



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPL. NO. 471 OF 2016

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 21(1), 23(1)
23(3) (f), 25 (c), 27 (1), 47(1), 49(1)(d) & 50(2) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP 26 LAWS OF
KENYA**

AND

IN THE MATTER OF THE INCOME TAX ACT, CAP 470 LAWS OF KENYA

AND

IN THE MATTER OF THE VALUE ADDED TAX ACT, 2013

AND

IN THE MATTER OF THE TAX PROCEDURES ACT, NO. 29 of 2015

AND

IN THE MATTER OF THE ADVOCATES ACT

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY..... RESPONDENT

EX PARTE:

PROFESSOR TOM ODHIAMBO OJIENDA SC

T/A PROF. TOM OJIENDA & ASSOCIATES

RULING

1. By A Motion on Notice dated 29th November, 2016, the ex parte applicant herein, **Professor Tom Odhiambo Ojienda**, seeks the following orders:

1. **THAT** the Honourable court be pleased and do hereby *enlarge the time to file a Substantive Notice of Motion Application after 21 days up on leave being granted as required under the provisions of Order 53 Rule 3 (1) of Civil Procedure Rules, 2010 and deem the Ex-Parte Applicant's Notice of Motion dated 31st October, 2016 as duly filed.*

2. **THAT** costs of and incidental to the application be provided for.

3. **THAT** such further and other reliefs that this Honourable Court may deem just and expedient to grant.

2. According to the applicant, through a Chamber Summons Application dated 4th October, 2016, he sought and obtained leave to apply for judicial review orders herein and pursuant to Order 53 rule 3(1) of the Civil Procedure Rules, it is required that the substantive motion be filed *within twenty-one days upon obtaining leave. Consequently, he had to file the Notice of Motion on or before 25th October, 2016.*

3. *The applicant however averred that he was involved in the recruitment of the Chief Justice, the Deputy Chief Justice and the Supreme Court Judge since he is a member of the Judicial Service Commission. He was thus unable to file his Notice of Motion application by 25th October, 2016 but managed to do so on 31st October, 2016, which was five days later since the said recruitments were not only tedious and involving but were inevitable because of the public interest at stake.*

4. The ex parte applicant further deposed that he in addition encountered difficulties obtaining some crucial documents from the respondent which he intended and indeed used in his Notice of Motion Application, one of which was the ledger card showing VAT entries against himself over the years which he had alluded to in his Chamber Summons Application for leave dated 4th October, 2016 but which he had not attached to his said Chamber Summons Application. According to him, he only obtained the said ledger card from the respondent on 30th October, 2016 and filed the application on 31st October, 2016.

5. It was the ex parte applicant's case that the 21 day period requirement within which to file the substantive Judicial Review motion is not cast in stone since it is only provided for under the Rules and in view of the provisions of Order 50 Rule 6 of the **Civil Procedure Rules** which empowers the Court to enlarge time, the court has power to enlarge the time provided under Order 53 Rule 3 (i) of the **Civil Procedure Rules**.

6. In the ex parte applicant's view, the five (5) days delay on his part before filing his Notice of Motion Application dated 31st October, 2016 was not inordinate and that Article 159 (i)(d) of the Constitution obligates that Justice shall be administered without undue regard to procedural technicalities.

7. He therefore averred that it is in interest of justice that this application is allowed and the substantive Notice of Motion dated 31st October, 2016 be heard on merit.

8. In his submissions, the applicant reiterated the foregoing and added that the debate as to application for extension of time under **Rule 50(6) of the Civil Procedure Rules** (sic) in judicial review proceedings has gained prominence over time with different courts holding conflicting positions as to the same. However, it was submitted that it has been accepted over time that the promulgation of the Constitution of Kenya

2010 substantively affected the general view that had been held as regards the same. More specifically, **Article 159 of the Constitution** made a fundamental change in the law governing the conduct of respective proceedings by calling upon the Courts of law not to pay undue regard to procedural technicalities at the expense of substantive justice.

