



Newham Services International Limited v Kenya Ports Authority; Catch Security Links Ltd & 9 others (Interested Parties) (Judicial Review Application 1 of 2022) [2023] KEHC 3456 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION 1 OF 2022**

**OA SEWE, J
APRIL 26, 2023**

BETWEEN

NEWHAM SERVICES INTERNATIONAL LIMITED APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

AND

CATCH SECURITY LINKS LTD INTERESTED PARTY

HATARI SECURITY GUARDS LTD INTERESTED PARTY

NORTHWOOD SERVICES LTD INTERESTED PARTY

TOTAL SECURITY SURVEILLANCE LTD INTERESTED PARTY

BEDROCK SECURITY SERVICE LTD INTERESTED PARTY

SOVIT SECURITY SOLUTIONS LTD INTERESTED PARTY

SECURITY LINKS LTD INTERESTED PARTY

ACCESS SECURITY LINKS LTD INTERESTED PARTY

RADAR LTD INTERESTED PARTY

VICKERS SECURITY SERVICES LTD INTERESTED PARTY

RULING

[1] The Notice of Motion dated 11th March 2022 was filed by Newham Services International Limited against the respondent, Kenya Ports Authority, for orders that:

(a) Spent



- (b) Pursuant to the orders granted by the Court (Hon. Mativo, J. as he then was) on 25th February 2022, granting leave to the applicant to file a substantive motion, this Court be pleased to extend the notice and the substantive motion dated 9th March 2022 and filed on 10th March 2022 be deemed to have been properly filed.
- (c) The costs of the application be in the cause.
- [2] The application was premised on the grounds that the Court granted the ex parte orders for judicial review on 25th February 2022; and that the leave was granted on condition that the applicant files and serves the substantive application within 10 days from the date of the order. It was further the contention of the applicant that, whereas it duly complied with the order, its efforts were frustrated by the court's e-filing system; such that it was impossible to finalize the transaction and make payment through the M-Pesa system within the period ordered by the Court. Thus, it was the assertion of the applicant that he was constrained to file physical copies of the documents instead; with the result that the substantive motion was only filed on 10th March 2022.
- [3] The application was supported by the affidavit sworn by the applicant's Advocate, Mr. Tom Wachakana of M/s Wachakana & Company Advocates. He averred that on 25th February 2022, the Court issued orders in respect of the Chamber Summons dated 23rd February 2011, pursuant to Section 8 of the Law Reform Act, Chapter 26 of the Laws of Kenya and Order 53 Rule 1 of the Civil Procedure Rules, directing the applicant to file a substantive application and have it served within 10 days. Mr. Wachakana added that although he presented the substantive motion for e-filing on 9th March 2022, the system failed; and he had no option but to resort to filing the hard copies on 10th March 2022. He therefore prayed that the Notice of Motion dated 9th March 2022 be deemed to have been properly filed.
- [4] In response to the application, the respondent relied on the Grounds of Opposition dated 20th April 2022, namely that:
- (a) The application is vexatious and a total abuse of the court process;
- (b) The application is incompetent ab initio since judicial review proceedings pitting public procurements such as the subject procurement, are proceedings sui generis, governed strictly under the Constitution of Kenya and the Public Procurement and Asset Disposal Act, 2015;
- (c) Timelines for challenging decisions made in respect of public procurements are strictly governed by law and therefore the application falls short of the statutory timelines set in the Public Procurement and Asset Disposal Act;
- (d) The applicant is guilty of lack of candour and abuse of judicial redress mechanisms, on the one hand asserting that it has invoked the statutory procedure for challenging a procurement process yet at the same time pursuing the instant distinct proceedings before this Court.
- [5] In addition to the Grounds of Opposition aforesaid, a Replying Affidavit, sworn by Edward Madagwa on 19th April 2022, was filed herein on 20th April 2022 on behalf of the 8th interested party, Vickers Security Services Ltd. At paragraph 2 thereof, Mr. Madagwa deposed that he was duly authorized to swear the said affidavit on behalf of the 2nd, 3rd, 5th and 7th interested parties as well. He averred that:
- (a) The Court has no jurisdiction to entertain the application because the first port of call ought to have been the Public Procurement Administrative Review Board, by dint of Section 167 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 and in view of the alternative



dispute resolution mechanism provided under Part XV of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015.

