REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

JUDICIAL REVIEW APPLICATION NO. 1 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LAND ACT 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT

BETWEEN

PETER ORENGO MIGIRO

(Suing on behalf of the late CHRISTOPHER ORENGE MAKORI).....APPLICANT

AND

SAMWEL OMAGWA JAMES.....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT KISII.....2ND RESPONDENT

KENYENYA LAND DISPUTES TRIBUNAL.....3RD RESPONDENT

RULING

INTRODUCTION

1. By a Chamber Summons dated 8th February, 2021 the Applicant filed an application pursuant to Order 50 Rule 6 and Order 53 Rules 1. 2 and 3 of the Civil Procedure Rules as well as Sections 8 and 9 of the Law Reform Act Cap 26 of the Laws of Kenya seeking the following orders:

a) Spent

b) That the Honourable court be pleased to enlarge the time for the applicant to file Judicial Review proceedings for purposes of quashing the decision of the Kenyenya Land Disputes Tribunal with all attendant orders emanating therefrom.

c) The ruling of Hon. L. Shinyanda delivered on the 16th day of June 2010 be reviewed by this Honourable Court with a view to quashing the same.

d) Leave be granted to the Applicant to apply for an order of certiorari to remove to this court and quash the orders and decision of Kenyenya Land Disputes Tribunal No. 99 of 2007 via an order decreeing that the land in dispute MAJOGE/MAGENCHE/670 belongs to James Nyangoto and his family.

e) Leave be granted to the Applicant to apply for an order of prohibition prohibiting the Respondent either by themselves, their servants, employees, officers and/or any person acting under their directions and control from taking steps, actions and measures to enforce its decision contained in the order dated 16th June 2010 under Misc Land Dispute Application No. 132 of 2008 that the land parcel No. MAJOGE/MAGENCHE/670 belongs to James Nyangoto and his family.

f) Leave granted herein do operate as a stay of any decision consequent from the orders dated 16th June 2010 in Misc Land Dispute Application No. 132 of 2008.

2. The application is anchored on the grounds that are on the face of the Chamber Summons and the Applicant's Statutory Statement and Verifying Affidavit sworn on the 8th February, 2021. In the Statutory Statement, the Applicant states that the decision of Kenyenya Land Disputes Tribunal in Tribunal Case No. 99 of the 2007 is arbitrary, unjust, unreasonable and contrary to law and it violates the Applicant's right to property.

3. In the Verifying Affidavit the Applicant depones that he is the administrator of the estate of Orenge Makori-deceased who was the original Applicant. He further depones that in Kisii Chief Magistrate's Civil suit No. 542 of 2001 the deceased who was the 1st Applicant sought orders of exhumation of the body that was buried on their land parcels No. MAJOGE/MAGENCHE/670 1514 and 1515. The court issued orders dated 29th October, 2004 restraining the Respondent from trespassing onto the Plaintiffs three parcels of land aforementioned.

4. He deponed that land parcel number 670 belongs to Orenge Makori- Deceased and the Tribunal's decision that the said parcel of land belongs to James Nyangoto and his family was unconstitutional and an infringement of the Applicant's legitimate expectation under the law. He further deponed that the dismissal of the Applicant's earlier application dated 4.3.2020 seeking to set aside the decision of the Tribunal was informed by a Grant of Letters of Administration issued in Ogembo SPM Succession Cause no. 33 of 2020 which relates to a different estate that is not in dispute whereas the Grant relating to the estate of Orenge Makori was issued in Ogembo SPM Succession Cause No. 32 of 2020. It was his contention that the dismissal of the said application had led to a miscarriage of justice as it had hindered the administrator of the estate from defending the estate in any manner.

5. Upon service of the application on the Respondents, the 1st Respondent filed a Replying Affidavit sworn on the 3rd May, 2021 and a Notice of Preliminary Objection on the same date.

6. In the Replying Affidavit, Samwel Omagwa James, the 1st Respondent dismissed the application as being frivolous, vexatious and an abuse of the court process. He claimed that the application was full of falsehoods aimed at hoodwinking the court to grant the orders sought therein. It was his averment that the decision of the Tribunal was made more than 10 years ago and adopted by the

court in 2010 and that the Applicants fully participated in the same.

7. He averred that after the Applicants were served with an eviction order they moved the court vide an application seeking to set aside, stay or review the said orders, which application was dismissed. It was his contention that there is a valid judgment which has never been appealed against for a period of over 10 years and the delay in filing the instant application is inexcusable.

8. He pointed out that the application offends the provisions of section 9 of the Law Reform Act Cap 26 of the Laws of Kenya and that the orders sought herein were sought in the lower court more than 10 years ago.

9. In the Notice of Preliminary Objection, the Applicant raised the following ground that the application dated 8.2.2021 offends the provisions of section 9(2) (3) of the Law Reform Act Cap 26 of the Laws of Kenya.

10. The court directed that the Preliminary Objection and application be disposed of concurrently and that the same be canvassed by way of written submissions.

1ST RESPONDENT'S SUBMISSIONS

11. In his submissions learned counsel for the 1st Respondent submitted that the application is time-barred, contra-statute and a nullity. It was his submission that Under Order 53 Rules 1 and 2 of the Civil Procedure Rules, it is clear that leave to file an application for Judicial Review must be filed within 6 months from the date of the judgment or decision. This provision is similar to section 9(2) and (3) of the Law Reform Act Cap 26 of the Laws of Kenya.

