



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO.1 OF 2015

MADZAYO MRIMA & JADI ADVOCATE...APPLICANT/RESPONDENT

VERSUS

PETER SAFARI SHEHERESPONDENT/APPLICANT

CORAM: Hon. Justice R. Nyakundi

Mr. Kadima for the Respondent

Mr. Kinyanjui for the Appellant

RULING

This latest notice of motion dated 25th April, 2019 was brought in terms of **order 51 Rules 1 and 3, order 22 Rules 22 and 25, order 21 Rule 12** of the Civil Procedure Rules, **section 3A and 63(e)** of the Civil Procedure Act. The motion sought leave by the honourable court to grant the following orders:

- a. Extend and or in the alternative re-instate the Interim Orders granted on 15th March, 2019 and consequential orders thereto pending hearing inter-parties of this Application and/or until further orders from this oHonHHonourable Court.**
- b. To make such orders it deems fit and convenient to meet the ends of justice.**

A brief background on this application is necessary.

On 14th March 2019 a notice of motion was duly filed by the Firm of Kadima & Co. Advocates for the respondent seeking key relief of an order of stay of execution of the orders

(1) Judgment/entered on 6th April, 2017 and consequential orders thereto pending hearing inter partes of this application.

It was also premised an on **order 51 Rules 1 22, order 22 Rules 22 and 25, order 21 Rule 12** of the Civil Procedure Rules, **section 3A and 63** of the Civil Procedure Rules.

The affidavit in support deponed by Peter Safari States and enumerates various grounds upon which the court should be guided to grant the orders stated in the body of the notice of motion.

It was the applicant contention that the advocates client bill of costs as filed is in contravention of the court order in the Election Petition No.14 of 2013 involving **Benson Njiraini v Pete Shehe**.

Apparently, the applicant depones that the applicant/respondent was meant to file party and party bill of costs to recover costs incurred in the election Litigation.

The respondents through legal counsel Farida Jadi filed a replying affidavit objecting to the application by the applicant.

From the record this application of 14th March 2019 was not heard. It would appear strange that a further application was filed on 25th April

2019 on the same set of facts fashioned as a different motion.

The applicant in the latest application raises the facts of extension of interim orders affecting the notice of motion dated on 4th March, 2019.

The Legal Position

It is a general principle of law that issuance of a preliminary injunction or order assigns a legal entitlement to the moving party.

It is also issued provisionally without a full inquiry into the merits of the case. It can also be stated that in terms of **section 3** and **3A** of the Civil Procedure Act and **order 50 Rule 6** the court has inherent jurisdiction to extend time on any terms as the justice of the case demands.

However such discretion to extend time more particularly on *ex parte* orders violates the very essence of the constitutional canon on the right to a fair hearing and due process in terms of under **Article 50** of the constitution.

In the case of **Kimani v Mc Donnel 1966 EA 547**. The Court stated that;

“In exercising discretion the court should consider among other things, the facts and the circumstances, both prior and subsequent and are the respective merits of the parties together with any material factor, which appears to have entered into the passing of the judgment, or ruling or order which would not or might not have been present had the judgment or ruling not been *ex parte*.”*(underline emphasis mine)*

It is a conditional principle of agility that under the inherent jurisdiction in terms of **Section 3** and **order 50 rule 6** of the Civil Procedure Act and Rules on enlargement of time the court has unfettered discretion to extend time. However subsequent to this it should be exercised judiciously and not whimsically or capriciously likely to occasion prejudice or injustice to the other party. The other consideration for the applicant seeking extension to demonstrate sufficiently the cause for non-compliance with the directions of the court on timelines.

The same judicial approach was echoed by **Ochieng J** in the case of **Karachi Waila Nairobi Ltd v Sanji Van Mukherjee 2015 EKLR**. From the stand point of the respondent as discerned from the replying affidavits the disputes between the parties relates to a bill of costs in an election petition No.14 of 2013. The application dated 25th April, 2019 seeks an extension or in the alternative reinstatement of interim orders issued on 15th March, 2019.

If this Court was to allow the notice of motion by the respondent/applicant Peter Safari Shehe of 25th April 2019 substantial miscarriage of justice might occur unless the earlier motion of 14th March 2019 is heard and determined on the merits.

Similarly, in the English case **Mobil Petroleum Company Inc and another v The Director of Intellectual Property** in his capacity as the Registrar of Trade Marks 2001 HKL RD 225. It is thus stated on the guidance rule for extension of time or orders on request by a party.

“All matters including the adequacy of any reason for the delay, must be considered, the one weighted against the other, in the exercise of the court’s discretion”.

There is no doubt that the latest application under certificate of urgency dated 25th April, 2019 has the sole aim of delaying the speedy and expeditious determination of the notice of motion dated 14th March 2019.

It will be ultra-vires of the due process and the court will perpetuate unlawful exercise of discretion to the detriment of the respondent in extending the relief sought in terms of prayer No. 2 of the motion. I do not accept for one moment that the applicant has sufficiently discharged the burden for court’s jurisdiction to extend or reinstate interim orders.

For these reasons I will dismiss the notice of motion dated 25th April, 2019 with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF JULY, 2019.

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R. NYAKUNDI

JUDGE