



**Republic v Chairman Uasin Gishu Land Disputes Tribunal & another;
Baroswa (Exparte); Kitilit (Interested Party) (Judicial Review Miscellaneous
Application E20 of 2022) [2023] KEELC 859 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E20 OF 2022
JM ONYANGO, J
FEBRUARY 14, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**CHAIRMAN UASIN GISHU LAND DISPUTES TRIBUNAL . 1ST RESPONDENT
CHIEF MAGISTRATES COURT 2ND RESPONDENT**

AND

KIMELI BAROSWA EXPARTE

AND

ROSA TAMINING KITILIT INTERESTED PARTY

RULING

1. The ex parte applicant moved the court by way of a chamber summons pursuant to sections 8 and 9 of the Law Reform Act cap 26, sections 1A, 1B and 3A of the Civil Procedure Act, cap 21, order 5 rule 3 of the Civil Procedure Rules seeking the following orders:
 - a. Spent.
 - b. That this honourable court be pleased to grant leave to the ex parte applicant to apply for judicial Review orders to wit;
 - c. An order of certiorari directed at the respondent removing into the High Court for purposes of being quashed the respondent’s decision of having purported to sit and determine the dispute after repeal of the Land Disputes Tribunal Act (repealed) and issuance of the subsequent court decree and subsequent proceedings.



- d. An order of prohibition directed at the interested party prohibiting them from trespassing, transferring or encroaching on land parcel No Soy/Kipsomba BLK 2 which was legally obtained by the ex parte applicant
 - e. An order of mandamus directed at the 2nd respondent compelling her to restrain from signing and sending to the Land Control Board application forms for land parcel No Soy/Kipsomba BLK 2.
 - f. That the grant of leave to apply for orders of certiorari, prohibition and mandamus do operate as a stay of implementation of the respondent's aforesaid decision.
 - g. That the award of the Tribunal (Award No 58 of 2011) and the subsequent decree be quashed.
2. The application is based on the grounds set out on the face of the application and the supporting affidavit of Kimeli Barsoswa, the ex parte applicant herein. Upon service of the application on the respondents and the interested parties, the 1st and 2nd respondent filed grounds of opposition dated June 30, 2022 raising three grounds, the first one is that the application had been brought after the expiry of the 6 months period provided by the [Law Reform Act](#) and order 53 of the [Civil Procedure Rules](#). The second one is that order of prohibition sought herein is unknown in law and lastly that the interested party is not a public body hence such order cannot be issued against it.
 3. The interested party filed a notice of preliminary objection raising 4 grounds:
 4. The first one is the application for leave to apply for judicial review orders of certiorari, prohibition and mandamus is fatally and incurably defective at it offends section 9(2) of the [Law Reform Act](#) and order 53 rule 2 of the [Civil Procedure Rules](#) as it has been made after 6 months from the date of the disputed proceedings and decree.
 5. Secondly that the application is fatally defective as it offends order 50 rule 6 of the [Civil Procedure Rules](#) as it had been done without leave of the court extending time to file the application.
 6. Thirdly, that the application is fatally and incurably defective as it offends the provision of section 9(2) of the [Fair Administrative Actions Act](#) as the ex parte applicant has not exhausted all appeal mechanisms provided under the law.
 7. The court directed that the preliminary objection be canvassed by way of written submissions and the parties complied by filing their respective submissions.

Interested Party's Submissions

8. Learned counsel for the interested party submitted that in so far the ex parte applicant was seeking to quash orders that were issued by the Land Dispute's Tribunal on December 8, 2011 and adopted as a judgment of the court on June 27, 2016, the application for leave to file judicial review was statute – barred as it offends section 9(2) of the [Law Reform Act](#) which provides that such applications be filed within 6 months. He faulted the ex parte applicant for not providing any reasons for the delay or seeking leave to file the application out of time. He termed the delay of 10 years inordinate and inexcusable and submitted that the ex parte applicant had been indolent and slept on its rights.
9. Counsel further submitted that the ex parte applicant had not exhausted the appeal mechanism provided under section 16A of the [Environment and Land Court Act](#) and his application was therefore premature. He relied on the cases of [Mason Services Limited v Parklands Baptist Church Registered Trustees & Another \(2018\)eKLR](#), [Geoffrey Muthinja & Another v Samuel Mbugua Henry & 1756](#)



Others (2015)eKLR and *Peter Orengo Migiro (Suing on behalf of the late Christopher Orengo Makori) v Samwel Omagwa James & 2 Others (2022) eKLR.*

1st and 2nd respondents' Submissions

10. Learned counsel for the 1st and 2nd respondent similarly submitted that the application by the ex parte applicant was time-barred as it was filed after the expiry of 6 months contrary to the provisions of section 9(10 and (3) of the *Law Reform Act*. She cited the case of *Republic v Mwangi Nguyai & 3 Others ex parte Haru Nguyai* for the proposition that judicial review applications ought as a matter of public policy be instituted, heard and determined within the shortest time possible. It was her contention that there was no provision for extension of time under the *Law Reform Act* as was held by the Court of Appeal in *Wilson Osolo v John Ojiambo Ochola & Another (1995) eKLR*. She urged the court not to assist the ex parte applicant as he had been indolent.
11. Counsel further submitted that the orders of judicial review were only available against public bodies exercising their public or quasi-judicial functions and not to private persons. She relied on the case *Republic v Principal Kadhi ex parte Alibhai Adamali Dar & 2 Others; Murtaz Tuarabali (Interested Party)(2022) eKLR* and *Madbury v Madison*. It was therefore her contention that the orders of judicial review could not be directed at the Interested party.