- (b) The application does not warrant the orders sought for misapprehension of the law and for being filed out of time. In this regard, the 8th Interested Party averred that the order of court to file the substantive motion was given on 25th February, 2022 and thus the order ought to have been complied with on the 7th March, 2022 and not 9th March as intimated by the applicant; and that the assumption that the 10 days granted lapsed on 9th March, 2022 is without legal basis as Order 50 of the Civil Procedure Rules, 2010 is instructive in that regard.
 - (c) That, in any event, the interested parties have signed the contracts with the respondent and are already on the ground executing their respective contracts in respect of Tender No. KPA/2020-21/SS for Provision of External Security Services.
- [6] Although directions were given herein on 20th April 2022 that the application be canvassed by way of written submissions, it appears only counsel for the applicant complied. Thus, in his written submissions filed on 26th May 2022, Mr. Wachakana submitted that the Court has the jurisdiction under Order 50 Rule 6 of the Civil Procedure Rules to extend time which has lapsed due to an innocent error; in this case, the failure of the e-filing system. He cited *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR for the applicable principles and urged the Court to allow the application.
- [7] From the proceedings it is manifest that the applicant's application for leave to institute judicial review dated 23rd February, 2022 was transferred to this court from the Judicial Review Division of the High Court, Nairobi. The application was considered ex parte on 25th February, 2022 by Hon. Mativo, J. (as he then was), who issued various orders, among them an order granting leave to the applicant to file and serve the substantive judicial review application within 10 days. Evidently, the applicant did not comply with the said directions and hence the application for extension of time.
- [8] The explanation given by the applicant's counsel for the failure was that, although he had presented the substantive motion for court fees assessment on the 9th March, 2022 on the e-filing platform as is shown in the invoice annexed and marked "T-2", the same could not be processed due to no fault of theirs. The applicant blamed the delay on the Court's e-filing system failure and claimed that they thereafter made an attempt to pay via M-Pesa but the systems failed and had to file the said application physically in Mombasa.
- [9] Thus, counsel for the applicant explained that, whereas the said application has already been filed and served upon the respondent, it was filed and served outside the 10 days' window provided for by the Court. Accordingly, the applicant now seeks that the Notice of Motion application dated 9th March, 2022 be deemed to have been duly filed.
- [10] In the premises, the issues for determination are: -
- (a) Whether this court has jurisdiction to extend time for a substantive motion to be filed in Judicial Review proceedings; and if so,
 - (b) Whether Applicant has made out a case for enlargement of time.



[a] Whether this court has jurisdiction to extend time for a substantive motion to be filed in Judicial Review proceedings:

[11] Needless to say that jurisdiction is everything, and that without it, a court has no power to entertain a dispute. In *The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* (1989) KLR 1, Hon. Nyarangi JA aptly stated: -

...I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."

[12] Further, in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court held: -

...(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings..."

[13] The jurisdiction of this court to determine Judicial Review proceedings emanates, not only from Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya as read with Order 53 of the Civil Procedure Rules, but is also anchored in Article 47 of the Constitution of Kenya and the legal framework derived therefrom. Under Order 53 Rule 3(1) of the Civil Procedure Rules, once leave has been granted, a substantive motion must be filed within 21 days. In this case, however, the Court had set timelines that the substantive motion be filed within 10 days. The order was given on 25th February, 2022, and therefore, the last day for compliance was 7th March, 2022.