12. He contended that in order for the court to determine whether the Applicant should be granted leave to apply for Orders of Judicial Review, the court must first determine whether the application has been made within 6 months. He argued that since the judgment sought to be quashed was delivered in 2010, the application for leave which was filed on 8.2.2021 is inordinately late and the said delay is inexcusable and offends the provisions of Order 53 of the Civil Procedure Rules and Section 9(3) of the Law Reform Act. He relied on the case of **Cyril J. Haroo & Another v Uchumi Services Limited & 3 Others (2014) eKLR** where the Court held that:

"36. *This Court is governed by the provisions of the Constitution, the Environment and Land Court Act, and the Civil Procedure Act and the Rules made thereunder, among other statutes while discharging its mandate.*

37. Section 19 of the Civil Procedure Act provides that every suit shall be instituted in such manner as may be prescribed by the rules. For this court to have the requisite jurisdiction to handle a suit, that suit must be filed in accordance with the rules. For example a party cannot commence a suit by way of a letter and where that happens, the court will not have the jurisdiction to handle such a matte because a"suit" would not be said to have been instituted in accordance with the rules in such a case. The court will have no option but to declare such a "suit" a nullity.…..

41.Where a party intentionally or by mistake moves the court contrary to the provisions of the law, the court may call upon such a party to move the court appropriately by nullifying what was filed contra-statute in the first place. A proper suit may be filed again"

13. He maintained that the instant application was not instituted in such a manner as is prescribed by the law and it was time-barred, contra-statute and a nullity.

The Court in **Cyril Haroo** (supra) further held that:

"42 *A suit filed contra-statute is cannot be save by the Oxygen principle or the provisions of Article 159 of the Constitution. in the case of Siasa Pasua & 2 Others v Mbaruk Khamis Mohammed and Another (2012) eKLR Ojwang J (as he then was) had this to say about the 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 undue regard to procedural technicalities, does not in my opinion, negate the orderly scheme of litigation provided by the Civil Procedure Rules; and the law in respect of Originating Summons is by no means nullified."*

I am in agreement with the holding of the judge. Where a party does not comply with the express provisions of the law in terms of how he should move the court, and where the court does not have the discretion to rule otherwise, the provisions of article 159 cannot come to the aid of such a party. A suit which is filed contra-statute is incompetent and cannot be allowed to proceed because it should not be there in the first place."

14. Counsel concluded his submissions by emphasizing the instant application as contra-statute and therefore incompetent and that it should not be allowed to proceed. He urged the court to dismiss the application with costs to the Respondents.

15. On whether the Preliminary Objection was merited, it was counsel's contention that the same had merit and it should be allowed with costs to the Respondents as it fell within the definition of a Preliminary Objection as stated in the case of **Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Ltd (1969) E.A 696.**

ANALYSIS AND DETERMINATION

16. The main issue for determination is whether the Preliminary Objection should be upheld.

The question as to whether the court has the discretion to extend time for filing of an application for Judicial Review has been the subject of litigation and the Courts have held divergent views on the matter. In the case of **Republic v Kenya Revenue Authority Ex-parte Stanley Mombo Amuti (2018) eKLR** the Court held thus:

"37. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of the court to in such cases guided by the purposes, values and principles of the Constitution and the constitutional dictate to develop the law on that front. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. It would require a compelling reason that would pass an Article 24 analysis test to deny a litigant the right to approach the court. Where a party applies for extension of time as in this case, the court should exercise its discretion and examine the period of the delay and the reasons offered for the delay.

38. Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). Fourth, section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8 or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the act provides for grounds for applying for Judicial Review. Fifth, Article 159 commands courts to administer justice without undue regard to procedural technicalities.

39. In Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another (2014) eKLR discussing the same provisions, I observed that court decisions should boldly recognize the Constitution as the basis for Judicial Review. Additionally, court decisions should boldly recognize access to courts of a fundamental right guaranteed under the Constitution which can only be limited in a manner that can pass constitutional muster. It is a constitutional dictate that in applying the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Talking about developing the law, Judicial Review is now a constitutional supervision of public authorities involving a challenge to the legal validity of decisions. Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

40. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

41. It is therefore my conclusion that in an application for extension of time such as the one before me, all that an applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay. It will also be a consideration that the impugned decision seeking to be challenged violates or

threatens to violate the Bill of Rights or violation of the Constitution".

17. However 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.

18. What can be gleaned from the decisions is that indeed the scope of Judicial Review is no longer confined to the legal framework under the Law Reform Act and Order 53 of the Civil Procedure Act but is now entrenched in the Constitution and the Fair Administrative Act. However as correctly held in the in **NSSF** (supra), if one opts to file an application for Judicial Review under the Law Reform Act and Order 53 of the Civil Procedure Rules, one must apply for leave within six months of the decision as the court has no discretion to enlarge time within which to file the application for leave.

19. In arriving at this decision, I am guided by the Court of Appeal decision in **Wilson Osolo v John Ojiambo Ochola & Another 1995 eKLR** where the Court held that:

"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 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 of the Laws of Kenya which gives some limited right for extension of time to the suits after expiry of a limitation period. But this Act also has no relevance here".

20. Be that as it may, even assuming that the court had a discretion to extend time, the delay of 10 years which is grossly inordinate has not at all been explained.

21. In view of the foregoing, it is my finding that the Preliminary Objection is merited and I uphold it and strike out the application with costs to the 1st Respondent.

Dated, signed and delivered at Kisii this 23rd day of March, 2022.

J.M ONYANGO

JUDGE