



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 587 OF 2016

IN THE MATTER OF AN APPLICATION BY MICHAEL OGOGO, NELSON

ABBOT AND JOHNSON ODUK(suing as officials of COLEA

Nairobi County Association) FOR ORDER OF CERTIORARI,

PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE SOCIETIES ACT (CAP, 108)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE REGISTRAR OF SOCIETIES.....RESPONDENT

AND

MICHAEL OGOGO]

NELSON ABBOT]

JOHNSON ODUK](suing as officials of :-

COLEA Nairobi County Association).....EXPARTE APPLICANT

AND

JECKONIAH ONYANGO OJUNGA]

SYLVANCE ODHIAMBO OBADE]

CALEB ODAWO OWANG]

BEN OULO]

PETER ODHIAMBO OBIERO].....INTERESTED PARTIES

JUDGMENT

1. On 6th December 2016 this court granted to the exparte applicant leave to institute Judicial Review proceedings for the following orders:

a. Certiorari to quash the respondent's decision to continually condone interference with Colea Limited Nairobi County Association (hereinafter referred to as COLEA) file SOC/65144 by non members/imposters/persons who ceased to be members.

b. Certorari to quash the respondent's decision to sanction and oversee an unlawful and unprocedural purported election of Jeckoniah Onyango Ojunga, Sylvance Odhiambo Obae, Caleb Odawo Owang, Ben Oulo, Peter Odhiambo Obiero as officials of COLEA Nairobi County Association;

c. Prohibition against Jeckoniah Onyango Ojunga, Sylvance Odhiambo Obade, Caleb Odawo Owang, Ben Oulo, Peter Odhiambo Obiero/then agents, servants, principals restraining them from dealing in any manner whatsoever with the assets of Colea Nairobi County Association and or interfering in the affairs of Colea Nairobi County Association as officials or otherwise;

d. An order for mandamus compelling the respondent to confirm the exparte applicants as the officials of Colea Nairobi County Association whereof registering them as such.

e. Stay of any dealings and continuous intermeddling by Jechoniah Onyango Ojunga, Sylvance Odhiambo Obade, Caleb Odawo Owang, Ben Oulo, Peter Odhiambo Obiero, their agents, servants, principals with the assets and or affairs of Colea Nairobi County Association upon hearing and determination of this application.

f. That all necessary and consequential orders and directions be given.

g. Costs of the application be provided for.

2. The motion is based on the statutory statement and verifying affidavit sworn by Michael Ogogo and Johnson Oduk on 24th November 2016 accompanying the application for leave.

3. The order granting leave was very specific that the exparte applicant were given 14 days from the date of leave which was 6th December 2016 (Tuesday).

4. In other words, the substantive notice of motion was to be filed on or before 20th December 2016. The court was also directed the other parties to file their response and the matter was slated for mention on 18th January 2017 to confirm compliance, noting that time stopped running from 21st December 2016 to 6th January 2017 when the matter came up for mention on 18th January 2017, the exparte applicant's counsel Mr Akech informed the court that they had filed their application in time.

5. The court gave directions and all the parties filed responses and submissions which they adopted as canvassing their respective positions and the court was asked to write this judgment on the merits of the applicants.

6. However, as I retired to write the judgment, I observed that the notice of motion dated 20th December 2016 was filed on 21st December 2016 and court fees received vide official triplicate

receipt No. 8047526 dated 21st December 2016 for kshs 25,800 by A. Kalwa Advocate.

7. According to the 2016 annual calendar, 14 days end on 20th December 2016 and not 21st December 2016.

8. This is so because in computing time, the 1st day (6th December) is excluded and the last day (20th December) is included to make 14 days. (See Article 259 (5) (a) of the Constitution and order 50 Rule 8 of the Civil Procedure Rules which all stipulate that in computing time for doing any act, the first day of the order is excluded and the last day of the event shall be included.

9. In this case, the order for leave stipulates that the substantive motion should be filed and served within 14 days from 6th December 2016 which is 20th December 2016. However, the exparte applicants filed the motion on 21st December 2016 and when their advocates appeared in court on 18th January 2017, Mr Akech piously notified the court that they had filed the notice of motion in time.

10. Therefore, although the parties counsels on record have put forth the strongest arguments on behalf of their respective clients, this court must first and foremost determine whether the substantive motion which was filed out of the 14 days granted on 6th December 2017 is validly on record.

11. Order 53 Rule (1) (1) and (2) of the Civil Procedure Rules provides:

“1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore had been granted in accordance with this rule.

