



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC.APPLICATION CASE NO. 325 OF 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES OF 2010

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 1A, 1B AND 3A OF THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA AND ORDER 50 RULE 6 OF THE CIVIL PROCEDURE CODE

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO EXTEND TIME TO FILE JUDICIAL REVIEW

BETWEEN

REPUBLICAPPLICANT

VERSUS

HON. ATTORNEY GENERAL 1ST RESPONDENT

DISTRICT COOPERATIVE OFFICER

UASIN GISHU..... 2ND RESPONDENT

JESSE GITAU.....EX PARTE APPLICANT

RULING

The applicant filed the present application seeking orders for enlargement of time to file the application for judicial review, for orders of mandamus to compel the respondent to settle the decretal sum. In the alternative he sought orders for further leave to file the application for judicial review.

The application, in a nutshell, is based on the following grounds; the applicant obtained a decree against the respondent for Kshs. 127,330/- and that leave to file for judicial review was granted on 4th April 2017. The applicant was not within reach thus causing the delay in bringing the application within the requisite time.

APPLICANT’S CASE

The applicants contend that they were granted leave to file the judicial review application on 4th April 2017. The application was prepared but the instructing client was not within reach for the stipulated period. The applicant is desirous of pursuing his claim which remains unsettled since 2005 and there were 2 letters annexed as evidence of the same.

The application is supported by an affidavit and leave which was granted to file within 21 days but due to inadvertence of the counsel and the client to pay fees there was delay.

The applicant, is averred, should not be denied justice for inability to meet fees. The applicant is seeking to enjoy the fruits of judgment and extension of time can be allowed where prejudice is not accossioned to the Attorney General.

The applicant submitted that the respondent's submissions that the court has no jurisdiction to extend time are based on the old constitution. He referred to JR No. 480 of 2016 where the court held that the court had jurisdiction under the new constitution to extend time to facilitate access to justice for all.

RESPONDENTS' CASE

The respondents filed grounds of opposition to the application. They opposed the motion as it offended the provisions of *Order 53* of the *Civil Procedure Rules* and in particular the provisions on time limitations to institute judicial review applications.

Further, he stated that the applicants had failed to demonstrate sufficient grounds to warrant the issuance of the prayers sought.

The respondent submitted that courts are bound by statute even though the constitution has widened the scope on access to justice. *Article 159* does not apply to *Order 53* which is in mandatory terms. The authority relied upon was on an issue of whether weekends should be counted in determining the period of 6 months. The application before the court is different. What is alluded to have occasioned the delay is lack of filing fees. There are issues which the court needs not entertain. The respondents prayed the application be dismissed with costs.

ISSUE FOR DETERMINATION

1. Whether the Court can enlarge time for filing of an application for Judicial Review for orders of mandamus.

The respondents opposed the application on the basis that *Order 53* of the *Civil Procedure Rules* is couched in mandatory terms.

In *David Njenga Ngugi v Attorney General [2016] eKLR* the Court of Appeal most recently, when considering whether the use of the word "shall" in *Section 13A* of the *Government Proceedings Act* was mandatory or discretionary observed that:

The learned Judge of the High Court in striking out the suit went into error. Procedural rules and directory provisions of the law even where their peremptoriness is clear and unambiguous cannot vitiate a cause of action and the right to sue. In the instant case, the use of the word "shall" in Section 13A (supra) does not import "mandatoriness". It is directory and procedural. The appeal depicts the period prior to the 2010 Constitution. The 2010 Constitution now binds courts by dint of Article 159 (2) (d) in exercising judicial authority to administer justice without undue regard to procedural technicalities.

In *Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited [2016] eKLR* the court held, at paragraph 86;

"In my humble view, although Order 53 of the Civil Procedure Rules which relates to the procedure for the filing of Judicial Review proceedings does not specifically provide for enlargement of time, the fact that the Order and Rules thereunder are made under the Civil Procedure Act and Rules and that Order 50 Rule 6 of the Civil procedure Rules does not exclude the application of Order 53 thereof, the court is given latitude to either invoke its inherent jurisdiction to prevent an injustice or hardship being occasioned to the parties, or to apply order 50 Rule 6 of the Civil Procedure Rules and Sections 95 of the Civil Procedure Act, section 63(e) of the Civil Procedure Act and Section 59 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya and more importantly, Article 159(2)(d) of the Constitution in order to prevent an injustice being occasioned to an innocent party."

The Court of Appeal in *Caltex Oil (K) Limited v Rono Limited - Civil Appeal/Application No. 97 of 2008 (unreported)* stated in part that:

"However the fact that a default clause has been imposed by a court does not necessarily deprive a court of its jurisdiction to extend time. As a general principle, where the court fixes time for doing a thing it always retains power to extend time for doing the act until it has made an order finally disposing of the proceedings before it. It seems that the main test is whether the Court still retains control of the order, notwithstanding that there has been default. That would necessarily depend on the true construction of the default clause."

I find that the court has jurisdiction to enlarge time for filing the application for judicial review orders. Failure to grant the same will occasion an injustice as the applicant merely seeks to enjoy the fruits of their judgment.

In *Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited (supra)* the court cited with approval the case of *M. MWENESI v. SHIRLEY LUCKHURST & ANOTHER, Civil Application No. NAI 170 of 2000*, where the Court of Appeal held that:

"A Court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent a court of law is under a duty to exercise its inherent power to prevent injustice....."

The upshot of the foregoing is that this court has jurisdiction to enlarge time for filing of the judicial review application. The court therefore allows the application as prayed in the interests of justice.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 10th day of April, 2019.

In the presence of:-

Miss Mibei holding brief for Mr. Manani for Plaintiff/Applicant

Mr. Kuria for Defendant/Respondent

Mr. Mwelem - Court clerk