



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 58 OF 2018**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF SECTION 21(3) OF THE GOVERNMENT PROCEEDINGS ACT**

**AND**

**THE MATTER OF ARTICLE 48 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF ORDER 29 OF THE CIVIL PROCEDURE RULES AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF ENFORCEMENT OF DECREE PASSED IN NAIROBI HIGH COURT OF KENYA CIVIL CASE NO 2893 OF 1992**

**BETWEEN**

**M W N (a Minor suing through his Father and Next Friend D W N...APPLICANT**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**RULING**

**Introduction**

1. The Applicant herein filed a Chamber Summons application dated 12<sup>th</sup> February 2018, seeking leave to institute judicial review proceedings for an order of mandamus, to compel the Respondent to pay the decretal sum arising from a consent judgment entered into on 13<sup>th</sup> May 2003 in **Nairobi High Court Civil Case No. 2893 of 1992- D W vs Attorney General**. The decree was issued on 9<sup>th</sup> September 2005 and a Certificate of Order against the Government was issued on 13<sup>th</sup> October 2017. On 12<sup>th</sup> March 2018, this Court (Odunga J.) gave directions that the Chamber Summons be argued *inter partes*.

2. The Respondent thereupon filed a Notice of Preliminary Objection dated 9<sup>th</sup> March 2018, on the ground that the said application offends the provisions of section 4(4) of the Limitation of Actions Act and ought to be dismissed with costs. On 10<sup>th</sup> April 2018, the Applicant filed another application by way of a Notice of Motion dated 9<sup>th</sup> April 2018, seeking the following substantive orders:

- a) **The Court be pleased to grant the Applicant an extension of time within which to institute judicial review proceedings**

against the Respondent herein.

**b) This Court do order that the Applicant's Chamber Summons application dated 12<sup>th</sup> February 2018 seeking leave to institute judicial review proceedings against the Attorney General be deemed to have been properly filed in time.**

**c) The costs of the application be provided for.**

3. This Court gave directions that the Respondent's Notice of Preliminary Objection and Applicant's Notice of Motion dated 9<sup>th</sup> April 2018 be heard and determined together by way of written submissions, hence this ruling.

### **The Arguments**

4. Mr. Munene Wanjohi, a State Counsel in the Attorney General's chambers, filed submissions on behalf of the Respondent dated 26<sup>th</sup> September 2018. It was contended therein that the Respondent's Preliminary Objection fits within the definition provided in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) E.A 696**.

5. Further, that the Chamber Summons application dated 12<sup>th</sup> February 2018 is time barred by dint of section 4 (4) of the Limitations of Action Act, which requires that an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered. Therefore, that since the judgment sought to be enforced in **Nairobi High Court Civil Case No. 2893 of 1992- Douglas Wainaina vs Attorney General** was delivered on 19<sup>th</sup> May 2003, fifteen years ago, the application is in contravention to the statutory limitation.

6. Reliance was placed on the decisions in **Alexander Mbaka vs Royford Muriuki Rauni & 7 Others, (2016) e KLR** and **Hudson Moffat Mbue vs Settlement Fund Trustees & 3 Others ELC No 5704 of 1992**, that once a judgment has passed the 12<sup>th</sup> year of issue, it cannot be enforced. The Respondent also contended that the Applicant is not a vigilant litigant and has been indolent and shown lack of interest in the suit.

7. On the Applicant's application to enlarge time, the Respondent submitted that the same was an afterthought and waste of time, as the said application does not remedy the fact that the matter is time barred.

8. Waweru Gatonye & Co Advocates, the Advocates on record for the Applicant, filed submissions dated 25<sup>th</sup> September 2018. As regards the Respondent's Preliminary Objection, the Applicant urged that the Respondent had all along acknowledged that it owed the decretal sum together with costs, and that only the procedural requirements needed to be satisfied first.

9. Reliance was placed on section 23(3) of the Limitation of Actions Act and the decision of the Court of Appeal in **Kisii County Government vs Masosa Construction Company Ltd (2015) e KLR**, for the argument that the acknowledgment by the Respondent of the Applicant's claim gave rise to a fresh accrual of a right and revived the cause of action. Therefore, that the 12 years limitation period provided for in section 4(4) has not lapsed, and thus by its revival, the proceedings before the Court are not statute barred.

10. The Applicant also urged that the power to grant an order for extension of time to file proceedings out of time is a discretionary power of the Court, and relied on the Supreme Court decision in **Nicholas Kiptoo arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others (2014) e KLR** on the principles to be taken into account in the exercise of this discretion. It is the Applicant's case that it has satisfied the said principles, and is deserving of the Court's discretion for the grant of the extension of time for the following two reasons.

11. Firstly, that the Applicant has demonstrated that it took all the necessary steps to realize the fruits of its judgment, but its efforts were hampered by the unavailability/ missing of the Court file. Further, that it is only on 26<sup>th</sup> April 2017 that the Applicant was notified by the Court that a certified copy of the judgment was ready for collection. In addition, that the special and mandatory procedure of execution against the Government provided for in section 21 of the Government Proceedings Act requires a Certificate of Order against the Government, which can only be issued by the Court, but which could not be done in the present case due to the missing court file.

