



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

JUDICIAL REVIEW NO. 1 OF 2019

1. TIMOTHY MUKUNDI CICHOVI

2. ROSEMARY NJURA NYAGA

3. CATHERINE RUGURU NJAGI

4. ESTHER WAMBUI KAMAUEXPARTE APPLICANTS

5. ROSE BENARD

6. BONIFACE OTIENO KWEDHU

7. KEN MEME

VERSUS

COUNTY GOVERNMENT OF EMBU....APPLICANT/RESPONDENTS

RULING

A. Introduction

1. Vide a notice of motion dated 19/12/2019 the exparte applicants seek for orders that the proceedings of 9/12/2019 be set aside and the matter be heard afresh with the applicant being granted leave to file a replying affidavit to these proceedings.

2. The application was premised on the grounds contained in the affidavit of one Wilson Ileri the Embu County Secretary. In a nutshell, it was the applicant's case that the service of the notice of motion for the judicial review proceedings was not properly done as it was never served on him and hence his failure to attend court for the hearing. He further deposed that the issue at hand had serious impact in the operation of the County laws in respect of sale and consumption of alcohol and it was fair and just that the respondent be heard before the court proceeded to deliver its judgment which is now pending. The applicant further stated that it was ready to compensate the applicants in way of costs for the inconveniences caused. It was deposed that the applicants were enjoying stay and thus no prejudice would be suffered if the application was allowed and that the applicant had a good defense against the application which court should consider. The court was thus invited to exercise its discretionary and allow the application.

3. The application was opposed through the replying affidavit of Timothy Mukundi the 1st exparte applicant who with authority from the 2nd- 7th exparte applicants deposed that on 7/11/2019 and 25/11/2019, the County Secretary for the Applicant was served with the Miscellaneous Application No. 78 of 2019 seeking leave to file the Judicial Review proceedings and later with the substantive motion dated 22/11/2019 respectively but that he failed/declined to acknowledge receipt or to stamp on the original copies. It was argued that this application was being used as a ploy to delay the matter and frustrate the judicial process to the detriment of the exparte applicants.

4. It was further deposed that the applicants had admitted knowledge of the interim orders and as such they were privy to the said interim orders and they ought to have instructed their advocates to conduct the matter and therefore the deponent of the supporting affidavit was not being honest in pleading lack of knowledge of these proceedings. It was argued that the application was an afterthought and aimed at obstructing justice. Further that the applicant had not proffered sufficient reasons to warrant the grant of the orders sought and that the defense was a mere denial which was bound to fail should the matter be re-opened.

5. The parties took directions that the application be canvassed by way of written submissions which were duly filed by all the parties.

B. Issues for determination

6. I have considered the application herein, the reply by the ex parte applicants and the rival submissions filed herein. The issue for determination is whether the application has merit.

C. Applicable law and determination

7. Judicial review proceedings in Kenya are provided for under the Fair Administrative Action Act, 2015 and which was enacted to give effect to Article 47 of the Constitution regarding right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Under the said Act, Section 9(1)], a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution. Section 10 thereof gives the Chief Justice powers to make rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action. Order 53 of the Civil Procedure Rules is based on common law principles that govern judicial review proceedings. With the enactment of the new constitution Section 47, the judicial review proceedings was fortified in the supreme law.

8. Under the said Order, there is no provision as to setting aside an ex-parte order or proceedings as it is provided under Order 12 of the Civil Procedure Rules. Despite the said Order providing for service of the notice on all persons directly affected and an affidavit of service been filed before the notice is set down for hearing, it does not provide for setting aside of the orders made ex-parte.

9. However, Article 159 of the Constitution demands justice to be administered without undue regards to procedural technicalities. Section 3A of the *Civil Procedure Act* further grants the Court powers to make such orders as may be necessary to meet the ends of justice. *With the enactment of Fair Administrative Action Act, 2015 which Act implements Article 47 of the Constitution to give effect to the right to fair administrative action, the above Act effectively modifies the Law Reform Act and Order 53 of the Civil procedure Rules on flexibility in the application of the law to the circumstances of a particular case, with the sole intention of achieving substantive justice for the parties and especially where no prejudice is shown to be occasioned to the respondents or interested parties herein. Article 47 of the constitution elevates fair administrative action from a common law action to a constitutional right under the Bill of rights.*

10. *Article 48 of the Constitution commands the state to ensure that all persons are facilitated to access justice without any impediments. This was well articulated by Mativo, J. in the case of **Republic v Public Procurement Administrative Review Board & another Ex parte Magal Security Systems Ltd/Firefox Kenya Limited (JV) [2019] eKLR** which I find persuasive). In **Wilson Osolo –vs- John Ojiambo Ochola & The Attorney General C.A Civil Appeal No. 6 Of 1995 (Nbi)** the Court of Appeal while dealing with an issue of extension of time within which to file a substantive motion for Judicial review which is not provided for under Order 53 was of the view that the Court has a discretion to enlarge time though it may not have been given in the relevant statute. The court in that case was dealing with limit of time under Section 9 (3) of the Law Reform Act.*

11. In **Republic v Speaker of Nairobi City County Assembly & another Ex parte Evans Kidero [2017] eKLR**, R.E Aburili J observed that: -

“...46. In my humble view, even going by precedents supplied by the respondents, compared to other authoritative precedents from the Court of Appeal, the spirit of the legislature in placing Order 53 of the Civil Procedure Rules within the rest of the Civil Procedure Rules was intended to flex the strict muscles of Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, so as to allow courts to exercise discretion where there is default occasioned by inadvertent mistake. If that were not to be the case, in my view, the legislature would have promulgated rules separate from the ambit of the Civil Procedure Rules, for operationalization of Sections 8 and 9 of the Law Reform Act.