9. It was submitted that pursuant to section 9(1)(a) of the **Law Reform Act** CAP 26 of the Laws of Kenya, Order 53 of the **Civil Procedure Rules 2010** was enacted to make provision for the procedures that govern applications for prerogative orders. In relation to time specifically however was Order 53 Rule 3(1) of the **Civil Procedure Rules 2010** provides as follows:

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.

10. It was the ex parte applicant's view that it is apparent from the reading of this rule that there is no express provision on extension of time for filing of a substantive motion under Order 53 Rule 3(1) or the **Law Reform Act** CAP 26 of the Laws of Kenya. It was the applicant's position that a party can invoke the jurisdiction of the court under **Rule 50(6) of the Civil Procedure Rules 2010** (sic) to seek for extension of time to file the substantive motion in judicial review proceedings. The said provision was cited as providing that"

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.

11. The ex parte applicant noted that while section 9 of the **Law Reform Act** makes provision for substantive judicial review application, the procedure for filing the same has been captured under Order 53 of the **Civil Procedure Rules** and that matters as to the time frame within which the substantive motion is to be filed is captured under the **said Rules**. Accordingly, owing to the fact that the 21 days period is provided for by the Civil Procedure Rules, it goes without saying that a party can ably make an application for extension of the 21 day period under Rule 50(6) of the **Civil Procedure Rules 2010** as the filing of the motion is done under the Rules therein.

12. In support of his submissions the ex parte applicant relied on Mombasa High Court **Republic vs. General Manager, Moi International Airport & Another Ex parte Jared Adimo Odhiambo & Another [2014] eKLR** where the Court held that:

“Indeed, under Order 50 rule 6 of the Civil Procedure Rules, it is provided for extension of time limited for the doing of any act under the Rules as follows...The provisions of Order 50 rule 6 of the Civil Procedure Rules reflects the position with regard to statutory authority to enlarge time under section 59 of the Interpretation and General Provisions Act...”

13. Based on the said decision it was submitted that it is noteworthy that the above cited decision herein made two very important points as regard the application of Rule 50(6) of the **Civil Procedure Rules**:

a) That the filing of the substantive motion is a procedure provided for by the Order 53 Rule 3(1) of the **Civil Procedure Rules** and consequently is an act that fits the description of ‘under these Rules’ as envisaged by Order 50 Rule 6 of the **Civil Procedure Rules 2010**.

b) That Order 50 Rule 6 reflects the wide discretionary powers of the courts to extend time for doing particular acts in the interest of serving justice as read together with section 59 of the **Interpretation and General Provisions Act**.

14. The ex parte applicant therefore submitted that he had rightly invoked the jurisdiction of the Court to extend time for the filing of his substantive motion under Order 50 Rule 6 of the ***Civil Procedure Rules 2010*** and relied on ***Muriithi, J's decision in Miscellaneous Civil App Jr 8 of 2014 - Kenya Bureau of Standards & 3 others vs. Kenya Maritime Authority Ex parte Car Importers Association [2014] eKLR*** where the learned Judge stated that:

“With respect, I have taken the view that while the provision relating to the 6month period for commencement of proceedings certiorari is statutory being expressly provided for under section 9 of the Law Reform Act, the requirement for filing of the Notice of Motion upon grant of leave is prescribed by the subsidiary legislation of the Civil Procedure Rules, which contain a rule (O.50 r.6) providing expressly for enlargement of time for doing any act prescribed under the Rules...As shown above Order 50 rule 6 of the Civil Procedure Rules contemplates extension of time for purposes of anything prescribed under the Rules without excepting Order 53 of the Rules. Even if the 6-month period for the commencement of judicial review proceedings were taken to be statutorily insulated, by the provisions of section 9 of the Law Reform Act, from the court’s power of extension under Order 50 rule 6, the same cannot be said of the 21-day period prescribed only by the Rules. For the reason that the prescription as to time of filing is a matter of procedure rather than substantive ingredient of the right or claim, and consequently subject to Article 159 of the Constitution and Order 50 rule 6 of the Civil Procedure Rules, I agree with the school of opinion that the court has power to extend the 21-day period prescribed by the rules for the filing of the Notice of Motion upon grant of leave under Order 53 Rule 3 (1) of the Civil Procedure Rules.”

