



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MARSABIT**

**JUDICIAL REVIEW NO. 1 OF 2019**

**ABDINUR HASSAN ADAN.....APPLICANT**

**VERSUS**

**THE COUNTY CRIMINAL INVESTIGATION**

**OFFICER, MARSABIT COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE'S**

**COURT MARSABIT.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC**

**PROSECUTION.....3<sup>RD</sup> RESPONDENT**

**RULING**

The notice of motion dated 12<sup>th</sup> of March 2019 seeks the following orders: -

- a) That leave be granted to the Applicant for extension of time by seven (7) days within which to file and serve the Notice of Motion.**
- b) That the Notice of Motion herein dated 11<sup>th</sup> January 2019 be deemed as having been filed and served within time.**
- c) That the Ruling pending for delivery in respect of the Applicant's Chamber Summons dated 28<sup>th</sup> December, 2018 be stayed pending the hearing and determination of this Application more particularly prayer 2(a) above.**

The application is supported by the affidavit of the exparte applicant sworn on the same date. The first and second interested parties filed grounds of opposition in relation to application. The respondents did not file any response to the application. Mr. Mwangangi, prosecution counsel promised to file a response on 29<sup>th</sup> March, 2019 but did not do so.

MR. NDEGE from the firm of HASSAN N. LAKICHA & Company advocate entirely relied on the written submissions. It is submitted that the exparte applicant is seeking leave for extension of time by seven days to enable him file and serve a substantive judicial review notice of motion. The ex-parte applicant was granted leave to apply for judicial review orders of certiorari and prohibition on 9<sup>th</sup> of January 2019. Counsel on record prepared the substantive application that was to be filed within the stipulated time and forwarded it to a fellow advocate who is practicing in Marsabit to file it on his behalf. On 21<sup>st</sup> January 2019 the matter came up for mention for direction and Mr. Halake advocate held brief for Mr. Lakicha for the exparte applicant. Mr. Lakicha focused on the main chamber summons application only to learn that the substantive application had not been filed and time had elapsed. The mistakes of the counsel should never be visited upon an innocent client. The court has wide discretion to extend time within which the substantive motion is to be filed it is established that the delay is not inordinate, is excusable and has not occasioned prejudice to the respondent. Article 159 of the constitution enjoins the courts not to pay undue regard to procedural technicalities but instead focus on meting out substantive justice. The remedy of judicial review is a public and is provided for under Article 23 (3) (f) of the constitution. Counsel relies on the case of **REPUBLIC VS REGISTRAR OF SOCIETIES and ANOTHER EX-PARTE LINUS KATHERA and ANOTHER (2018) eKLR** where Justice F. GIKONYO observed as follows: -

**“... In my view, the Constitution of Kenya, 2010 changed the perception of justice when it demanded in Article 159 that court should always strive to serve substantive justice proceedings. Again, by specifically providing in article 23(3) (f) of the**

**Constitution, that judicial review is one of the constitutional remedies a party can seek, and with the introduction of right to fair administrative action and overriding objective of the law as part of administration of justice, I think that substantive justice should be the way to go in dealing with proceedings such as judicial review with public remedy element.”**

Mr. Ndege also buttressed his submissions with the case of **REPUBLIC VS KENYA REVENUE AUTHORITY** exparte **STANELY MUMBO AMOTI (2018) eKLR** where Justice John N. Mativo observed as follows: -

**“It is therefore my conclusion that in an application for extension of time such as the one before me, all that an applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay. It will also be a consideration that the impugned decision seeking to be challenged violates or threatens to violate the Bill of Rights or violation of the Constitution.**

**Provisions limiting access to courts must be read in a manner that conforms with the constitution. No matter how noble and worthy admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail. Suffice to say that the ex parte applicants have in the recitals in the heading to their application invoked Articles 21 (1), 23 (3) (f), 25 (c), 27 (1), 47 (1), 49 (1) (d) and 50 (2) of the Constitution.”**

It is submitted that the current application has been brought in good time after realizing that it has not been filed. The exparte applicant has a constitutional right to access justice. Counsel relies on the case of **REPUBLIC VS PUBLIC PROCUREMENT ADMINSTRATIVE REVIEW BOARD EX PARTE. SYNER-CHEMIE LIMITED (2016) eKLR** where Justice R.E Aburili observed as follows: -

**“The applicant’s counsel was diligent in bringing this application timeously. His admitted mistake should not be visited on his innocent client who has a constitutional right to access justice.**

**Accordingly, I find the application as filed merited. I grant the orders enlarging time within which the substantive notice of motion ought to have been filed by a further 7 date from the days of this ruling.”**

