my conclusions herein above, 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, I find and hold that the preliminary objection succeeds."

21. On the second issue, a look at the Appicant's application clearly shows that the Applicant is raising issues which require this court to carry out a merit review. The Applicant having chosen to come under

Order 53 of the Civil Procedure Rules and Section 8 and 9 of the *Law Reform Act* as opposed to the Fair Administrative Actions Act or a Constitutional Petition, he cannot be heard to ask this court to do a merit review s the court is only under a duty to ensure that proper procedures were followed.

22. A look at the impugned decision shows that the Applicant was given an opportunity to be heard. He cross examined the Interested Party. The 1st Respondent visited the suit property before making the final decision. In the case of Standard Chartered Bank Kenya Limited & 10 others -vs- Attorney General & 3 others (Civil Appeal E847 OF 2023) (2025) KECA (KLR) (7 March, 2025) (Judgment) Neutral Citation (2025) KECA 433 (KLR) the Court of Appeal held as follows:

> " There is no denying that judicial review proceedings brought under the Fair Administrative Actions Act do admit to a measure of merit review as was recognized by the Supreme Court itself in Praxidis Namoni Saisi & 7 others Vs Director of Public Prosecution KESC 6 (KLR). Even then, such merit examination is limited to the examination of uncontroverted evidence. Such necessary latitude does not, however, apply to a purely Order 53 judicial review, then the High Court is precluded from conducting a merit review as was made clear by the Supreme Court in the Dandecase (Supra) the relevant excerpt of which we cited earlier in the judgement."

23. Contrary to the Applicant's assertion that there were no reasons given as to how the 1st Respondent arrived at his decision, the 1st Respondent has clearly given the reasons for granting the Applicant ¼ of the suit property. I therefore find that the Applicant's application is devoid of merit. The same is hereby dismissed with costs to the Respondents and Interested Party.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF MARCH, 2025.

In the Presence of:

Ms. Kirina for Respondents

Mr. Nyingi for Ex-parte Applicant.

Court assistant - Steve Musyoki