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.....”

12. *Taking into consideration the above authorities, I am of the considered view that this court has jurisdiction to entertain the application herein even in absence of express provisions under Order 53 of the Civil Procedure Rules 2010 and apply the provisions of Order 51 Rule 15 which provides for setting aside of an order made ex parte during hearing of applications.*

13. Having opined that the court has jurisdiction to set aside orders made ex parte during hearing of a judicial review proceedings, I proceed to look at the merits of this application.

14. As it can be seen from Order 51 Rule 15, the jurisdiction to set aside ex-parte orders is discretionary. The principles governing the exercise of judicial discretion to set aside ex-parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See **Patel –vs- E.A. Cargo Handling Services Ltd (1974) E.A.75**). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See **Shah v Mbogo (1967) EA 116** and **Richard Ncharpi Leiyagu vs. Independent Electoral Boundaries Commission & 2 Others [2013] eKLR**). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See **Sebei District Administration – vs- Gasyali [1968] E.A. 300**). It also goes without saying that the reason for failure to attend should be considered.

15. Applying the above principles to the instant application, it was the applicant’s case that service was not effected properly and as such the applicants did not attend court. The ex parte applicants in rebuttal deposed to the effect that the application was served upon the applicant through the County Secretary who refused to acknowledge service. I have perused the court record and noted that the affidavit of service annexed to the applicants’ replying affidavit. Paragraph 4 therein is to the effect that the process server *upon arrival at the offices of the Governor met the receptionist and after introducing himself to the said receptionist and communicating the purpose of his visit, he served the said receptionist with the pleadings which he willingly accepted, retained his copies but declined to sign on the process server’s copies.*

Service of the Notice of Motion for Judicial is a requirement under Order 53.

16. I have already opined that the Civil Procedure Rules 2010 ought to apply where the said Order does not make provisions. One of such cases is provision on service of pleadings. Section 44(3) of the County Government Act provides that the County Secretary (whose office is created under that section) shall be the Head of County Public Service Board. As such, he is the right person to be served on behalf of the County Government. From the affidavit of service, it is clear that it was not the County Secretary who was served with the application in question. The process server in his training ought to know that service of process ought to be on the person or his authorized agent. In my considered opinion, the receptionist at the Governor's office was not an agent of the County Secretary. As such, the service having not been properly effected, the applicants could not be said to have been aware of the proceedings herein.

17. Under Order 5 Rule 16, where there is any allegation that a summons has not been properly served, the court has discretion to examine the serving officer on oath, or cause him to be so examined by another court touching on the service and may make such further inquiry in the matter as it thinks fit. As such, the integrity of the service having been questioned, it was necessary for the process server to be availed by the exparte applicant to shed light on the issue. I note that the counsel for the applicant did not apply to cross-examine the process server. Similarly, counsel for the respondent did not deem it fit to avail him if at all the service was indeed beyond reproach. As such, the court will only rely on the affidavit of service on record and the evidence of the parties that and which clearly indicates that the service was made on the wrong person or agent.

18. The other issue is for this court to decide whether the draft replying affidavit raises triable issues. Triable issues were defined by the Court of Appeal in **Job Kilach v. Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR** in the following terms: -

“.....What then is a defence that raises no bona fide triable issue” A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

19. The applicant herein raised the issue as to some of the persons granted with the license were not the ones listed in the notice of motion. I have perused the said motion and noted that prayer 2 contains different entities from the applicants in the notice of motion dated 22/11/2019. In my opinion the replying affidavit qualifies to having raised triable issues in these proceedings.

20. From the pleadings, the applicants were granted leave to file the substantive motion and the said leave was to operate as a stay. The said orders were extended by the court on 18/08/2020. As such, they are currently enjoying stay of implementation of the impugned decision. It is my opinion therefore that in the circumstances herein, the applicants herein would not suffer any prejudice if the application is allowed. In my opinion, delay (if any) would not be to the disadvantage of the applicants/ respondents. For that reason, the stay orders are still in force. Furthermore, any loss that the exparte applicants might suffer may be compensated by costs.

21. I further note that these proceedings herein concern issues to do with implementation of laws which as the applicant stated has impact on a large and wide Embu County population. The issue at hand touches on public interest and as such, it would be prudent that the applicant be heard before any decision can be made. In my considered view the delivery of the judgment in the Judicial Review application without allowing the applicant to be heard in my opinion may adversely affect the County in its operations in serving the residents of the County. As such, the nature of the proceedings in my humble view warrants the applicant being offered an opportunity to be heard. As the Court held in **Richard Ncharpi Leiyagu vs. Independent Electoral Boundaries Commission & 2 Others (supra): -**

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

22. I am convinced that to deny the applicant an opportunity to be heard amount to injustice that may adversely affect the operations of the County in the relevant area of service delivery.

23. In conclusion, I find the application dated 19/12/2019 merited and proceed to grant the following orders: -

- a) That the judgment that was scheduled to be delivered on 22/01/2020 in respect of the application dated 22/11/2019 is hereby arrested.***
- b) That the applicant/respondent do file its replying affidavit to these proceedings within 14 days.***
- c) That the applicants/respondents meet the costs of this application.***

24. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 23rd day of September, 2020.

F. MUCHEMI

JUDGE

Ruling delivered through Video Link in the presence of: -

Mr. Kabathi for the Exparte Applicant