Ex -parte applicant's Submissions

12. Learned counsel for the *ex parte* applicant submitted that the application for judicial review was proper as the proceedings in award No 58 which was the genesis of this application was still pending. It was his submission that judicial review orders were discretionary and the court could only decline to grant them if there was unreasonable delay in bringing the application for judicial review, where the applicant had not acted in good faith, where the remedy would impede the authority's ability to deliver fair administrative action or where the judge considers that an alternative remedy could have been pursued.
13. It was his contention that the court has powers under sections 8 and 9 of the *Law Reform Act* to issue the prerogative writ of certiorari to quash a decision which was *ultra vires* and a writ of prohibition to forbid an action by a public office from taking place.
14. Counsel submitted that the preliminary objection could not be raised if any fact needed to be ascertained. He relied on the case of *Oraro v Mbaja (2005) eKLR* and *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Ltd*. He argued that in the instant case, the interested party had failed to disclose that the proceedings relating to the award of the Tribunal were still going on.
15. He further submitted that judicial review was one of the reliefs for violation of fundamental rights and freedoms under article 23(3) of the *Constitution* and section 7 of the *Fair Administrative Actions Act*. He urged that under article 159 of the *Constitution* the courts were enjoined to administer justice without undue regard to procedural technicalities.

Issues for Determination

16. Having considered the application, the preliminary objection and the rival submissions the issues for determination are twofold:
 - i. Whether the application for leave to apply for judicial review was filed out of time.
 - ii. Whether order of prohibition can issue against the Interested person.



Analysis and Determination

17. With regard to the question of time. It is not in dispute that the application seeks to challenge the decision of the defunct Land Disputes Tribunal made on December 8, 2011 *vide* Award No 58 of 2011. The said decision was adopted as a judgment of the court on June 29, 2017. The application for leave to apply for judicial review was made 11 years after the decision of the Tribunal and 5 years after its adoption by the court.

Section 9 of the [Law Reform Act](#) provides as follows:

“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”.

A similar provision is found in order 53(2) of the [Civil Procedure Rules](#) which provides as follows:

“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 an 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.

18. In the instant case, the ex parte applicant filed the application for leave under sections 8 and 9 of the [Law Reform Act](#) and order 53 of the [Civil Procedure Rules](#) and he was therefore required to bring the application within a period of six months. In arriving at this finding I am guided by the case of [Wilson Osolo v John Ojiambo Ochola & Another \(1996\) eKLR](#) where the Court of Appeal held as follows:

“...It can readily be seen that order 53 rule 2 as it then stood) is derived verbatim from section 9 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 for extension of time limited by statute, 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 which gives some limited right for extension of time to file suits after expiry of a limitation period. But the act has no relevance here.”

19. However, it should be noted that under the current legal framework for judicial review one need not be confined to the provisions of the [Law Reform Act](#) as the scope for judicial review has been expanded and it is entrenched in the [Constitution](#), the [Fair Administrative Actions Act](#) and the [Environment and Land Court Act](#). In the case of [National Social Security Limited v Sokomanja Limited \(2021 eKLR\)](#) the court observed as follows:

“Judicial review as a relief is provided for in among others; article 23 (3) of the [Constitution](#) of Kenya 2010, section 8 of the [Law Reform Act](#) Chapter 26 Laws of Kenya, section 13(7) of the [Environment and Land Court Act](#) 2011, section 7 of the [Fair Administrative Action Act](#) 2015 and the Common law. In my view, no leave is required to seek judicial review as a relief under article 23(3) of the [Constitution](#) where proceedings are instituted to enforce the Bill of Rights under article 22 of the [Constitution](#) or where proceedings have been brought under



section 7 of the *Fair Administrative Action Act*, 2015 for the review of an administrative action. Such leave is also not required under the *Environment and Land Court Act* 2011 before such relief is sought.

Leave is however still required in my view where an applicant for judicial review moves the court under the *Law Reform Act* Chapter 26 Laws of Kenya and order 53 of the Civil Procedure Rules. Following the promulgation of the *Constitution* of Kenya, 2010 and *Fair Administrative Action Act*, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under the *Constitution* of Kenya 2010 and/or the *Fair Administrative Action Act*, 2015 in which case they will not need leave of the court or go for the same relief under the *Law Reform Act* Chapter 26 Laws of Kenya and order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the court.

20. Having opted to file the application under the *Law Reform Act* and order 53 of the *Civil Procedure Rules*, the applicant was bound by the provisions of the *Law Reform Act*, which provide that the application be filed within a period of six months. The said act does not provide for extension of time. It is therefore my finding that the application is defective for having been filed out of time.
21. Regarding the question as to whether judicial review remedies can be directed at an individual, whereas I agree with counsel for the interested party that these remedies available against public bodies exercising their public or quasi-judicial functions I am of the view that where the Tribunal 's award was directed at an individual the review of Tribunal's decision would necessarily entail making orders against that individual.
22. The upshot is that the preliminary objection has merit, I therefore uphold it and strike out the application with costs to the respondent and Interested party.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF FEBRUARY, 2023

J M ONYANGO

JUDGE

