



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 39 OF 2015

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT

DR. ALFRED N. MUTUA.....2ND RESPONDENT

EX-PARTE BENARD KIALA

RULING

1. On 6th February, 2015 this Court granted leave to the Applicant, Bernard Kiala to commence judicial review proceedings and apply for orders of prohibition and mandamus in respect of certain actions by the 1st Respondent, the County Government of Machakos and the 2nd Respondent, Dr. Alfred N Mutua. The Applicant was directed to file and serve the substantive notice of motion together with skeletal submissions and list of authorities within 15 days from the date of grant of leave. The Applicant failed to comply.
2. The Applicant's inaction was met by the respondents' notice of motion application dated 23rd June, 2015 in which they seek orders as follows:

“1. THAT this Honourable Court be pleased to vacate/set aside the Orders made on 6th February, 2015 granting leave to the Applicant/Respondent to file the substantive Application and to dismiss the judicial review proceedings herein.

3. **THAT the costs of the judicial review proceedings herein be borne by the Applicant/Respondent.”**

The application is supported by the grounds on its face and the supporting affidavit sworn on 23rd June, 2015 by the 2nd Respondent.

3. In brief, it is the respondents' case that the Applicant's failure to file the substantive notice of motion is a sign of lack of seriousness. The respondents contend that these proceedings are politics being brought into the court arena with a view to inciting members of the public.

4. The respondents assert that the inaction by the Applicant is in breach of Order 53 Rule 3 of the Civil Procedure Rules, 2010.

5. The Applicant did not respond to the application but instead opted to file his own notice of motion application dated 17th January, 2016 seeking orders as follows:

- “1. THAT this matter be certified as urgent and service of the same be dispensed with in the first instance.**
- 2. THAT this Honourable Court be pleased to grant leave to the Applicant to file the Substantive Notice of Motion Application out of time.**
- 3. THAT the annexed substantive Notice of Motion application be deemed as filed.**
- 4. THAT costs be in the cause.”**

6. The application is supported by the grounds on its face as follows:

- “1. THAT the Applicant filed an application for leave to commence judicial review proceedings on 6th February, 2015 vide a Chamber Summons application dated 27th January, 2015.**
- 2. THAT leave was duly granted on the same day but however the applicant was unable to file the substantive motion.**
- 3. THAT the applicant has been denied the opportunity to attend cabinet meetings to contribute any issues affecting the County of Machakos as required by the Constitution.**
- 4. THAT the Respondents have also suspended the Applicant’s personal secretary making it difficult and almost impossible for the Applicant to obtain documents vital/fundamental to the drafting and filing of his substantive motion.**
- 5. THAT the Respondents continue to frustrate the Applicant in his performance of duties as Deputy Governor by withdrawing privileges that have been donated to him by legislative and constitutional processes by virtue of his position as the Deputy Governor.**
- 6. THAT the Honourable Court does have the discretion to grant the orders prayed for.**
- 7. THAT it is in the interest of justice that orders prayed for are granted as the Respondents continue to frustrate and deny the Applicant his right and privileges as guaranteed by legislation and the constitution.**
- 8. THAT justice must be administered without undue regard to procedural technicalities as provided for in Article 159 (d) of the Constitution of Kenya 2010.”**

7. The application is also supported by an affidavit sworn by the Applicant on 22nd January, 2015. It is reasonable to presume that the affidavit was sworn on 22nd January, 2016. The affidavit reiterates the grounds in support of the application.

8. The respondents opposed the application through an affidavit sworn by the 2nd Respondent. The gist of the respondents’ reply is that the Applicant has never complied with the directions of this Court and the instant application is only meant to defeat their application of 23rd June, 2015 seeking the dismissal of the proceedings.

9. Incidences of the Applicant’s indolence are cited as follows:

- a) failure to file the substantive notice of motion and skeletal submissions as directed by the court on the date of the grant of leave;
- b) failure to inform the respondents that leave had been granted; and

c) serving the replying affidavit to the respondents' application dated 23rd June, 2015 on 23rd January, 2016 when the instant application was served.

