REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 270 OF 2016

REPUBLIC……………………………………………….………APPLICANT

VERSUS

CABINET SECRETARY, INFORMATION

COMMUNICATION & TECHNOLOGY……………1ST RESPONDENT

POSTAL CORPORATION OF KENYA BOARD..........2ND RESPONDENT

AND

PAULINE MUTHANGARI & 4 ORS……............INTERSTED PARTIES

EX PARTE CELESTINE OKUTA & ORS.

RULING

1. On 22nd June, 2016, I granted the ex parte applicant leave to apply for judicial review orders and directed the applicant to file and serve the substantive Motion within 3 days.

2. Pursuant to the said directions and in accordance with the provisions of section 57(a) of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya, the substantive Motion ought to have been filed and served by latest 25th June, 2016. That Motion was however not filed till 27th June, 2016.

3. The 2nd Respondent herein has now moved this Court vide a Motion on Notice dated 6th July, 2016, seeking that the substantive Motion filed by the ex parte applicant herein be dismissed on the ground that the same was filed out of the time stipulated by this Court. According to the 2nd Respondent, the substantive Motion was filed on 27th June, 2016 and was served the following day on 28th June, 2016.

4. According to **Miss Nyambati**, learned counsel for the 2nd Respondent the ex parte applicant has not sought to extend the time which was given by the Court hence the Court's discretionary jurisdiction has not been invoked to warrant the Court doing so. Learned counsel contended that whereas the Court has the power to abridge the time for filing of the Motion, the Court however has no power to extend the same. It was submitted that timelines are not technicalities which are curable under 159(2)(d) of the Constitution hence the substantive Motion ought to be dismissed.

5. **Miss Odhiambo**, learned counsel for the 1st Respondent on her part left the issue to the Court.

6. The application was opposed by the ex parte applicants who, through their learned counsel, **Mr Okwe Achiando**, were of the view that the substantive Motion was not filed out of time. According to the ex parte applicant under Order 53 rule 3(1) of the ***Civil Procedure Rules***, they had 21 days within which to file their substantive Motion. To them the 2nd Respondent was relying on technicalities to defeat their cause hence was abusing the process of this Court.

7. They further contended that both the affidavits filed in support of the instant application were defective as they were not sworn by persons duly authorised to do so.

8. I have considered the foregoing. The affidavit in support of the instant application was sworn by **Kennedy Ogeto**, the 2nd Respondent's advocate. In the said affidavit, the deponent, apart from the issue of service of the substantive Motion relied on the material on the face of the record of these proceedings. The law is not that an advocate cannot swear an affidavit at all in legal proceedings in which he is appearing as counsel. The law to my understanding is that an advocate is only barred from deposing to contested facts in such proceedings. Where the deposition is simply on the state of the record which the Court even on own motion ma take notice of, there is nothing barring counsel from stating the same. Similarly an advocate can properly swear as to his understanding of the law based on uncontested facts. This was the position in **East African Foundry Works (K) Ltd. vs. Kenya Commercial Bank Ltd. Nairobi (Milimani) HCCC No. 1077 of 2002 [2002] 1 KLR 443; [2002] 2 EA 366** and as was appreciated by **Njagi, J** in **National Hospital Insurance Fund vs. The Deposit Protection Fund Board & 5 Others Nairobi (Milimani) HCCC No. 505 of 2003:**

> **"Whereas the officers of a body corporate are the best placed to swear affidavits on its behalf, where the matters deposed of touch upon and concern the proceedings which took place before the taxing officer, between the advocate and his client, the former would be better placed to know, of his personal knowledge, what transpired during the proceedings, what the taxing master took into consideration and to that extent, he would be competent to swear the affidavit, but should take care to steer clear of controversy."**

9. It is therefore my view that with respect to matters which form part of this record, the deponent of the affidavit in support of the instant application, though an advocate, was competent to depose to the same. In any case the Court is only empowered to strike out the offensive parts of an affidavit and not necessarily the whole affidavit.

10. There was however a further affidavit sworn by **Jane Florence Otieno**, the 2nd Respondent's General Manager, in which it was averred that service on the 2nd Respondent was in fact effected on 28th June, 2016. In my view whereas the 2nd Respondent's advocate was not competent to swear as to the date of service of the Motion, that issue was cured by the further affidavit.

11. It is however contended that the further affidavit itself was incompetent due to the fact that the deponent had no authority from the 2nd Respondent to swear the same. Although the ex parte applicants purportedly relied on Order 4 rule 4 of the ***Civil Procedure Rules***, that provision with due respect only deals with representative suits. I take it the applicants intended to rely on Order 4 rule 1(4) of the ***Civil Procedure Rules***. Similarly that provision only applies to verifying affidavits accompanying plaints and not to any other affidavit. In any case there is no requirement thereunder that the resolution under seal also be filed.

12. In the premises there is no basis upon which the affidavits sworn in support of the instant application can be found to be defective.

13. **Miss Nyambati** seemed to have been of the view that whereas the Court may abridge the time for filing of the Motion, it does not have the power to extend the 21 days period for doing so. 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.***

14. 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].

15. 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) this Court is empowered to enlarge the time.

16. 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 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."** [Emphasis added].

17. Although the ex parte applicant seemed to have been of the view that they are entitled to 21 days within which to file their substantive Motion notwithstanding directions to the contrary, they must appreciate that the Rules are subject to the *Civil Procedure Act* and under section 3A of the parent legislation, this Court has the power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Accordingly nothing stops this Court from stipulating a shorter period than the 21 days and once the Court does so the parties must comply therewith unless the said directions are varied by an order of the Court.

18. This Court upon granting leave did not state that the ex parte applicants were to file the substantive Motion upon receipt of the extracted order. In fact the Court did not compel any party to extract an order. A party cannot adopt its own procedure and use the same to enlarge time at its own bidding.

19. 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 Ongeri 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".

20. 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.

21. In this case, the applicants instead of showing why the Motion was not filed in time has taken the incorrect position that they were entitled to wait until they obtained the extracted order after which the time would start running. Based on that incorrect position they have not bothered to even apply for enlargement of time. Yet they seek that this Court should ignore its order stipulating the period within which they were supposed to file the substantive motion claiming that it is a technicality. 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.

22. The applicants expect 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."

23. In my view a party cannot unilaterally decide not to comply with the conditions attached to the exercise of discretion in his or her favour on the ground that he or she ought to have access to justice. In this case the applicants had the option of moving the Court to extend time or seeking to regularised the record where the Motion had been filed. By failing to exercise any of the available options the applicants have disentitled themselves of the favourable exercise of discretion.

24. In the result I find that the Motion on Notice dated 6th July, 2016 is merited.

25. It follows that these proceedings are incompetent and are hereby struck out with costs to the 2nd Respondent.

Dated at Nairobi this 16th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Achiando for the Applicant

Miss Maina for the Respondent

Cc Mwangi