12. Secondly, that the Respondent will not suffer any prejudice as the judgment sought to be enforced was issued by consent of the parties, and upon being issued with the demand to settle the decretal sum and costs, the Respondent on 26<sup>th</sup> January 2006 requested for among other documents a certificate of order against the government in order to pursue payment. Therefore, that the Respondent is estopped from relying on section 4(4) of the Limitations Act as it had undertaken to settle the decretal sum.

### **The Determination**

13. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

*“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

14. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of Oraro -vs- Mbaja (2005)1KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in Mukisa Biscuit Company -vs- West End Distributors Ltd(supra) that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

15. The issues for determination herein therefore are whether the grounds raised in the Respondent's preliminary objection raise pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. If not upheld, the Court will then consider if the Applicant is deserved of extension of time. The Respondent in this respect states that the Applicant's application dated 12<sup>th</sup> February 2018 is time barred, and relies on section 4(4) which provides as follows:

**“(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”**

16. The time of filing of proceedings in this Court to enforce a judgment is thus clearly regulated by the law, and if not complied with ousts the jurisdiction of this Court. This is thus a pure point of law that has been raised by the Respondent.

17. In the present case it is not in dispute that the judgment sought to be enforced by the Applicant's Chamber Summons application dated 12<sup>th</sup> February 2018 was delivered in Nairobi High Court Civil Case No. 2893 of 1992- D W vs Attorney General on the 19<sup>th</sup> May 2003, and the said application is thus filed after more than twelve years after the said judgment. The Applicant however argues that the time was extended by section 23(3) of the Limitation of Action Act to this case, arising from the Respondent's acknowledgement of its liability to pay the decretal sum. Section 23(3) provides as follows:

**“(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:**

**Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt..”**

18. It was confirmed by the Court of Appeal in Kisii County Government vs Masosa Construction Company Ltd (supra) that under this provision, where the “*person liable or accountable*” acknowledges the claim, the right accrues on the date of acknowledgment. The Respondent has in this respect not disputed the facts put forward by the Applicant as regards its acknowledgment of its obligation to pay the decretal sum, and in particular the contents of its letter dated 26<sup>th</sup> January 2007 in which it requested for documents to forward to the relevant department for payment, which letter was annexed as “Annexure DWN 5” to the Applicant's affidavit in support of his Notice of Motion.

19. Thus, notwithstanding that the prescribed period of limitation has expired, the said statutory period was extended by the Respondent's acknowledgment of its debt, and the Applicant can therefore file an application to enforce his judgment outside the prescribed period of twelve years. To this extent the Respondent's Preliminary Objection dated 9<sup>th</sup> March 2018 is found not to have merit.

20. As regards the Applicants application for extension of time, the main grounds given for in the Notice of Motion and Applicant's supporting affidavit are that after judgment was entered, the decree extracted and costs taxed, the Applicant wrote to the Respondent by a letter dated 11<sup>th</sup> October 2006 demanding payment of the decretal sum and taxed costs. The Respondent thereupon responded in a letter dated 26<sup>th</sup> January 2007, seeking certain documents including the certified copy of the judgment to forward to the relevant department for payment.

21. That the Applicant then wrote to the Deputy Registrar of this Court, seeking the certified copy of the judgment, and despite various letters written between 6<sup>th</sup> February 2007 and 14<sup>th</sup> March 2017, the same was not availed. The Applicant also stated that he was informed by the registry staff that the court file was missing. The said judgment was only availed on 26<sup>th</sup> April 2017, whereupon, the Applicant applied for a Certificate of Order of Costs against the Government, which was issued on 13<sup>th</sup> October 2017, which was forwarded to the Respondent by a letter dated 30<sup>th</sup> November 2017. The Applicant attached copies of the said correspondence.

22. I have considered the pleadings and arguments made on extension of time. Extension of time is a matter of judicial discretion, and the Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, (2014) eKLR laid down the principles that apply in an application for extension of time as follows:

- 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 for 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, is a consideration to be made on a case to case basis;
- 4) Whether there is a reasonable 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 if the extension is granted

6) Whether the application has been brought without undue delay; and

7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

23. The Applicant's main reason for the delay in filing their appeal is that he was unable to get crucial documents to follow up on the procedure for payment from the Court, and he annexed correspondence of his requests for the certified copy of the judgment. This Court thus finds that reasonable cause has been shown and a justifiable reason given by the Applicant for the delay in commencing the judicial review proceedings herein.

24. In any event, this Court also finds that no substantial prejudice will be suffered by the Respondent, as it had indicated that it was willing to pursue the payment of the amount due to the Applicant. I therefore find that the Applicant's Notice of Motion dated 9<sup>th</sup> April 2018 is merited.

25. I accordingly order as follows:

I. The Respondent's Preliminary Objection dated 9<sup>th</sup> March 2018 is not merited and it is accordingly dismissed.

II. The Applicant be and is hereby granted extension of time and leave to institute judicial review proceedings against the Attorney General within 14 days from the date of this ruling.

III. There shall be no order as to costs.

26. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2018**

**P. NYAMWEYA**

**JUDGE**