



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APP NO 2 OF 2017**

**IN THE MATTER OF: Application for Orders of Mandamus**

**And**

**The Societies Act Cap 108 Laws of Kenya**

**And**

**LINUS KATHERA.....1<sup>ST</sup> APPLICANT**

**JOSPHAT MURANGURI.....2<sup>ND</sup> APPLICANT**

**Versus**

**REGISTRAR OF SOCIETIES.....RESPONDENT**

**And**

**NJURI NCHEKE SUPREME COUNCIL OF**

**MERU ELDERS.....Suing through its official:**

**PAULO MÍTHINGIA, PHARES MUTWIRI &**

**SIMON MWAMBA MUKANGU.....INTERESTED PARTIES**

**JUDGMENT**

**Extension of time to file judicial review**

[1] As per the law, an *Ex parte* Applicant who has been given leave should file the substantive application for judicial review orders within 21 days upon grant of leave. See rule 3(1) of the Civil Procedure Rules that:-

**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.**

[2] The *Ex parte* Applicants were granted leave to apply for orders of mandamus on 18<sup>th</sup> May 2017. They did not file the substantive motion within 21 days from the grant of leave. They have now applied for extension of time to file the substantive motion. The reason given by Mr. Kibanga, legal counsel for the *Ex parte* Applicants is that the lapse was inadvertent as counsel dealing with the matter filed a fresh application No 3 of 2017 instead of filing a substantive motion following leave of court. He urged the court to draw from article 159 of the Constitution and section 3A of the Civil Procedure Act, and serve substantive justice rather than refuse them remedy based on technicalities. He submitted that the application that had been erroneously filed has been withdrawn. He therefore, did not see any prejudice being suffered by the Respondents. He beseeched court to enlarge the time as sought.

[3] Miano, legal counsel for the interested parties opposed the application and insisted that the *Ex parte* Applicants are the ones who have frustrated the arbitration meant to resolve this dispute. They also relied upon the decision by *Makau J* in **JR NO 3 OF 2015** that the dispute should be resolved through arbitration. He argued that the *Ex parte* Applicants are abusing the court process and their request for extension of

time should be refused.

[4] The Registrar of Societies filed a replying affidavit and stated categorically that she formally wrote on 22<sup>ND</sup> January, 2016 to the warring parties under section 18 of the Societies Act and pursuant to the order of the court in **MERU HC JR NO 3 OF 2015** calling for a meeting on 17<sup>th</sup> February, 2016 to deliberate on the mode of arbitration, venue, representation and the terms of reference thereof. The letter is marked as exhibit "ANM 3". The said meeting was re-scheduled to 8<sup>th</sup> March, 2016 and all parties attended the latter meeting. In the meeting parties agreed to submit to arbitration. Disagreements ensued on the appointed arbitrator. Subsequently, the Registrar of Societies directed that it will arbitrate over the dispute and convened a meeting on 21<sup>st</sup> April, 2016, but none of the advocates for the parties appeared. They instead sought an adjournment. The Registrar of Societies convened another meeting for 28<sup>th</sup> June, 2016 at their offices but none of the parties attended. After it was clear that all efforts have failed, the Registrar of Societies now invoke section 18 of the Societies Act and directed parties to hold a dispute resolution meeting under a framework to be agreed upon within 90 days to resolve the dispute and file a report with the Registrar of Societies as to whether the dispute has been resolved or institution of proceedings for the settlement of such dispute. See letter dated 1<sup>st</sup> July 2016. No report was ever filed. Instead, the Applicants wrote a letter dated 14<sup>th</sup> November, 2016 requesting the Respondent to note their new Constitution and office bearers. But the Applicant did not approve the request. They did not stop there as the Applicants wrote on 31<sup>st</sup> January 2017 asking the Registrar of Societies to cancel the registration of the Interested Party. The Registrar accuse the *Ex parte* Applicants for frustrating her efforts to resolve the dispute herein. Nonetheless the Respondent is still able and willing to arbitrate over this dispute.

## **DETERMINATION**

### **Judicial review: public remedy**

[5] It should be appreciated that judicial review is a public remedy sought by the *Ex parte* Applicant at the instance of the Republic. Needless to state that, the Constitution enacted judicial review at article 23(3) (f) as one of the constitutional reliefs one may seek from court. See the article below:-

#### **23. Authority of courts to uphold and enforce the Bill of Rights**

**(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

**(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

**(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

**(a) a declaration of rights;**

**(b) an injunction;**

**(c) a conservatory order;**

**(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**

**(e) an order for compensation; and**

**(f) an order of judicial review.**

Therefore, the power and punch of judicial review is in the courts' ability to use judicial review as a means of ensuring that public bodies operate within their constitutional as well as statutory bounds; that, cannot be overemphasized.

### **Power to enlarge time in JR**

[6] I have now been asked to enlarge time for the *Ex parte* Applicants to file a motion for judicial review orders after the time prescribed in law has lapsed. Do I have such power? A discourse on the power of court to enlarge time for the filing of motion for judicial review orders is therefore, necessary.

