



Mwangi v Attorney General & another (Judicial Review Miscellaneous Application E020 of 2022) [2023] KEHC 23020 (KLR) (Judicial Review) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E020 OF 2022
JM CHIGITI, J
SEPTEMBER 28, 2023**

BETWEEN

JOHN MAKUMI MWANGI APPLICANT

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

**THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR &
COORDINATION OF NATIONAL GOVERNMENT 2ND RESPONDENT**

RULING

1. The Applicant instituted these Judicial Review proceedings through a Chamber Summons Application dated 15th February, 2022 seeking leave to institute judicial proceedings for order of Mandamus. Leave to institute substantive motion was subsequently granted on the 17th February, 2022; and the court directed that the substantive motion be taken out and be served within 21 days. The 21 days' timeline lapsed without compliance with the courts directive.
2. Thereafter, the ex-parte Applicant filed a Notice of Motion dated 13th June, 2023 seeking orders:
 1. Spent.
 2. That this Honourable Court be pleased to enlarge the time within which the Applicant ought to have filed their substantive judicial review motion for a further 7 days from the date of granting of such an enlargement pursuant to the orders issued on 17th February, 2022.
 3. That the Applicant be granted leave to file and serve their substantive judicial review motion out of time.
 4. That Costs of this Application be in the cause.



3. In response to the Notice of Motion Application dated 13th June, 2023 the Respondent filed a Notice of Preliminary Objection dated 6th July, 2023. The aforementioned Preliminary Objection forms the subject of this ruling.
4. The Notice of Preliminary Objection dated 6th July, 2023 filed by the Respondent, was based on the grounds:
 1. That the Court lacks jurisdiction to enlarge the Statutory period under order 53 Rule 3 (1) of the Civil Procedure Rules.
 2. That the purported application is a non-starter because no substantive notice of motion had been filed within the mandatory statutory period under Order 53 Rule 3 (1) of the Civil Procedure Rules.
 3. That since the leave granted to the Application on 17th February, 2022 has already lapsed, no stay which is consistent with the provisions of Order 53 Rule 1 (4) of the Civil Procedure Rules can be granted in the circumstances herein.
 4. That the purported application dated 13th June 2022 is a non-starter because there is no suit upon which the said purported application can be founded, as the leave granted to commence the Judicial Review Proceedings has already lapsed due to failure to file the substantive application within the period of leave stipulated by the court.
5. To buttress their case, supporting the Preliminary Objection, the Respondent filed their written submissions dated 12th February, 2023 wherein it was submitted that the Applicant's Application offends Sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya, and also contravenes Section 53 Rule 3 of the Civil Procedure Rules, 2010.
6. To the Respondent, all the provisions cited by the Applicant's Counsel are not applicable in Judicial Review proceedings. Judicial Review proceedings are governed by Sections 8 and 9 of the Law Reform Act and Order 53 of the *Civil Procedure Rules*, 2010. It was submitted that there is no room for extension of time in Judicial Review proceedings and this court has no discretion to grant the extension. Relied on the Court of Appeal case of *Wilson Osolo v John Ojiambo Ochola & Another* [1996] eKLR.
7. Further, that in any event, extension of time is discretionary and a powerful tool which should be used judiciously. That the Applicant has not met the principle threshold laid down in the case of *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR.
8. It was contended that a party cannot decide to disobey a court order and then approach it (Court) seeking extension of time. That non-compliance of a court order is not a mere technicality, and cannot be cured by relying on Article 159 of the Constitution. That Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010 is coached in mandatory terms.
9. The Respondent thus urged this Honourable Court to dismiss the ex-parte Applicant's Application with costs. Relied on *Republic V Linda Wanjiku & 2 Others Ex Parte E.N (Applying as Father and Next of Friend of SK (Minor)* [2017] eKLR, and *Republic V Medical Laboratory Technologists Board Ex Parte Anastacia Ngithi Wahu & 177 Others* [2017] eKLR case.
10. Notably, it was the Respondent's position that courts have no discretion to extend time in Judicial Review proceedings. That this position was affirmed in the cases of *Republic V Chairman, Amangoro Land Disputes Tribunal & Another Ex Parte Alfred Ididi Eketon Ididi & Another* [2015] eKLR; *Republic V Public Procurement Administrative Review Board & Another*; *Mer Security*