15. The ex parte applicant similarly relied on ***Aburili, J's decision in Judicial Review No. 371 & 372 of 2015 - Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited [2016] eKLR*** where she pointed out that:

“In my humble view, although Order 53 of the Civil Procedure Rules which relates to the procedure for the filing of Judicial Review proceedings does not specifically provide for enlargement of time, the fact that the Order and Rules thereunder are made under the Civil Procedure Act and Rules and that Order 50 Rule 6 of the Civil procedure Rules does not exclude the application of Order 53 thereof, the court is given latitude to either invoke its inherent jurisdiction to prevent an injustice or hardship being occasioned to the parties, or to apply order 50 Rules 6 of the Civil Procedure Rules and Sections 95 of the Civil Procedure Act, section 63(e) of the Civil Procedure Act and Section 59 of the Interpretation AND General Provisions Act Cap 2 Laws of Kenya and more importantly, Article 159(2)(d) of the Constitution in order to prevent an injustice being occasioned to an innocent party.”

16. It was further submitted by the ex parte applicant that the filing of the substantive motion is an aspect of procedure as opposed to substantive law. Consequently, striking out a substantive motion for failure to adhere to the 21 day period provided for by the rules would mean paying undue regard to procedural technicalities as opposed to substantive justice and would be flying on the very face of Article 159(2)(d) of the Constitution. According to the applicant, it is now accepted that the courts of law ought to take into consideration the provisions of Article 159 of the Constitution in dealing with matters that are being adjudicated before them and judicial review proceedings are no exception and relied on ***Miscellaneous Civil App Jr 8 of 2014 - Kenya Bureau of Standards & 3 Others vs. Kenya Maritime Authority Ex parte Car Importers Association [2014] eKLR*** for the holding that:

“I also consider that the 21-day rule for the filing of the Notice of Motion is a matter of procedure rather than substantive rule of jurisdiction of the court in judicial review matters, and is therefore open to extension in accordance with the substantial justice principle of Article 159 of the Constitution.”

17. In this respect the ex parte applicant revisited the decision in ***Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited*** (supra) at Paragraph 101 where the

Court expressed itself thus:

18. “In the current constitutional dispensation, the courts in interpreting any Statute or Rule must ensure that the purposes, values and principles of the Constitution are protected and promoted and that is the task that I have undertaken in this matter. It would be surprising to find that the origin of the Judicial Review remedies which is in England, permits the extension of time whereas in Kenya, we are still stuck to the stringent interpretation of a rule that was meant to curtail aggrieved Africans from seeking Justice, by placing stringent timelines, knowing that courts were few and quite far away and removed from where the aggrieved persons lived, at the time when Order 53 and the Law Reform Act were enacted, on 31st January, 1924 and 1956 respectively.”

19. In the same vein the applicant relied on this Court’s decision in Miscellaneous Application 699 of 2007 - Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 others [2013] eKLR while citing the case of Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22 that:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”

20. According to the applicant, Article 159(2)(d) of the Constitution can only be adhered to if the courts decline to pay undue regard to procedural technicalities and on the contrary stress on the serving of substantive justice.

21. It was submitted that the Courts of Law have the inherent powers to control their processes so as to meet the ends of justice and reliance was placed on Republic vs. General Manager, Moi International Airport & Another Ex parte Jared Adimo Odhiambo & Another [2014] eKLR. It was submitted that the Court in the said case in further discussing its inherent powers to formulate its processes to ensure justice is done further held that even if Order 50 Rule 6 did not apply in judicial Review proceedings, it still had an inherent duty to ensure that justice is done. The Honourable Court stated that:

“Even where courts have found that the Order 53 is unaffected by the rest of the provisions of the Civil Procedure Rules, so that reliance cannot be placed on the power to extend under Order 50 rule 6, court have fallen back to their inherent power to ensure justice is done.”