2. An application for such leave as aforesaid shall be made exparte to a judge in chambers, and shall be accompanied by a statement setting out and the name and description of the applicant, the relief sought, and the grounds on which it is sought and by affidavits verifying the facts relied on.

12. The above provisions clearly stipulate that for one to apply for Judicial Review orders of certiorari, prohibition and mandamus, leave to apply must be sought and granted by the court. It follows that in the absence of leave to apply, or where such leave granted has lapsed before the filing of the substantive motion, the main motion cannot lie as the court's jurisdiction would be ousted with the lapsing of leave unless enlargement of time is sought and granted.

13. The filing of the substantive motion upon leave being granted goes to the jurisdiction of the court to entertain the substantive motion, it is not a procedural technicality curable by application of the overriding objective of the law or the principle espoused in Article 159(2) of the Constitution.

14. Under Order 53(3) (1) of the Civil Procedure Rules, the leave once granted to apply for the 3 Judicial Review remedies of Certiorari, Prohibition or Mandamus, the substantive motion must be filed within 21 days of the date of leave.

15. However, the court having granted to the exparte applicant a shorter period of 14 days, owing to the urgency of the matter before it as no stay had been granted, it was upon the exparte applicant to file the main motion within the time frame granted by the court.

16. Failure to do so or to comply with the order of the court on the given timelines renders the substantive motion as filed inept and the question of whether or not the delay in filing of the motion is inordinate or excusable does not arise.

17. It is the leave of court that originates the substantive pleadings in the Judicial Review applications for certiorari, mandamus and prohibition.

18. Faced within a similar situation in **JR 97 of 2016 Linda Okello vs The Inspector General of**

Police and The National Police Service and Others[2016] e KLR and Republic vs The Kenya Medical Laboratory Technicians and Technologists Board Exparte Edna Mwendu Kavindu (2017) e KLR where the exparte applicants, upon being granted leave of court to institute Judicial Review proceedings went to slumber and filed the motions out of the timelines granted by the court, this court, citing with approval the Court of Appeal decision in **United Housing Estate Limited vs Nyalas (K) Limited Civil Appeal No. Nairobi 84/96** where the Court of Appeal stated:

“ A party who obtains an order of the court on certain specified conditions s 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.”

19. I thus observed:

“ It follows that a party cannot unilaterally choose not to comply with conditions attached to the exercise of the court’s discretion in his or her favour on the ground that he or she ought to access justice”

20. The exparte applicants had the option of seeking leave of court to enlarge the lapsed time by applying to regularize that lapse as stipulated in Order 50 Rule 6 of the Civil Procedure Rules but they did not hence they have effectively disentitled themselves of the favourable exercise of the court’s discretion.

21. In **Wilson Osolo v John Ojiambo Ochola & Another CA 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 stipulates 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 there under, nonetheless was of the considered 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 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. There was no such application save the one dated 28th 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.”

22. In **John Ongeru Mariaria & 2 Others vs Paul Matundura Capp No. 301/2003 [2004] 2 EA 163**, the Court of Appeal quite properly guided that:

“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.”

23. Odunga J quite recently in **Republic vs Cabinet Secretary, information Communication for Technology & Another exparte Celestine Okuta & others [2016] e KLR**, faced with a similar situation where the applicant failed to file substantive notice of motion within the timelines stipulated in the order for leave to apply, expressed himself thus and I concur.

“In my view , court orders are serious decisions that can only be exercised 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 exercised.”

24. In this case, 20th December 2016 which was the last day of the order for leave was a working day and moreso, court fees for the filing of the substantive notice of motion was assessed by the court registry on 20th December 2016 at shs 25,800/- with an endorsement by the assessment clerk. It was a Tuesday.

25. However the motion was filed on 21st December 2016 which was the 15th day. No leave to enlarge the day was sought and obtained and on the first mention date to confirm compliance with court order of 6th December 2016, the exparte applicant’s counsel piously informed the court that they had filed the motion within time, which was a lie.

26. It is for the above reasons that this court would be wasting very precious judicial time if it delved into the merits and demerits of the motion that never was as that would amount to no more than chasing a wild goose with the aim of achieving no results at the end of the day.

27. Accordingly, I find and hold that the notice of motion dated 20th December 2016 and filed in court on 21st December 2017 is incompetently before the court and incapable of adjudication on its merits. The same is hereby struck out.

28. As the respondents and interested party gave a blind eye on this very important aspect of the law, I decline to award them any costs of the incompetent application. In this case, the court must take credit for being vigilant. Each party to bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 18th day of October, 2017.

R.E. ABURILI

JUDGE