- & Communications System Ltd/Megason Electronics & Control 1978 (Jv) & Another (Interested Parties); Exparte Magal Security Systems Ltd/Firefox Kenya Limited (Jv) [2019] eKLR; and Rosaline Tubei & 8 Others V Patrick K. Cheruiyot & 3 Others [2014] eKLR.
11. Conversely, the Applicant in opposing the Preliminary Objection, filed their written submissions dated 3rd January, 2023. They submitted that the procedure for filing of the substantive motion is set out in Order 53 Rule (3) of the Civil Procedure Rules 2010 and that owing to the fact that the 21 days' period is provided for by the Civil Procedure Rules, it goes without saying that a party can make an Application for extension of the 21 days' period under Order 50 rule 6 of the Civil Procedure Rules, 2010. That courts have upheld it (courts) have power to enlarge the 21 days' period stipulated in Order 53 Rule 3 of the Civil Procedure Rules.
 12. Reliance was placed on the cases of JR 371 & 372/2015 Republic Vs Public Procurement Administrative Review Board Ex-parte SynerChemie Ltd [2016] e KLR; JR 8/2014 KBS 3 Others v Kenya Maritime Authority Ex-parte Car Importers Association; and Miscellaneous 699/2007 Lucy Bosire V Kehancha & Divisional Land Disputes Tribunal & 2 Others citing Branco Arabe Espanol V Bank of Uganda.
 13. According to the Applicant, by placing Order 53 within the Civil Procedure Rules, the intention was that the order would operate alongside other enabling rules under the statute. Wilson Osolo v John Ojiambo Ochola & the Attorney General CA No. 6 Nairobi 1996 eKLR case was relied upon.
 14. Additionally, the Applicant posited that Article 159 (2) of *the Constitution* of Kenya 2010 enjoins the courts not to pay undue regard to procedural technicalities, but that instead focus on meting out substantive justice.
 15. It was the Applicant's submissions that Order 50 Rule 6 of the Civil Procedure Rules 2010, on enlargement of time, is applicable to Judicial Review applications contemplated in Order 53 Rule 3 of the Civil Procedure Rules. That even if it were not so, this court retains its inherent power to extend the time limited by Order 53 Rule 3, as a strict application of the rule would be a legitimate restriction on the right of access to justice which is a constitutional right stipulated in Article 48 of *the Constitution* of Kenya 2010.
 16. That section 95 of the *Civil Procedure Act* stipulates that where any period is fixed or granted by the court for the doing of any act prescribed or allowed by the Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.
 17. It was conceded that the instant proceedings are still at the leave stage, and if allowed, that is when the substantive motion can be filed. The Applicant posited that unless time is extended, filing the substantive motion will be inconsequential.
 18. To the Applicant, the Respondent have not demonstrated any prejudice or loss that has been or is likely to be occasioned to them if enlargement of time is granted. That this instant Preliminary Objection is an attempt to avoid satisfying the decretal amount.
 19. The Applicant maintained that, if their application to enlarge time is not granted, it would mean that judgment in CMCC NO. 859 of 2006 of 24th March 2015 would have been delivered in vain, resulting to the Plaintiff/Applicant being denied chance to execute the judgment.
 20. In the end, the Applicant, prayed that the Respondent's Notice of Preliminary Objection dated 6th July 2022 be dismissed, and the Plaintiff's/Applicants Application dated 13th June 2022 be allowed on merit.



Analysis and Determination

21. The circumstances in which a Preliminary Objection may be raised was in this regard explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
22. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. On the other hand, a preliminary objection cannot be raised if any fact requires to be ascertained. In the case of *Oraro vs Mbaja*, (2005) 1 KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in *Mukisa Biscuit Company -vs- West End Distributors Ltd* (supra) that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.
23. The issues for determination herein, therefore, are whether the grounds raised in Respondent’s Preliminary Objection raise pure points of law, and if so, whether the said preliminary objection has merit, and should be upheld. In this respect, it is notable that other than the ground raised on this Court’s jurisdiction, all the other grounds raised by the Respondent are grounds which either call for the exercise of this Court’s discretion in reaching a decision thereon, or for of evidence and argument, and can therefore not be raised as pure questions of law.
24. On the ground raised of this Court’s jurisdiction, the Respondent has cited Order 53 Rule 3 (1) of the Civil Procedure Rules, which provides that when leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.
25. The question that arises in this respect is not one of whether or not this Court has jurisdiction, but whether it has discretion to extend time for filing a substantive Notice of Motion out of time. In particular, whether the period of 21 days stipulated in Order 53 Rule 3 of the Civil Procedure Rules, 2010 can be enlarged by application of Order 50 Rule 6 of the Civil Procedure Rules, which expressly provides for and grants the Court jurisdiction to enlarge time.
26. The substantive issues that arise for determination are whether this Court can extend time for the Applicant to file his substantive Notice of Motion. In determining this issue, I find guidance and persuaded by Nyamweya J (as she then was) in her 17th September, 2020 Ruling in the case *Bernard Njiiu Njiraini v Clerk of the National Assembly & another; Cabinet Secretary, Ministry of Industrialisation, Trade & Enterprise Development & 4 others (Interested Parties)* [2020] eKLR.
27. I have considered the arguments made by the parties on the issues of extension of time to file the substantive Notice of Motion. Notably, there is currently no settled position as to whether the period of 21 days stipulated in Order 53 Rule 3 of the Civil Procedure Rules, 2010, can be enlarged by application of Order 50 Rule 6 of the Civil Procedure Rules, which provides for enlargement of time.