### **The dichotomy**

[7] 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. I do not wish to multiply those decisions except it suffices to cite the case of **R vs. PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD EX Parte SYNER- CHEMIE LIMITED [2016] eKLR** in which *Aburili J.* in a masterly fashion carried out an analysis of the dichotomy, the various cases thereto and also tapped into contemporary jurisprudence on

the subject. 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 in judicial 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.

[8] Having said that, I also think that the decision by **Ringera J** (as he then was) on the term “shall” in a statute in the case of **STANDARD CHARTERED BANK LTD. vs. LUCTON (KENYA) LTD. NAIROBI (MILIMANI) HCCC NO. 462 OF 1997** is still good law today; that the use of the word “shall” in a statute only signifies that the matter is *prima facie* mandatory and its use is not conclusive or decisive as it may be deduced by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. Similar position obtains in respect of the word “shall” used in relation to filing of a motion for judicial review under rule 3(1) of the Civil Procedure Rules. The apt rendition by **Ringera J** (as he then was) was as follows:

***“There appears to be a common belief by many in these courts that the use of the word “shall” in a statute makes the provision under construction a mandatory one in all circumstances. That belief is in my discernment of the law a fallacious one. As I understand the canons of statutory interpretation, the use of the word “shall” in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. As long ago as 1861, in the case of LIVERPOOL BOROUGH BANK V TURNER [1861] 30 L. J. Ch. 379, pp. 380-381, Lord Campbell had laid it down that;***

***“No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered”.***

[9] From the above analysis, the court may extend time to file motion for judicial review. But the question is this. What considerations should guide the court in extending time in judicial review?

#### **When extension may be refused**

[10] Due to the nature of judicial review- which I have tersely described above- promptness in filing motion for judicial review orders has been insisted upon by the law. And where there has been undue delay in so filing, courts may withdraw the leave granted or refuse to extend time to commence judicial review proceedings. Again, if hardship, prejudice or detriment will be suffered by the Respondent or any other person, or to good administration, the court will refuse to extend time for filing judicial review proceedings. In addition, where the proceeding is premature or has been overtaken by event or serves no useful purpose or is an abuse of court process, the court will withdraw its leave or refuse to extend time to file motion for judicial review orders. Therefore, the *Ex parte* Applicant must show good reason for extending time.

#### **Applying the test**

[11] Applying this test, leave was granted herein on 18<sup>th</sup> May, 2017, but no substantive motion was filed within the stipulated period of 21 days. There is obviously delay. But, is there any good reason shown by the *Ex parte* Applicant for these proceedings to continue? The explanation given for the delay may be reasonable or objective. However, the facts of this case require a keen consideration. In this case, I see parties who are constantly engaged in accusations and counter accusation about who is responsible for the deadlock on the resolution of the dispute among them. Of importance to note, these proceedings relate to the **NJURI NCHEKE SUPREME COUNCIL OF MERU ELDERS**, a society registered under and regulated by the provisions of the Societies Act- a reality that will never depart from the backyard of these parties. Depositions in the affidavit by **ANN N. MWANGI** and the facts before me, makes one thing clear; that the Registrar of Societies is of the opinion that, in light of the dispute among the members and officers of **NJURI NCHEKE SUPREME COUNCIL OF MERU ELDERS**, she is not satisfied as to the identity of the persons who have been properly constituted as officers of the society herein. Immediately, Section 18 of the Societies Act comes into play. According to the Registrar of Societies, upon invoking section 18 of the Societies Act as directed by **Makau J**, no report has been filed as sought by the Registrar. Similarly, there has been no arbitration or resolution of the dispute as per the order of **Makau J** and she blames the *Ex parte* Applicant for the malaise. I see parties who are trying to outdo the other by whatever means at the expense of the Society; such to me is wasted efforts and now it at all. As a result, these parties have held the society hostage and has left it helpless. But as long as the society is alive, the law shall prevail and protect it. Accordingly, as the dispute resolution mechanism in section 18 of the Societies Act has not been exhausted, these proceedings are premature. They could as well be an abuse of the process of the court given the fact that the *Ex parte* Applicants have not shown how they facilitated the arbitration called by the Registrar. 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 hereby withdrawn. The entire proceeding dies; its remains shall be interred in the court archives. It is so ordered.

#### **Piece of advice**

[12] The foregoing notwithstanding, referral of this matter by **Makau J**, for resolution by the Registrar of Societies in accordance with section 18 of the Societies Act, should be followed to the letter. And no party should impede the arbitration of the dispute by the Registrar. It is advisable that formal process of arbitration be commenced immediately, and if necessary, the Registrar should invoke the powers bestowed upon her to call any unwilling suitor to order. And of course, such belligerent suitor should not expect to find favour with the court in any proceedings arising from his default.

[13] Given the nature of these proceedings I will order each party to bear own costs. It is so ordered.

**Dated, signed and delivered in court at Meru this 14<sup>th</sup> day of February 2018**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Mwathe advocate for Mr.Kibe advocate

For Mr. Kibe advocate for 2<sup>nd</sup> respondent

Mr.Munene advocate for Mr.Kibanga advocate for

Ex parte applicant.

M/s. Kungu for Registrar of Societies