



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC JUDICIAL REVIEW NO. 1 OF 2021**

REPUBLIC.....APPLICANT

VERSUS

ETHICS & ANTI-CORRUPTION COMMISSION.....RESPONDENT

AND

GEOFFEY MONARI.....INTERESTED PARTY

CHARLES MUTUMA RINGERA.....EX PARTE APPLICANT

**RULING**

1. The *Ex Parte* Applicant filed a Notice of Motion application dated 19<sup>th</sup> January 2022 brought under **Article 159 (2) (d) of the Constitution, Order 53 Rule 3(1) and Order 50 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and Section 9(3) of the Law Reform Act** seeking the following orders:

*“1. Spent.*

*2. THAT this application be certified urgent, the same be heard ex-parte and service thereof be dispensed with in the first instance.*

*3. THAT this Honourable court be pleased to extend the leave granted to the Applicant by Hon. Justice Anthony Ndung’u on the 8<sup>th</sup> day of December 2021 to institute Judicial Review proceedings*

*4. THAT the Notice of Motion application dated 18<sup>th</sup> January 2022 be admitted out of time and the same be deemed to have properly filed.*

*5. THAT the costs of this application be provided for.*

6. The application is based on the grounds on the face of the application and the supporting affidavit of Edwin Waudo an advocate with the firm of Migos Ogamba & Waudo Advocates who are on record for the *Ex Parte* Applicant. Mr. Waudo deposes that on 8<sup>th</sup> December 2021 the *Ex Parte* Applicant filed a chamber summons under Certificate of Urgency seeking leave to institute judicial review proceedings against the Respondent. That on 9<sup>th</sup> December 2021 Anita Kipruto, a staff member of the firm, made a telephone inquiry at the registry to follow up on the orders issued by Ndung’u J and was informed that the matter would be mentioned on the 15<sup>th</sup> December 2021 but when the matter was mentioned as directed Ndung’u J ordered the suit be transferred to this court. Mr. Waudo contends that believing that no orders had been issued by Ndung’u J he filed a Notice of Motion dated 10<sup>th</sup> January 2022 and a certificate of urgency seeking to have the chamber summons application heard on priority basis. On 11<sup>th</sup> January 2022, Ogembo J considered the application and directed that the matter be mentioned on 23<sup>rd</sup> February 2022. Mr. Waudo avers that when Ms. Kipruto made an inquiry on the orders issued she was informed that on 8<sup>th</sup> December 2021 Ndung’u J granted leave to institute judicial review proceedings and directed that the substantive motion be taken out and served within 3 days. Mr. Waudo deposes that the mistake of not filing the substantive motion on time was inadvertent and genuine and that under **Order 50 Rule 6 of the Civil Procedure Rules** the court has jurisdiction to extend time for filing the substantive motion and he prays the court grants the orders sought.

7. Despite being duly served the Respondent and the Interested Party did not file a response to the application and this court directed that the matter be canvassed by written submissions. The *Ex Parte* Applicant filed submissions dated 10<sup>th</sup> February 2022 where he framed two issues for determination namely:

- a. Whether this court has jurisdiction to extend time for filing the substantive motion.
- b. Whether the application is merited

8. Mr. Waudo Learned Counsel for the Ex Parte Applicant submitted that this court has jurisdiction to enlarge the time limited for filing the judicial review application; That the court's power is derived from **Section 9 (2) of the Fair Administrative Action Act 2015 and Order 50 Rule (6) of the Civil Procedure Rules**. In support of his submissions Counsel also relied on the case of **Wilson Osolo v John Ojiambo Ochola & Another (1996) eKLR** where the Court of Appeal stated that:

*"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 of 15<sup>th</sup> February 1982 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. There was no such application save the one dated 28<sup>th</sup> April 1994. That came too late in the day in any event and the learned Judge erred in even considering the extension of time some 12 years after the event."*

9. Mr. Waudo also cited extensively from the case of **Republic v Public Procurement Administrative Review Board Ex-parte Syner-Chemie Limited [2016] eKLR** the case of **Republic v Speaker of Nairobi City County Assembly & Another Ex-parte Evans Kidero [2017] eKLR** and the case of **Republic v Kenya Revenue Authority Ex-parte Stanely Mombo Amuti (2018) eKLR** where the courts held that this court has power to enlarge time to file the substantive motion.

10. On whether the application is merited Counsel submitted that in extending the time limited for filing the application the court considers the length of the delay, the reasons for the delay and whether granting the orders will prejudice the respondent. On the length of the delay, Mr. Waudo submitted that Order 53 rule 3 provides that an applicant has a maximum of 21 days to file a judicial review application while Order 50 rule 4 and rule 8 gives guidance on the computation of days. He relied on **Section 57 of the Interpretation and General Provisions Act** and on the case of **Republic v Public Procurement Administrative Review Board Ex-parte Syner-Chemie Limited [2016] eKLR** where the court stated that:

"19. In *Simon Towett Maritim vs. Jotham Muiruri Kibaru Nakuru HCCC No. 188 of 2007, Ouko, J* (as he then was) expressed himself as follows:

*"It is common ground that the cause of action arose on 27<sup>th</sup> July, 2004. The applicant's claim being for damages for conversion, he was required to file the suit, in terms of Section 4(2) of the Limitation of Actions Act, within three years from 27<sup>th</sup> July, 2004. The plaint herein was filed on 20<sup>th</sup> August 2007. In computing time for the purposes of a written law, unless the contrary intention appears, regard must be had to section 57 of the Interpretation and General Provisions Act, Cap 2. Between 27<sup>th</sup> July, 2004 (excluding 27<sup>th</sup> July 2004) and 20<sup>th</sup> August, 2007, there are eleven months which constitute what are referred to as excluded days in the Interpretation and General Provisions Act (Saturday, Sunday and public holidays). Eleven months out of the period in question would bring the suit well within the prescribed period."*

11. Counsel contended that in the instant case leave was granted on 9<sup>th</sup> December 2021 which date was excluded in computation pursuant to **Section 57 of the Interpretation and General Provisions Act**. Further, that 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 18<sup>th</sup> and 21<sup>st</sup> December 2021 as well as 15<sup>th</sup> and 16<sup>th</sup> January 2022 are excluded from the computation under **Section 57 of the Interpretation and General Provisions Act** being non-working/excluded days; That in addition, 21<sup>st</sup> December 2021 to 13<sup>th</sup> January 2022 are excluded in computation of time under **Order 50 Rule 4 of the Civil Procedure Rules**. Counsel argued that the Notice of Motion was filed 10 days after Ndung'u J granted leave and that the delay of 7 days was not inordinate.

12. Counsel also submitted that the reason for the delay was an inadvertent error on the part of the *Ex Parte* Applicant's advocate arising from incomplete information obtained from the court registry due to inability to physically access the court file and the mistake ought to be excused. Counsel cited the case of **Benson Murai & others v Amos Wainaina (1997) eKLR** where Madan JA stated that:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate."

13. Counsel further contended that no prejudice will be suffered by the respondent as the judicial review application was in any case filed within the usual 21 days after the leave as required under **Order 53 Rule 3(1) of the Civil Procedure Rules** and that the failure to enlarge time will occasion hardship and result in injustice to the applicant. He urged this court to allow the application and that the substantive motion filed on 11 January 2022 be deemed as duly filed.

#### **Analysis and determination**

14. I have considered the application, the grounds thereof, the supporting affidavit, the submissions of Counsel for the applicant and the law. It is trite that the period limited for filing of the substantive motion under **Order 53 Rule 3 (1) of the Civil Procedure Rules** can be enlarged

– see the case of **Wilson Osolo v John Ojiambo Ochala & another [1996] eKLR** where the Court of Appeal stated **“This period of 21 days could have been extended by a reasonable period had there been an application under Order 46 of Civil Procedure Rules.”** The issue for determination therefore is whether the application for extension of time herein is merited.

15. Time for filing the substantive application for judicial review is provided for under **Order 53 Rule 3 of the Civil Procedure Rules** which states:

“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.”

16. The applicant relies on **Order 50 Rule 6 of the Civil Procedure Rules** which states that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

17. The question before this court is whether failure to file the substantive motion within the 3 days as directed by the court ought to be excused. In this case the substantive motion was filed out of the time limited by the court but within the time prescribed by the rules for filing such applications generally. Counsel has given what to me seems to be a plausible explanation for noncompliance with the order of Ndung’u J and I am persuaded that the application is merited and it ought to be granted so as to do justice to the parties. My finding is lent support by the following cases: -

The case of **Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti (supra)** the court stated that:

(i) **“44. Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.[46] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King’s Bench in Rookey’s Case[47] stated as follows:-**

**“Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with.”**

**45. Article of the Constitution vests judicial authority in the courts to be exercised in accordance with the principles enumerated therein. These principles include protecting purposes and principles of the Constitution and administering justice without undue technicalities.**

**46. In addition, the discretionary powers of the court are constrained by the objectives of the Constitution to grant access to justice. ‘Discretion’ signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard— what is ‘just and equitable’ — which calls for an overall assessment in the light of the factors mentioned in [the Constitution or a statutory provision], each of which in turn calls for an assessment of circumstances.**

(ii) The case of **Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited (supra)** the court discussing its inherent discretion stated that:

**“...I would still invoke the Court’s inherent jurisdiction to ensure that justice is done to the parties since there is no prohibition for enlargement of time that is granted by the court as is the case herein. In this case, it is simply too early for that claim to be credible and I do not believe that the Rules Committee in enacting Order 53 of the civil Procedure Rules intended to preclude meritorious claims in these circumstances.**

**84. In Raval V The Mombasa Hardware Ltd [1968] EA 392, the court in considering inherent jurisdiction of the court held that the reason usually given by the court for resorting to its inherent jurisdiction is to prevent a miscarriage of justice, especially where the defendant(respondent) is not prejudiced in any way if the court extended the time.”**

18. I am also satisfied that by allowing this application no prejudice shall be suffered by either the Respondent or the Interested Party. The application is therefore allowed and the Notice of Motion dated 18<sup>th</sup> January 2022 be and is hereby deemed as duly filed. Costs shall be in the cause.

Signed, dated and delivered electronically this 24<sup>TH</sup> day of February, 2022.

E.N. MAINA

**JUDGE**