



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 41 OF 2015

IN THE MATTER OF: CONTRAVENTION OF ARTICLE

2(6), 10, 19, 20, 21(3), 22, 23, 24, 27, 32 AND 56

OF THE CONSTITUTION OF KENYA 2010

BETWEEN

AMINA BAKARI HAMISI.....PETITIONER

AND

1. THE BOARD OF MANAGEMENT BURA GIRLS' HIGH SCHOOL

2. THE COUNTY DIRECTOR OF EDUCATION TAITA TAVETA

COUNTY being sued through THE HON. ATTORNEY-GENERAL

3. THE CABINET SECRETARY MINISTRY OF EDUCATION

SCIENCE & TECHNOLOGY being sued through

THE HON. ATTORNEY-GENERAL

4. THE HON. ATTORNEY-GENERAL.....RESPONDENTS

AND

NATIONAL COHESION &

INTEGRATION COMMISSION.....INTERESTED PARTY

RULING

The Application

1. By the Notice of Motion dated 7th February, 2017 the Applicant **Amina Bakari Hamisi** prays for an order that the court be pleased to grant leave for enlargement of time of filing notice of appeal out of

time. The application is premised on the grounds stated therein and is supported by affidavit of the Applicant sworn on 7th February, 2017.

2. The Applicant's case is that the Petition was canvassed by way of highlighting written submissions on 9th December, 2015 and Judgment was reserved for 29th January, 2016 when unfortunately the Presiding Court was on leave and her advocates on record were advised by the registry staff that it was to be delivered on notice. The Applicant's lawyer on record advised that the Interested Party's Advocate wrote to the court and sought to have the matter mentioned before the Presiding Judge **Hon. Emukule** (now retired) in order to take a new Judgment date to no avail and that it has come to her knowledge and that of her advocate over a week ago that the Judgment of the court was delivered on 29th November, 2016 in their absence and without notification of all the counsel representing the parties in the matter with exception of a representative of the Hon. Attorney –General who was in attendance. The said Judgment was uploaded in the Kenya Law Reports website and the gist of the Judgment is that her Petition was dismissed with no order as to costs but was held to serve no useful purpose. Now since the time of filing the notice of appeal has lapsed, it is only in the interest of justice that the court exercises its discretion to enlarge time in order to uphold her inalienable right to seek justice to guard against any continued contravention of constitutional rights of Muslim girls to practice and manifest their religion. The Applicant's case is that the intended appeal has high chances of success.

The Response

3. The application is opposed by the 2nd, 3rd and 4th Respondents vide Grounds of Opposition filed herein on 14th March, 2017. It is also opposed by the 1st Respondent vide a replying affidavit sworn by Justice **Sammy Kaburu**, counsel for the 1st Respondent, on 3rd March, 2017. The Respondents' opposition to the application is based on the grounds that the Applicant has not shown any grounds upon which such prayers can be granted, and that there is inordinate delay. The Respondent's case is that the Judgment was delivered on 29th November, 2016 and was uploaded on the Kenya Law Web site at the same time for all to read; and that the Applicant was not diligent enough. Further, the Respondents state that the Applicant does not have an arguable appeal. The Respondents' case is that the Petitioner's application seeking leave to file an appeal out of time is a mere afterthought and effort to prevent the Respondents from enjoying the fruits of Judgment delivered in their favour.

Submissions

4. Parties made oral submissions in court which I have carefully considered. The issue I raise for determination is this.

(i) Whether notice of Judgment was served.

5. It is a cardinal rule of natural justice, and statutory justice as well, that where a Judgment or a Ruling is to be delivered on notice, a notice must actually issue to all the parties for the delivery of the Ruling or Judgment. The notice is an important requirement to protect the right of a party who may wish to appeal, since appeal can only be instituted within statutorily stipulated timelines. Therefore, a party who is aggrieved only needs to show that no notice was given for the delivery of the Ruling or the Judgment.

6. In this matter the Applicant alleges that no notice was issued to her for the delivery of the Judgment. I have also perused the court file and I have seen no copy of such a notice. So I believe the allegations by the Applicant that she was not given the notice. What then this court will consider is how long it took the Applicant to bring this action after establishing that Judgment was delivered. According to the supporting affidavit of the Applicant she became aware of the Judgment a week before this matter was filed. That could be around 30th January, 2017. This matter was filed on 7th February, 2017. This means that the Applicant was diligent and took immediate action upon realizing that Judgment was delivered in her absence.

7. The Respondents have submitted that the Applicant has no arguable appeal. I have perused the said

Judgment. It is not the duty of this court to delve so much into the merits of the intended appeal. Even then, it must be noted that the Applicant has a constitutional right to appeal, and that right cannot be denied by failure to give notice of delivery of the Judgment. Whether or not the intended appeal is arguable is presently irrelevant. What is important is that the Applicant was denied a chance to choose to file her appeal within a statutory timelines for failure to give notice for delivery of Judgment.

8. Consequently, this court finds that the application is merited and hereby enlarges the statutory period for filing appeal herein. The Applicant shall exercise that enlarged time within ten (10) days from the date of this Ruling.

9. Parties shall bear own costs of this application.

Orders accordingly.

Dated, signed and Delivered in Mombasa this 12th day of April, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Ngari for 2nd, 3rd and 4th Respondents

No appearance for Applicant

Mr. Kaunda Court Assistant