22. According to the applicant, the delay in the filing of the substantive motion was not inordinate or inexcusable and no prejudice will be suffered by the Respondent as a result of the 5 days delay in the filing of the substantive motion and hence this Application ought to be allowed as prayed. In this case he relied on Republic v General Manager, Moi International Airport & another Ex parte Jared Adimo Odhiambo & another [2014] eKLR (supra) where the court allowed the application as the court deemed that a 7 day delay could not be under any circumstance inordinate.

23. It was further submitted that the delay herein cannot be termed as inexcusable since:

(i) At the time the Applicant was involved in the recruitment of the Chief Justice, the Deputy Chief Justice and the Supreme Court Judge since he is a member of the Judicial Service Commission.

(ii) The Applicant was thus unable to file my Notice of Motion application by 25th October, 2016 but managed to do so on 31st October, 2016 (five days later) since the said recruitments were not only tedious and involving but were inevitable because of the public interest at stake.

(iii) The Applicant further encountered difficulties obtaining some crucial documents from the respondent which he intended and indeed used in his Notice of Motion Application. Such one crucial document was the ledger card showing VAT entries against the applicant over the years

which he had alluded to in his Chamber Summons Application for leave dated 4th October, 2016 but which he had not attached on his said Chamber Summons Application.

(iv) The Applicant only obtained the said ledger card from the respondent on 30th October, 2016 and filed the application on 31st October, 2016.

24. It was therefore submitted that to throw away the substantive application as a result of the delay herein would occasion great injustice to the Applicant as it would result in the court dismissing the motion without considering its merits particularly when no prejudice would be suffered by the Respondents as a result of the delay in the filing of the substantive motion.

Respondent's Case

25. In opposition to the application the Respondent averred that on 8th March 2017 when this matter came up for mention the Respondent's counsel learnt from Counsel for the Ex parte Applicant that the instant Notice of Motion was filed on 29th November 2016 and he took time to consult **Ms Mburugu** whether she had been served with the Application but was informed that no such application had been filed hence the filing and service of the Application is belated.

26. It was averred that the Respondent filed a Notice of Preliminary Objection dated 22nd November 2016 which contests that the substantive Notice of Motion dated 31st October 2016 was filed out of time long after the time of the leave granted on 10th October 2016 under Order 53 of the **Civil Procedure Rules** 2010 had lapsed which rendered the Notice of motion dated 31st October 2016 incompetent to the extent that there is no application before this Honourable Court capable of being adjudicated.

27. According to the deponent of the replying affidavit, from the time when he took over he also did not see the Notice of Motion dated 29th November 2016 until the 8th March 2017 when he was served in Court by Counsel for Ex Parte Applicant together with the Grounds of Opposition dated 30th January 2017 in opposition to the Respondent's Notice of Preliminary objection dated 22nd November 2016.

28. It was the Respondent's case that the Rules of procedure are made to foster the administration justice and they have time lines so that each party to the dispute does not suffer injustice or prejudice. It was averred that in consonant for lack of good reason as to why the Notice of Motion was not filed within time the Ex parte Applicant has invoked his involvement in the Recruitment of Judicial officers which had nothing to do with the preparation of the Notice of Motion which ought to have done when preparing the Court Order granting leave and stay on 10th October 2016 which was served upon the Respondent. In the Respondent's view, the Ex parte applicant required nothing more than the Notice of Motion in terms of the Chamber Summons application and no additional grounds or supporting affidavits were required hence the excuse and reason advanced that the Ex parte Applicant was engaged is untenable.

