



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW NO. 489 OF 2016
IN THE MATTER OF AN APPLICATION BY JAMES SAMUEL MBURU
FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS
AND
IN THE MATTER OF THE ATTORNEY GENERAL
AND
IN THE MATTER OF THE PRINCIPAL SECRETARY MINISTRY OF FINANCE AND
NATIONAL TREASURY
AND
IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT, CAP 40 LAWS OF KENYA
BETWEEN
JAMES SAMUEL MBURU.....APPLICANT
VERSUS
ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. By an application dated 8th November 2016 the applicant James Samuel Mburu seeks from this court the following orders:

a. judicial Review Orders of Mandamus to issue jointly and severally directed to the respondent the Attorney General and the Principal Secretary, Ministry of Finance and National Treasury, compelling them jointly and severally to pay to the applicant the sum of the shs 472,575 being the decretal sum owed to him in Nairobi CM CC No. 13421 of 2003 together with interest thereon at 12% per annum from 1st January 2001 to 1st January 2007 and taxed costs of the suit pursuant to the certificate of order issued on 9th February 2016

b. That in the event of failure to pay the sum of Kenya shillings 472,575, the persons occupying

the position of the Attorney General and the Principal Secretary of the Ministry of Finance and the National Treasury, be committed to jail in contempt of the orders issued herein.

c. That the court grants him leave to file the verifying affidavit attached herewith and the same be deemed to have been properly filed and that it be admitted as part of the court record.

d. That costs of the application be paid by the respondents.

2. The application which was filed pursuant to leave of court granted on 13th October 2016, was lodged in court on 10th November within 29 days from the date when the leave was granted.

3. Order 53 Rule 3(1) of the Civil Procedure Rules clearly stipulate that where leave is granted to apply for Judicial Review orders of mandamus, certiorari or prohibition, the substantive motion shall be filed within 21 days from the date of such leave.

4. It follows that unless the court at the time of granting such leave gives the applicant any other shorter term within which the main motion is to be lodged, it is upon the applicant to ensure that the substantive motion is filed within 21 days from the date of the order for leave since that is a statutory time frame which need not be repeated by the court when making the order granting leave.

5. In this case, it is clear that the applicant after obtaining the order for leave on the chamber summons dated 13th October 2016 went to slumber and only managed to file the substantive motion on 10th November 2016.

6. Judicial Review matters are time bound and unless with leave of court such time stipulated by the Rules is enlarged, the motion as currently filed is incompetent and amenable for striking out.

7. It must be emphasized that the provisions of Article 159 of the Constitution cannot come to the aid of the applicant who expressly came to court under the provisions of Order 53 Rules 3 and 4 of the Civil Procedure Rules which stipulate the time frame within which the substantive motion ought to be filed.

8. I am fortified on this issue by several decisions of this court and of the Court of Appeal. In **Wilson Osolo vs John Ojiabo Ochola and the Attorney General, CA No. 6/1995 Nairobi** the Court of Appeal while considering Order 53 Rule (3) (1) of the Civil Procedure Rules held:

“It can readily be seen that Order 53 Rule (2) as it then stood, is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules, that procedure cannot be availed for the extension of time limited by statute, in this case, the Law Reform Act.”

9. The same court further stated:

“It was a mandatory requirement of Order 53 Rule 3(1) of the Civil Procedure Rules then and it is now again so that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days of 15th February, 1982, there was no proper application before the superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules.

10. In this case, the order of leave was made on 13th October 2016. The substantive motion therefore ought to have been made on or before 3rd November 2016 which was the 21st day. Instead, it was filed on 10th November 2016. No application for enlargement of time under Order 50 Rule 6 of the Civil Procedure Rules was made for consideration.

11. Odunga J in **Republic vs Cabinet Secretary, Information Communication & Technology & Another Exparte Celestine Okuta & Others [2016] e KLR** was faced with a similar situation as the one herein where the applicant failed to file the substantive motion within the time frame stipulated in the order leave. In striking out the notice of motion, the learned judge held, and I agree:

“In my view, court orders are serious decisions that can only be excused based on material placed before the court and cannot be ignored on the ground that they are technicalities.

In my view, the law is that technicalities of procedure ought not to automatically lead to termination of proceedings and that the court must have the power to save the same where material exist before the court to justify non compliance. However, where there is none and where in fact the applicant adopts an incorrect position of the law to justify his inaction, such omission cannot be excused.”

12. The learned judge was echoing the Court of Appeal decision in **John Onger Mariaria & 2 others vs Paul Matundura Civil Application No. Nairobi 301 of 2003[2004] 2 EA 163** where the Court held:

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work must fall on their shoulders..... Whereas it is true that the court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone.....justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.”

13. Counsel for the applicant argued the motion as if it was validly on record. Article 159(2) (c) of the Constitution stipulates that justice shall not be delayed and therefore filing of the motion out of time without leave of court cannot be a procedural technicality curable under Article 159 2 (d) of the Constitution.

14. For the above reasons, I decline to delve into the merits of the notice of motion for orders of mandamus which was strenuously opposed by the respondent’s counsel and proceed to strike out this motion dated 8th November 2016 and filed in court on 10th November 2016 for being incompetent.

15. As the mistake was that of counsel for the applicant who ought to know statutory timelines, I will spare the applicant the penalty of costs and order that each party bear their own costs of the incompetent motion.

Dated, signed and delivered in open court at Nairobi this 27th day of February 2017.

R. E. ABURILI

JUDGE