Mr. Muriuki appeared for the two interested parties. Counsel submit that order 53 of the Civil procedures rules as well as the Law Reform Act do not envisage filing of a notice of motion outside the 21 days statutorily stipulated time frame. The word **SHALL** is used. It does not give a party the option of extending time to file a notice of motion. Once a party fails to file a motion within the 21 days period the entire judicial review application becomes spent. Indeed failure to file a motion within the 21 days is a disobedience of a court order. Counsel relies on the case of **REPUBLIC VS COMMUNICATIONS COMMISSIONS OF KENYA and TWO OTHERS**. Nairobi **MISC CIVIL CASE APPLICATION NO. 1570 OF 2004** where justice MAKHANDIA (as he then was) observed as follows: -

**“Applying the foresaid principles to the circumstances of this case, I am in no doubt at all that the ex parte Applicant has deliberately and without just cause failed to comply with a peremptory Court Order. The consequences that would ensue from want of compliance with the order where explicitly set out in the order; to wit, Leave so granted would automatically lapse. Since there was non-compliance with the Order by the ex parte Applicant and in terms of the orders, Leave so granted automatically lapsed. Any subsequent pleadings filed pursuant to the Leave so granted were in the premises incompetent and liable to be struck out. I would for the foregoing reasons grant prayers 1, 2 and 3 of the Notice of Motion dated 22<sup>nd</sup> February 2005.”**

Mr. Muriuki further relies on the case of **LINUS KATHERA and ANOTHER VS REGISTRAR of SOCIETIES and TWO Others (Supra)**. In that case Justice F. Gikonyo observed as follows: -

**“Good faith is everything in judicial proceedings especially those that entail court’s discretion. In the circumstances, these proceedings do not deserve further breath of life by the court. I refuse to extend time for filing of motion for judicial review order of mandamus. Consequently, leave granted herein is withdrawn. The proceedings dies; its remains shall be interred in the court archives. It is so ordered.”**

The issue for determination is whether the court should enlarge time to enable the ex-parte applicant file his substantive Judicial Review motion after expiry of the 21 days granted by the Court. Justice G. Gikonyo in the case of ex-parte **Linus Kathera (Supra)** observed the following:

***There is a dichotomy in opinion amongst judges, literary scholars as well as advocates as to whether or not the court can extend time for the filing of motion for judicial review beyond the 21 days’ period provided in Order 53. Some posit that it does not have such power whilst other say it does. And, each side of the divide has given ample and valid reasons for their respective standpoint. Many decided cases on the subject have revealed that dichotomy.***

In the case of **AVIATION AND ALLIED WORKERS UNION V KQ LTD & 3 OTHERS [2015] eKLR**, the Supreme Court laid down the principles to be considered when a request to extend time is made. The principles are:

- 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 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. *Where there is (good) 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 respondent's if the extension is granted:*
6. *Whether the application has been brought without undue delay: and*
7. *Whether in certain cases, like election, petitions, the public interest should be a consideration for extending time."*

I wish to add that the Supreme Court in the above case was dealing with an election petition case. Rule 53 of the Supreme Court Rules states:-

*The Court may extend the time limited by these rules or by any other decision of the court.*

Therefore, the Supreme Court is granted the discretion to extend time by its own rules.

Mr. Muriuki is of the view that order 53 of the Civil Procedure Rules does not give room for extension of time. The records shows that the ex parte applicant made the application for leave to seek Judicial Review Orders on 28<sup>th</sup> December, 2018. The application was heard in chambers by Justice F. Gikonyo in Meru on 9.1.2019 and the Judge made the following orders:-

1. *Application dated 28.12.18 deserves to be heard during court recess for it is urgent and requires prompt hearing. I so certify it.*
2. *Upon consideration of application for leave, I hereby grant leave to the exparte applicant to apply for Judicial Review orders of certiorari and prohibition.*
3. *The substantive application be filed as per order 53 of Civil Procedure Rules.*
4. *As the proceedings to be quashed and or prohibited are in Marsabit, I direct that this file be transferred to Marsabit High Court for consideration by the good judge.*
5. *Pursuant to (4) above, whether stay herein shall operate as stay shall be heard on 21.1.19 by Chitembwe J. to facilitate the said hearing, Marsabit PMC CR C No.690 of 2018, R VS Abdinoor Hassan Adan be availed before the Judge on 21.1.19.*

Order 53 rules 1 and of the Civil Procedure Rules states as follows: -

1. *(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.*
2. *(2) An application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.*
3. *(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.*
4. *(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.*

*Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter parties before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.*

Order 53 Rule 93)(1) states as follows:-

***3.(1) 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.***

The ex-parte applicant relies on Article 159 of the constitution and has put emphasis on the need to deal with substantive justice as opposed to procedural technicalities. It is further reiterated that the mistakes of counsel should never be visited on his client.