29. It was averred that it is quite clear that from the 29th November 2016 when the instant Notice of Motion was filed and while the Ex parte Applicant appears to be aware that the orders have lapsed has instead proceeded on the premise there are valid in place. No efforts were made to urge that this motion be heard first in priority to substantive application. According to the Respondent, the only remedy available to Ex parte Applicant is to file a fresh application and seek fresh leave since it has not been demonstrated as to why the substantive Notice of Motion was not filed in time.

30. It was submitted on behalf of the Respondent by **Mr Ontweka**, its learned counsel that the application is incurably defective. Further procedural rules have a purpose to ensure that parties follow the rules and for good order hence notwithstanding the shifting of grounds, parties should meet the timelines. In its view to argue that there is no prejudice after it had responded to the application amounted to circumventing its preliminary objection. It was the Respondent's view that had the applicant filed its application first, the Respondent ordinarily would not have opposed the application. However the applicant's application was triggered by the Respondent's replying affidavit and the

31. It was contended that the High Court has found that Order 53 rule 3 does not apply to judicial review applications which is neither civil nor criminal and reference was made to **Rosaline Tubei & 8 Others vs. Patrick K. Cheruiyot & 3 Others 2014] eKLR.** It was contended that the requirement of compliance with Order 53 is not a technicality and reliance was placed on **Republic vs. Kahindi Nyafula & 3 Others ex parte Kilifi South East Farmers Co-operative [2014] eKLR.**

32. To the Respondent Order 50 rule 6 does not aid the applicant since nothing was required to be foiled by the applicant apart from the Notice of Motion. In its view justice cuts across and the applicant ought to know that timelines have a purpose.

33. In this case it was contended that there were two competing interests involved, the appointment of the Chief Justice and a personal interest and in this case the latter interest was ignored by the applicant. In its view no sufficient reasons were advanced to warrant the grant of the orders sought. The Court was therefore urged to balance the interest of the parties, uphold the preliminary objection and find that the application for extension of time is belated.

34. In his rejoinder **Mr Makokha**, learned counsel for the Applicant clarified that the preliminary objection was filed after the application seeking extension of time.

Determination

35. I have considered the issues raised herein. It is not in doubt that 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.

36. It is therefore clear that the time for the filing of the Motion is prescribed not by the substantive statute but by the ***Civil Procedure Rules*** which is a delegated legislation made by the Rules Committee pursuant to the powers donated to the Committee vide the aegis of section 81 of the ***Civil Procedure Act***. It is in this regard that I agree with the decision in **Miscellaneous Civil Application 12 of 2014 - Republic vs. General Manager, Moi International Airport & Another Ex parte Jared Adimo Odhiambo & Another** (supra) that:

“Although power to extend time is not expressly granted in Order 53 rule 3 on the period for the filing of the Notice of Motion, there must be, consistently with the Article 159 principle of justice without undue regard to technicalities of procedure, inherent jurisdiction to extend the time in the interests of substantial justice. This must be so especially where the time is prescribed not by Statute but by the rules of Court...In Wanguhu vs Kania (1987) KLR 51, Nakuru Court of Appeal, Civil Appeal No. 101 of 1984 (Hancox, Nyarangi, JJA & Platt Ag JA), it was held that the court has inherent power in it to control its process for the ends of justice and that section 3A of the Civil Procedure Act preserves the inherent powers when there are no rules.”

37. 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].

38. There is no doubt that judicial review proceedings are special proceedings guided by sections 8 and 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*. However the framers of the said Rules deemed fit to provide for enlargement of time in instances where the said framers had themselves prescribed the timelines without making a distinction between judicial review and other proceedings prescribed by the said Rules. In **Sukwinder Singh Jutley vs. Prudential Association Co. of Kenya Ltd & Another Civil Appeal (Application) No. 62 of 2004**, the Court of Appeal held that in procedural rules that lack clarity, the Court is at liberty to lean on constructions which aid the course of justice. Since there is no express rule barring the enlargement of time to file the substantive motion as opposed to enlargement of time to apply for leave, in my view the Court ought to adopt an interpretation of Order 53 rule 3(1) as read with Order 50 rule 6 of the *Civil Procedure Rules* which aid the course of justice. I therefore associate myself with the opinion of Githua J. in **R vs. National Environmental Management Authority and Anor. ex parte Elizabeth Njeri Hinga and Anor. (2012) eKLR** 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 Rule 3 (1) under its inherent powers, if it is satisfied that it is fair and just to do so.”