Some courts have applied strict interpretation regarding extension of time within which the substantive motion should be filed, and held that the requirements in Order 53 Rule 3 are mandatory.

28. This was the position adopted by the Courts in the cases of *Republic v Kahindi Nyafula & 3 Others, Ex-parte Kilifi South East Farmers' Co-operative*; *Republic v District Land Adjudication Officer Meru South/Mara Sub counties & County Government of Tharaka Nithi Ex-parte Gladys Kainda Mbae & Another* (2018) eKLR, *Republic v Council of Legal Education & Another Ex-parte Sabiha Kassamia & Another* (2018) eKLR and *Republic v Public Procurement Administrative Board & Another; Mer Security & Communications System Ltd/Megason Electronic & Control 1978 (JV) & Another (Interested Parties)*; *Ex-parte Magal Security Systems Ltd/Firefox Kenya Limited (JV)* (2019) eKLR .
29. However, I subscribe to the position articulated in *Republic vs Speaker of Nairobi City County Assembly & another Exparte Evans Kidero* [2017] eKLR and *Republic vs Public Procurement Administrative Review Board Exparte Syner – Chemie Limited*, [2016] eKLR that the constitutional provisions as regards fair administrative action, access to justice and substantive justice in Articles 47, 48 and 159 of *the Constitution* override timelines provided in delegated legislation.
30. Also, it is a general principal of statutory interpretation that unless the enabling Act so provides, delegated legislation cannot override any Act or any rule of general law (see Bennion on Statutory Interpretation, Fifth Edition at section 50). In the present case the same delegated legislation (Civil Procedure Rules) that provides for the timelines for filing substantive Notices of Motion also allows for the extension of that time under Order 50 Rule 6, as acknowledged by the Court of Appeal in the case of *Wilson Osolo vs John Ojiambo Ochola & the Attorney General CA No. 6 Nairobi of 1995* as follows:

“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.”
31. Notably, the Supreme Court of Kenya reiterated the position that extension of time an equitable remedy, that was only available to a deserving party at the discretion of the court, in its decision in *George Kang’ethe Waruhiu vs Esther Nyamweru Munene & Another* (2021) eKLR. The Supreme Court further held that a party who sought extension of time had the burden of laying a basis, to the satisfaction of the court whether the court could exercise the discretion to extend time. Further, that this is a consideration to be made on a case- to-case basis, and factors to be taken into account include a demonstrated reasonable cause for the delay; whether there would be any prejudice suffered by the respondents, if extension was granted; whether the application had been brought without undue delay; and whether in certain cases, public interest could be a consideration for extending time. Further to the above, the Supreme Court emphasised on the need for an applicant to satisfactorily declare and explain the whole period of delay to the court.
32. In the instant matter, the Applicant conceded that their failure to file the substantive judicial review Notice of Motion Application within 21 days was not deliberate and the same is regrettable. The Applicant’s counsel had submitted that as soon as they found out about the omission in filing the same, they attended court on 8th June, 2022 and were granted leave to put in an application for enlargement of time before Hon. Justice Anthony Ndungu.



33. On the contrary, the Respondent submitted that Judicial Review applications are time bound and that requires parties to be vigilant and stated a maxims of equity, 'Equity aids the vigilant, not the indolent'. Also that, the Applicant thought that the application for leave is still pending yet the leave had been issued four (4) months ago. That the Applicant lost interest in the matter and therefore, his application dated 13th June, 2022 should be dismissed with costs.
34. On 8th June, 2023 upon realizing their mistake, of not filing the substantive notice of motion, Counsel for the Applicant proceeded to file a Notice of Motion Application dated 13th June, 2023 seeking leave enlarge time and to file the substantive motion out of time.
35. To my mind, the Applicant's counsel delayed for about four (4) months, and still no substantive notice of motion was filed. I find a period of five (5) months delay to amount to inordinate delay. However, I take note that the mistake was by the Applicant's counsel, and not the Applicant. As such, in the prevailing circumstances, the mistake of the counsel ought not to be visited upon the litigants.
36. For these reasons, this Court will exercise its discretion in favour of the Applicant, and extend the time to file their substantive Notice of Motion.
 - I. The Respondent's Preliminary Objection dated 6th July, 2023 is unmerited, and is hereby dismissed.
 - II. Consequently, the Applicants Notice of Motion dated 13th June, 2023 is allowed in terms of prayer 2 and 3. As to prayer 4.
 - III. The Motion shall be filed and served within 14 days.
 - IV. The Respondents shall file and serve their responses if any to the application within 14 days of service.
 - V. The Applicant shall thereafter file and serve its submissions within 7 days of service.
 - VI. The Respondents shall thereafter file and serve their submissions within 7 days of service.
 - VII. The submissions shall be limited to 7 pages each.
 - VIII. The matter shall be mentioned on 11.12.2023 for further directions.
 - IX. No order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2023

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J.CHIGITI (SC)

JUDGE