[14] To my mind, Section 9 of the *Law Reform Act*, does not contemplate extension of time for purposes of filing Judicial Review proceedings. Hence, the courts have advocated for the *Law Reform Act* to be revised to include a specific provision for extension of time. Nevertheless, since the period for filing a Judicial Review matter is governed by Order 53 of the Civil Procedure Rules, it is, in my view amenable to extension. I am therefore in agreement with the position taken in *Kenya Bureau of Standards & 3 Others v Kenya Maritime Authority Ex parte Car Importers Association* [2014] eKLR that: -

...With respect, I have taken the view that while the provision relating to the 6 month period for commencement of proceedings for certiorari is statutory being expressly provided for under section 9 of the *Law Reform Act*, the requirement for filing of the Notice of Motion upon grant of leave is prescribed by the subsidiary legislation of the Civil Procedure Rules, which contain a rule (O.50 r.6) providing expressly for enlargement of time for doing any act prescribed under the Rules...As shown above Order 50 rule 6 of the Civil Procedure Rules contemplates extension of time for purposes of anything prescribed under the Rules without excepting Order 53 of the Rules. Even if the 6-month period for the commencement of judicial review proceedings were taken to be statutorily insulated, by the provisions of section 9 of the *Law Reform Act*, from the court's power of extension under



Order 50 rule 6, the same cannot be said of the 21-day period prescribed only by the Rules. For the reason that the prescription as to time of filing is a matter of procedure rather than substantive ingredient of the right or claim, and consequently subject to Article 159 of the Constitution and Order 50 rule 6 of the Civil Procedure Rules, I agree with the school of opinion that the court has power to extend the 21-day period prescribed by the rules for the filing of the Notice of Motion upon grant of leave under Order 53 Rule 3 (1) of the Civil Procedure Rules...”

- [15] The same position was taken in Republic v Speaker of Nairobi City County Assembly & another Ex Parte Evans Kidero [2017] eKLR, thus: -

...47. By placing Order 53 within the Civil Procedure Rules, it was intended that the order would operate alongside other enabling rules under the statute. And if that were not the case, then the Court of Appeal would not have stated the following in the case of *Wilson Osolo vs John Ojiambo Ochola & the Attorney General* CA No. 6 Nairobi of 1995 while considering whether the court has power or jurisdiction to enlarge time stipulated under Order 53 of the Civil Procedure Rules:

“As 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, the procedure cannot be availed of the extension of time limited by statute, in this case, the Law Reform Act.”

48. In the same judgment, the Court of Appeal stated:

It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15th February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules...”

- [16] It is evident then that this court can enlarge time pursuant to Order 50 Rule 6 of the Civil Procedure Rules, provided sufficient grounds to do so have been shown. The timeline set out to file the substantive motion, being a procedural requirement, can be cured under Order 50, Rule 6 of the Civil Procedure Rules. It is therefore my finding that the Court has the requisite jurisdiction to extend the time for filing the substantive Judicial Review application.

[b] Whether Applicant has made out a case for enlargement of time:

- [17] I must however hasten to add that, since the power to enlarge time is discretionary, it can only be granted to a deserving party upon a basis being laid to the satisfaction of the Court. Hence, the second issue to consider is whether the applicant has made out a case for enlargement of time. In this regard, the applicable principles were well set out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:

...This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:



1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time...”

[18] I have considered the explanation given by the applicant’s counsel for the failure to file the substantive application within the 10 days given; namely that, although he had presented the substantive motion for court assessment on the 9th March, 2022 on the e-filing platform, as is shown in the invoice annexed and marked “T-2”, the same could not be processed due to no fault of theirs. The applicant blamed the delay on the Court e-filing system and explained that even their attempt to pay via M-Pesa was unsuccessful due to system failure. Ultimately, they had to file the said application physically in Mombasa.

[19] I find that explanation for the delay of four (4) days to be reasonable. Moreover, the parties herein have not shown the prejudice that they will suffer should the application be allowed.

[20] The upshot of the above is that the Notice of Motion application dated 11th March, 2022 for extension of time to file a substantive Judicial Review application meritorious. The same is allowed and orders granted as hereunder:

- (a) That the application dated 9th March, 2022 and filed on the 10th March, 2022 be and is hereby deemed duly and properly filed.
- (b) Costs of the application to be in the cause.

21 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF APRIL 2023

OLGA SEWE

JUDGE