On the issue of whether the Court has powers to enlarge time for filing of Judicial review orders or extend time after the twenty-one (21) days period granted by the Court has elapsed my view is that the Court does have the power to enlarge time notwithstanding the provisions of Order 53(3) of the Civil Procedure Rules. The Court should not find itself helpless when confronted with the issue of time. Justice should not be locked out by time. Even after the application is filed within the 21 days period, the substantive application may take over two years before the same is heard. The question then is, why put more emphasis on the twenty one day period and thereafter make the period of determining the motion open ended. Substantive Justice requires that a litigant should have his complaint determined on merit unless it can

be established that such a litigant slept on his/her rights. The Court should not down its tools simply because the litigant failed to comply with its order requiring him to file his substantive motion within twenty one days. The court has powers to unlock the time chains and let a litigant enter the doors of Justice and ventilate his cause. It is up to the Court's discretion to either enlarge time or decline to do so. The decision by the court not to extend time should not be borne out of the Court's incapacity to do so. At times the issue at hand involves gross violation of fundamental rights and freedoms and time should not be seen as an obstacle which locks out the victims of such violations from seeking justice before a Court of law.

In the case of **REPUBLIC V FUNYULA LAND DISPUTES TRIBUNAL & 3 OTHERS (2004) I KLR, 584**, Justice Serگون dealt with a Preliminary Objection involving the filing of the substantive motion outside the 21 days period granted by the Court as well as whether the subsequent application should be filed in the same miscellaneous application file that was used to grant leave or it should be filed separately. The Court found that the subsequent substantive motion having been filed outside the 21 days period had been filed out of time and that the subsequent motion after leave is granted ought to be filed in a separate file as the miscellaneous file relating to the granting of leave stands spent. The court was not called upon to enlarge time and did not deal with that issue.

In the case of **MAHAJA V KHUTWALO, (1983) KLR 553**, the court of Appeal dealt with the issue of enlargement of time. In his judgment, HANCOX J.A. (as he then was) at page 561 held as follows: -

**Nonetheless I would hesitate to reach a finding that no power of enlargement of time was intended to be given in such cases, for there are instances in which to deprive the applicant of the right to apply therefor would work definite injustice. Unless persuaded by cogent argument to the contrary I would lean against an interpretation of the subsection which would impose an absolute time limit. I derive support for this view from R V London County Council, ex parte Swan & Edgar [1927] Ltd [1929] 141 LT at p 591 where the Divisional Court held that the rules of the Supreme Court did give power to enlarge the time limit set by rule 21 of the Crown Office Rules.**

The next question is, what caused the delay? The explanation for this is that a substantive application was prepared and forwarded to Mr. Halake Advocate of Marsabit. The said Advocate failed to file the application. I have noted that there is no proof to this allegation. How was the application forwarded to Mr. Halake? If it was sent by soft copy, an email to the said advocate informing him what to do ought to have been annexed as proof. If the application was sent by mail, the posting details could have been annexed in the affidavit in support. Further, Mr. Halake has not sworn any affidavit to enjoin the contentions by the ex-parte applicant and his counsel.

The record shows that Mr. Halake appeared before me on 21.01.2019. By that time the twenty one day period had not lapsed. The case was adjourned to 22.2.2019. By then the 21 days period had lapsed. The period lapsed on or about the 30<sup>th</sup> January, 2019. On 22.2.2019 Mr. Lakicha appeared before me. By then the application had not been filed and there was no indication that the ex-parte applicant would call upon this court to enlarge time. Indeed, it is Mr. Muriuki who raised the issue in his submissions that the substantive application had not been filed. Mr. Lakicha responded to that contention as follows: -

***“The issue is specifically whether leave shall operate as a stay or not. The issue of 21 days is not cast on stone. We will deal with that issue when the application is filed...”***

Although the application for enlargement of time which is alleged to have been intended to be filed by Mr. Halake advocate is dated 11<sup>th</sup> January, 2019, the same is not supported by any affidavit sworn by the ex-parte applicant at that time. The current proposed application dated 12<sup>th</sup> March, 2019 together with its supporting affidavit sworn on the same date was filed on 25<sup>th</sup> March, 2019. What comes out of all this is that even after the issue of non filing of the substantive application was raised on 22<sup>nd</sup> February, 2019, Counsel for the ex-parte applicant found it proper not to take action until 25<sup>th</sup> March, 2019, a period of over one month, when he decided to file the application. Nothing would have been easier than to inform Mr. Halake to file the application dated 11<sup>th</sup> January, 2019. The application filed on 25.3.2019 seems to have been triggered by the ruling that was to be delivered on 29.3.2019 in relation to the question as to whether the leave that had been granted on 9.1.2019 was to operate as a stay. The application sought to stay the ruling and have it heard and determined.