10. Rule 3 (1) of Order 53 of the Civil Procedure Rules, 2010 provides that:

“3. (1) 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.”

11. In my view, the timeframe provided by the said Rule is however not cast in stone and can be enlarged for good reason. In a ruling delivered on 12th October, 2012 in **Elizabeth Njeri Hinga & another v National Environmental Management Authority & 2 others [2012] eKLR**, Githua, J captured the applicable principle as follows:

“It is therefore my finding that since Order 53 Rule 3(1) is not part of the substantive law governing the conduct of judicial review proceedings, this court can exercise its discretion to extend time within which to file a substantive motion for judicial review even after expiry of the 21 days prescribed under Order 53 (1) under its inherent powers if it is satisfied that it is fair and just to do so. The court must however exercise that discretion judiciously on the basis of sound legal principles and on the evidence before it. I hasten to add that the court’s discretion in such applications must be exercised cautiously and only when it is necessary to meet the ends of justice. In my opinion, the court’s discretion should only be exercised in favour of a party who demonstrates that he had good, credible, cogent and sufficient reasons to account for his/her failure to file the motion within the time allowed by the law.”

12. I associate myself with the position taken by the learned Judge. This court has a duty to do justice and that duty extends to enlargement of time where the time for doing a thing is provided by the procedural rules and not the substantive law.

13. The only question that needs to be answered is whether the Applicant has met the conditions for enlargement of time.

14. In **John Ochanda v Telkom Kenya Limited [2014] eKLR**, the Supreme Court citing its decision in the case of **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & others, Supreme Court Application No.16 of 2014** enumerated the circumstances under which time may be enlarged as follows:

“[18] This Court in the *Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & Others Supreme Court Application No. 16 of 2014 (The Nick Salat case)* acknowledged that extension of time is a discretionary and a very powerful tool which should be exercised with abundant caution, care and fairness. It should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realized. The Court proceeded to lay down the following under-lying principles to guide the Court, at page 31 thus:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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 time, 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 respondents 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.””

15. Enlargement of time is therefore a tool of ensuring justice and should only be extended to a party who persuades the court that the delay in complying with the timelines was caused by circumstances beyond his control. The beneficiary of an enlargement of time should also demonstrate that there was no delay in filing the application for enlargement of time.

16. In the case at hand, the Applicant filed the application for enlargement of time over ten months after leave was granted. The application for enlargement of time came almost six months after the respondents had filed an application seeking to dismiss the judicial review proceedings.

17. The reason given as to why the Applicant did not file the substantive notice of motion within the time granted by the court is that the respondents had suspended the Applicant's personal secretary thus making it difficult and almost impossible for him to obtain documents vital to the drafting and filing of the motion. If this is so, then on what basis was the Applicant granted leave? For the court to form an opinion that the Applicant had an arguable case, he must have provided sufficient material at the leave stage. That material in itself was sufficient to enable the Applicant file the substantive notice of motion.

18. The Applicant did not inform the court of the reasons for the delay in filing the substantive notice of motion. His application for enlargement of time is an afterthought.

19. In view of the facts in this matter, I find that enlarging time would of itself amount to abuse of the court process. The Applicant simply has no interest in pursuing these proceedings. The Applicant's notice of motion application dated 17th January, 2016 is therefore dismissed.

20. Once the 21 days provided by Order 53 Rule (1) of the Civil Procedure Rules, 2010 for filing of the notice of motion expired, the leave granted to commence these proceedings lapsed. There was therefore no need for the respondents to file the application dated 23rd June, 2016 seeking to dismiss these judicial review proceedings. Their application is therefore superfluous but in order to assure them this matter is as dead as a dodo, I declare that these judicial review proceedings ceased to exist when the Applicant failed to file the substantive notice of motion within 21 days from the date of grant of leave on 6th February, 2015.

21. There will be no order as to costs in respect of the application for leave and the applications subsequently filed thereafter. In other words, parties will meet their own costs of these proceedings.

Dated, signed and delivered at Nairobi this 24th day of May, 2016

W. KORIR,

JUDGE OF THE HIGH COURT