



Kitulu v Law Society of Kenya Disciplinary Tribunal; Anthony (Interested Party) (Judicial Review 495 of 2017) [2022] KEHC 14289 (KLR) (Judicial Review) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW 495 OF 2017
AK NDUNG'U, J
OCTOBER 27, 2022**

BETWEEN

MUEMA KITULU APPLICANT

AND

LAW SOCIETY OF KENYA DISCIPLINARY TRIBUNAL RESPONDENT

AND

JACINTA MUTHEU ANTHONY INTERESTED PARTY

RULING

1. The application before this court is the notice of motion application dated November 1, 2021 and it seeks the following prayers;
 1. Spent
 2. That this honourable court be pleased to stay further proceedings with regard to the reference dated August 9, 2019 and the status quo be maintained pending determination of the application herein.
 3. That this honourable court be pleased to extend time for filing a notice of appeal against the ruling of Hon Lady Justice P Nyamweya issued on the April 3, 2019.
 4. That the draft notice of appeal annexed hereto and marked MK-I be deemed as duly filed and served upon payment of the requisite court fee.
 5. That the cost of this application be provided for.



2. The application is supported by the supporting affidavit of Muema Kitulu. The grounds upon which the application is based are that upon dismissal of the applicant's judicial review application and awarding of costs by Nyamweya J (as she then was) the client/respondent filed a party and party bill of costs dated July 20, 2018 which bill was taxed at the sum of Kshs 219,920/=.
3. The applicant is said to have sought leave to file a reference out of time as his advocates on record had failed to inform him of the taxation award on time and also that the Deputy Registrar had failed to provide reasons for the award despite a request being made under rule 11(2) of the Advocates Remuneration Order.
4. The interested party herein is said to have filed a cross application dated December 17, 2018 seeking to have the taxed costs adopted as judgment of the court and the court having directed that both applications by the parties be dealt with concurrently, the applicants reference was dismissed while that of interested party was allowed. It is the applicant's argument that the ruling was delivered in his absence and only brought to his attention on April 25, 2019 when M/S Mbusera Auctioneers purported to attach his law firm in execution of the warrants issued by the court.
5. The applicant paid the sum of Kshs 232, 492/= together with auctioneer fees amounting to Kshs 34,500/= and also instructed the firm of Ongoya and Wambua Advocates to file an appeal against the original judgment, however the same was not done. A second party and party bill of costs dated October 23, 2019 was filed by the respondent which sought the sum of Kshs 298,190/= as costs. The Deputy Registrar awarded the sum of Kshs 301,630/=.
6. A second reference was filed by the applicant herein and the same is yet to be determined. The applicant urges that he is dissatisfied with the decision of Nyamweya J and that the rapid manner in which the parties have lodged their bills of costs and attempted to execute their award and his advocates manner of handling issues are what has caused him to miss the statutory period of filing a challenge to the impugned decision.
7. The respondent in rebuttal filed a replying affidavit sworn by Grace Wangui an advocate of the High Court in which it is contended that the applicant's allegation that he was not aware of the ruling is false as he was represented by Mr Maguna advocate on the said date.
8. It is the respondent's case that the applicant's application is time barred as rule 75(2) of the Court of Appeal Rules provides that a notice of appeal shall be filed within 14 days of the decision that one intends to appeal against. The applicant it is argued ought to have vigilantly followed up on his matter and that it is trite that equity aids the vigilant and not the indolent. The respondent argues that allowing the applicant's application will only serve to further prejudice the respondent.
9. In submissions the applicant argues that as was held in the case of *Harman Singh and others v Mistry* [1917] EA 122 the High Court has inherent jurisdiction to order a stay in any suit for sufficient reason. The applicant urges that he has demonstrated that there is good cause for the delay as was held by the Court of Appeal in Stanley Kabaro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR.
10. The respondent on the other hand contends that parties having already filed submissions and a ruling date set in regard to the applicant's reference dated August 9, 2019, the stay orders sought by the applicant have been sought in vain as was held in the case of Mukunya Mugo 'A' & another v Elizabeth Mugure Mukunya ELC No 111 of 2017.
11. The application having been filed two (2) years after delivery of the court's ruling dated April 3, 2019 the same cannot be considered to have been done expeditiously as was held by Ringera J(as he



then was) in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000. According to the respondent the application is therefore frivolous, vexatious and suffers from inordinate delay violating its right as guaranteed under section 1A of the *Civil Procedure Act*.

12. The respondent argues that the applicant has failed to give sufficient reasons for the undue delay occasioned as was held in the Supreme Court case of *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR. It was further reiterated that as has been held by the courts in various cases such as *Nancy Wairimu Karenju v Lucia Wanjiku Kamau* [2021] eKLR and *George Kimani Thuo v Lucy Njeri Mbutia* [2021] eKLR the applicant ought to have been vigilant and followed up on his matter.

Determination

13. On the material before court, the issues that arise for determination are whether this court has jurisdiction to extend time to file a notice of appeal out of time and if so whether the applicant has satisfactorily laid a basis to warrant this court to extend time.
14. This court's discretion to enlarge time is derived from section 95 of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules* which state as follows;

“95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this 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”

“6. Power to enlarge time [order 50, rule 6]

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.

15. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR in determining whether the court had jurisdiction to extend time to file an election petition appeal out of time and whether a basis had been satisfactorily laid to warrant the court to extend time to file the appeal stated as follows;

“Time is a crucial component in dispensation of justice, hence the maxim: justice delayed is justice denied. It is a litigants' legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined. Time is of more essence in election matters where the people's sovereign power to elect their legal representatives is involved.

A party may however, encounter some delay and the time within which he was to perform an act lapses. At common law, equity developed in the courts of chancery division to check the excess of common law. If one showed that he had a bona fide cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling



reasons, the courts of the chancery division could intervene and indulge such a person if established that he was not at fault.

It is on this equitable under-pinning that courts in common law jurisdictions in exercise of their discretion now grant orders extending time. Presently, extension of time has now been given statutory backing with various legislations providing courts with the power to extend time.

Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

16. The court went on to derive the under-lying principles that a court should consider in exercising its discretion 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.”
17. I am not satisfied that the applicant herein has explained to this honourable court satisfactorily his reasons for the delay in filing the instant application seeking to file a notice of appeal out of time and yet the decision of Nyamweya J he seeks to challenge was delivered on April 3, 2019 and brought to his attention as alleged on April 25, 2019.
18. The applicant being an advocate of the High Court of Kenya ought to have been aware that the 14-day period within which he was required to have filed his notice of appeal having lapsed, there was critical urgency to file without any delay an application seeking enlargement of time.
19. The applicant purports to place blame on his advocates on record Ongoya and Wambola, and, although the firm ought to have filed the notice of appeal as instructed, it was upon the applicant to vigilantly follow up on his matter. It is also baffling that even upon finding out that the firm had failed to adhere to his instructions to file the notice, it is not until the deputy registrar had awarded the respondent herein costs that he opted to take any form of action by filing a second reference, and even then, there was no sign of an application seeking enlargement of time to file his notice of appeal yet he claimed



to have been aggrieved by Nyamweya J's decision. No valid reason has been adduced by the applicant before this court why he waited for two (2) years to file the instant application before this court.

20. In light of the above I find that the applicant has failed to satisfy the requisite threshold for grant of prayer 3 of the notice of motion and therefore I find no need to stay further proceedings in regard to the reference dated August 9, 2019.
21. The application dated November 1, 2022 is hereby dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2022

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A. K. NDUNGU

JUDGE