It is submitted by counsel for the ex-parte applicant that the mistakes of his counsel should not be visited upon the ex-parte applicant. It is true that at times the court can excuse a counsel's mistake but the court's leniency cannot be taken for granted. It should not be taken for granted that the Court will always not revisit a counsel's mistakes upon the client. At times the court will condemn both the counsel and the client where it is established that mistakes by the counsel are not excusable and also where it can be shown that even the client himself is not free from blame. Having instructed his advocate to file an application for Judicial review orders way back in December, 2018, the ex-parte applicant ought to have followed up the matter with his counsel. The picture given by his counsel is that the application was prepared way back in January, 2019. Why didn't the ex-parte applicant check with his counsel in January or even February 2019 to find out if the application had been filed. I do find that this is one case where the mistakes of counsel should be visited upon both the counsel and his client.

In the case of **MWANGI V KENYA AIRWAYS LTD (2003) KLR 486**, the Court of Appeal considered the issue of extension of time and held:-

**4. Matters which the court takes into account in deciding whether or to grant an extension of time are:-**

- a) the length of the delay;**
- b) the reason for the delay;**
- c) possibly, the chances of the appeal succeeding if the application is granted; and**

d) *the degree of prejudice to the respondent if the application is granted.*

5. *The chances of the appeal succeeding if the application is granted is merely stated in something for a "possible" consideration, not that it must be considered.*

6. *In an application to extend time, there is no legal requirement that pleadings and a copy of the judgment should be attached to the application so as to enable the judge to determine the merits or otherwise of the proposed appeal. Where the application was refused on such grounds, as was done in this case, the decision of a single judge may be interfered with.*

7. *Under rule 4 of the Court of Appeal Rules there is no requirement that an applicant show "sufficient cause" before the judge grants an extension of time.*

8. *The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (cap 9 sub leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.*

In my considered view, the Court where an application for extension of time is made may as well consider the merits of the application. Doing so does not amount to condemning the applicant unheard should the court conclude that there is no good reason to extend time as the subsequent application lacks merit. Not all applications should be fully heard just for the sake of satisfying a litigant. If the court is of the view that even if time was to be enlarged what is to be heard and determined subsequently lacks merit, is frivolous and an abuse of the court process, the court has powers to deny enlargement of time.

The ex-parte applicant intended to arrest the delivery of the ruling on the issue of whether leave was to operate as a stay against his prosecution. This court delivered its ruling on 29.1.2019 and declined to make the leave granted operate as a stay. I did allow the state to continue with the prosecution of the ex-parte applicant. I believe the criminal case is on-going. It would be imprudent for me to open the gates and allow the ex-parte applicant file out of time and prosecute an application for orders of certiorari and prohibition. This Court stated in its ruling as follows:-

***In Judicial review application involving criminal proceedings the court should not allow itself to be used by suspects in criminal cases and grant stay orders in the hope that the accused would have a breathing space to navigate his way in the interim period and have the criminal charges withdrawn. Public interest requires that those accused in criminal cases should deal with their accusers in the trial court unless it is established that the criminal process is being abused and is meant to serve ulterior motives.***

Given the nature of the dispute, I am not convinced that the prosecution of the ex-parte applicant is done in total violation of his constitutional rights as enshrined in the Bill of rights. The complainants claim that they gave out money to the ex-parte applicant who presented himself as being in a position to sell motor vehicles to them. The ex-parte applicant has indicated that a sum of Ksh.100,000 was refunded to the complainants on 19<sup>th</sup> June, 2018. There is no civil suit pending before any court between the parties. The complainants opted to pursue a criminal process. The ex-parte applicant was charged with the offence of obtaining by false pretences contrary to section 313 of the Penal Code. The facts as per the two counts on the charge sheet indicate that the ex-parte applicant obtained Ksh.5,613,000 from the 1<sup>st</sup> complainant and Ksh.1,980,000 from the 2<sup>nd</sup> complainant. The alleged offence was committed between 14<sup>th</sup> October 2017 and 4<sup>th</sup> June, 2018. I see no violation of the ex-parte applicant's constitutional rights in the prosecution. Indeed it is the complainants who will be prejudiced if the prosecution is stopped.

Leave was granted on 9<sup>th</sup> January, 2019. The ex-parte applicant was to file the substantive notice of motion within 21 days from 9.1.2019. The application was filed on 25.3.2019. I do find that there has been inordinate delay in filing the application. Further, having allowed the prosecution to continue, I am satisfied that the application herein is an abuse of the court process and lacks merit.

In the end, I do decline to extend time for the filing of a notice of motion seeking Judicial Review orders. The leave granted does not operate as an order of stay as per the ruling delivered on 29.3.2019. The leave granted should not be allowed to stay hanging and is hereby withdrawn for non compliance. The application dated 12<sup>th</sup> March, 2019 lacks merit and is hereby dismissed with costs to the respondents and interested parties.

**Dated, Signed and Delivered at Marsabit this 24<sup>th</sup> day of June 2019**

**S. CHITEMBWE**

**JUDGE**