



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISC. CIVIL APPLICATION NO. 454 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE ADVOCATES DISCIPLINARY TRIBUNAL.....1<sup>ST</sup> RESPONDENT**

**THE LAW SOCIETY OF KENYA.....2<sup>ND</sup> RESPONDENT**

**EX PARTE: JOSEPH AWINO**

**RULING**

1. On 26<sup>th</sup> day of July, 2017, I granted the ex parte applicant herein leave to apply for judicial review orders and directed that the substantive Motion be filed and served within ten days. According to section 57(a) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya:

***In computing time for the purposes of a written law, unless the contrary intention appears -***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.***

2. Therefore in computing the said 10 days, 26<sup>th</sup> day of July, 2017 would be excluded. However since the 10<sup>th</sup> day was the 5<sup>th</sup> August, 2017, the 5<sup>th</sup> and 6<sup>th</sup> August, 2017 were excluded with the result that the applicant ought to have filed the Motion by latest the 8<sup>th</sup> of August, 2017 which however was a public holiday. Accordingly, the applicant ought to have filed the Motion by 9<sup>th</sup> August, 2017. That Motion was however not filed till 29<sup>th</sup> September, 2016, which was 20 days out of time.

3. It was further contended by **Miss Nakato**, learned counsel for the Respondent that the applicant has filed Civil Appeal No. 766 of 2016 in which a stay of the proceedings sought to be quashed herein was sought and granted on 29<sup>th</sup> August, 2017. It was therefore her view that by seeking the orders sought herein the applicant is forum shopping.

4. As a result the Respondent has raised a preliminary objection that these proceedings ought to be struck out on that basis.

5. The ex parte applicant has however opposed the application. According to his learned counsel, **Mr Otieno**. With respect to the Civil Appeal No. 766 of 2017, it was contended that the same was in respect

of Cause No. 22 of 2015 while these proceedings arise from Cause No. 178 of 2017 hence it is not true that similar orders are being sought in both proceedings.

6. While acknowledging that these proceedings were instituted outside the period prescribed by the Court, it was the applicant's case that since the Motion has already been filed, no further delay will be occasioned. It was the applicant's case that the delay of 23 days was due to inadvertence due to pressure of work and that there would be no further delays in the matter.

7. The Court was accordingly urged to exercise its discretion in the exercise of its inherent powers and Article 159 as read with 160 of the Constitution and regularise these proceedings. According to the applicant, no prejudice will be occasioned to the Respondent by doing so since the law permits the extension of time subject to costs. According to learned counsel the Court ought not to resort to the drastic step of striking out the proceedings since to do so would lock out the applicant from the Court as the applicant cannot bring further proceedings due to limitation. In support of his submissions the applicant relied on **Republic vs. The General Manager, Moi International Airport & Another ex parte Grace Nsongo [2014] eKLR.**

8. That this Court has the power to extend time within which the substantive Motion is to be filed is not in doubt. The provisions of the **Law Reform Act** do not prescribe the time within which substantive application is to be made. That power is donated to the Court by rule 3(1) of Order 53 of the **Civil Procedure Rules** which provides:

***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.***

9. It is therefore clear that the time for the filing of the Motion is prescribed by the **Civil Procedure Rules**. Order 50 rule 6 of the **Civil Procedure Rules** provides:

***Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***

***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.***  
[Emphasis mine].

10. In this case since the time for filing and service of the Motion was limited by an order of this Court, this Court clearly has the power to enlarge the time. Even where the period is not by an order of the Court but pursuant to Order 53 rule 3(1) of the **Civil Procedure Rules**, this Court is empowered to enlarge the time.

11. In **Wilson Osolo vs. John Ojiambo Ochola & Another Civil Appeal No. 6 of 1995** the Court of Appeal while appreciating that section 9(3) of the **Law Reform Act**, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed and that there is no provision for extending the time prescribed thereunder, was nevertheless of the view that:

***“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 15<sup>th</sup> 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. There was no such application save the one dated 28<sup>th</sup> April 1994. That came too late in the day in any event and the learned Judge erred in even considering the extension of time some 12 years after the event.” [Emphasis added].**

12. Whereas this Court has the jurisdiction to extend time within which a substantive Motion may be filed where leave has been granted, it is upon the applicant to apply for the extension of the time for doing so and being an exercise of discretion, the same must be exercised on sound judicial principles. As was held in **John Onger Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163:**

**“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. It is therefore clear that an applicant for extension of time must place before the Court material on the basis of which the Court can exercise its discretion in his favour. In other words it is upon the applicant to supply the Court with the peg with which the Court can pitch its tent.

14. In this case, unlike in *Grace Nasongo Case*, the applicant has not bothered to even apply for enlargement of time. What he seeks is that the Court ignores the prescribed period and proceeds to regularise these proceedings based on averments from the bar. With due respect such averments do not amount to evidence and cannot be the basis upon which this Court can ignore its directives. 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. Whereas I appreciate 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, where there is none and where in fact the applicant has not properly moved the Court to exercise its discretion, to exercise such discretion would amount to an arbitrary exercise of judicial power. However the Court must only exercise its discretion judicially or in other words on sound reason rather than whim, caprice or sympathy.

15. The applicant expects this Court to ignore express directions of the Court and treat their failure to comply with the Court’s directions as inconsequential. That position with due respect is untenable. I associate myself with the decision of the Court of Appeal in **United Housing Estate Limited vs. Nyals (Kenya) Limited Civil Appl. No. Nai. 84 of 1996** where the Court expressed itself as follows:

**“A party who obtains an order of a Court on certain specified conditions can only continue enjoying the benefits of that order if the conditions attaching to it are scrupulously honoured and in the event of a proved failure to comply with the attached condition, the Court has inherent power to recall or vacate such an order.”**

16. In this case the applicant had the option of moving the Court to extend time or seeking to regularise the record where the Motion had been filed. By failing to exercise any of the available options the applicant has disintitiled himself to the favourable exercise of discretion.

17. In the result I find that these proceedings are incompetent on that score.

18. With respect to the pendency of the Civil Appeal No. 766 of 2016, in the absence of the pleadings in respect of that case, I cannot make a determination that the cause of action herein is similar to the one that gave rise to the said appeal.

19. However as these proceedings were commenced out of time I agree that the same are incompetent and are hereby struck out but with no order as to costs.

**Dated at Nairobi this 24<sup>th</sup> day of October, 2017**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Nakato for the Respondent***

***CA Ooko***