39. This position has been affirmed by the Court of Appeal in **Wilson Osolo vs. John Ojiambo Ochola & Another Civil Appeal No. 6 of 1995** where 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].

40. It is therefore clear that the decisions of the High Court that hold to the contrary are *per incuriam* the decision of the Court of Appeal and are with due respect inconsequential. That the Court has the power to enlarge time is in fact appreciated by the Respondent when they submitted that had the applicant filed its application first, the Respondent ordinarily would not have opposed the application.

41. The question is whether the applicant merits the enlargement of time with such time as would validate the Motion already filed. In **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

42. With respect to the explanation for the delay, the applicant contends that he encountered difficulties obtaining some crucial documents from the respondent which he intended and indeed used in his Notice of Motion Application, one of which was the ledger card showing VAT entries against himself over the years which he had alluded to in his Chamber Summons Application for leave dated 4th October, 2016 but which he had not attached to his said Chamber Summons Application. According to him, he only

obtained the said ledger card from the respondent on 30th October, 2016 and filed the application on 31st October, 2016. As rightly submitted on behalf of the Respondent, it is now trite that there is no place for a further affidavit in an application to apply for judicial review and the only affidavit provided for is the affidavit verifying the facts which ought to be detailed and contain all the facts relied upon by the Applicant. However where a replying affidavit is filed which raises new matters, leave may be sought and granted pursuant to Order 53 rule 4(2) of the **Civil Procedure Rules** in order to deal with the new matters rising from the replying affidavits. This position was clarified in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321** where Nyamu, J (as he then was) was of the view which view I associate with that:

“There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant’s case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent’s case is a hangover, which is not acceptable under the Judicial Review jurisdiction.”

43. Therefore that reason is with due respect untenable. The applicant however contended that he was engaged in the process of recruitment of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court in his capacity as a member of the Judicial Service Commission. This contention is not seriously disputed save for the fact that the applicant ought to have also considered his personal interests.

44. However, Madan, J (as he then was) in **Gulamhussein Noormohamed Cassam & Another vs. Shashikant Ramji Sachania & Another 1 KAR 24** held that:

“An error of judgement on the part of a legal adviser may help to build up sufficient reason under rule 4 of the Court of Appeal Rules to induce the court to exercise its discretion to extend time for doing of any act under the Rules of the Court... In the instant case the notice of appeal was filed in time. But for the error in the wrong interpretation of the relevant rule and the mix-up in the High Court when the court file could not be traced, notice of appeal could undoubtedly have been served in time. It is the essence of an error or mistake that even a plain rule may be misread or misinterpreted. “

45. The same Judge in **Murai vs. Wainaina (No 4) [1982] KLR 38** expressed himself as follows:

“The mistake here should not be so narrowly construed as to mean only error with fault. It is not possible to say legitimately that a fact completely within physical apprehension can neither be *bona fide*: a mental fact may be either. But there may be a *bona fide* act, belief, intention, claim, objection or mistake or a person’s conduct may be *bona fide*. Each of these is, so to speak a mental fact having its origin in the individual...A *bona fide* mistake includes a mistake of law as well as of fact. If he has made a blunder on a point of law, a blunder is a mistake. In nine cases out of ten if there is a mistake in substance, it will be found that there is a mistake in law. Ignorance of the law can constitute a mistake of law...The former advocate’s belief was a mistake on a point of law however wrong he might have been in his

belief. No one has said that it was a deliberate act. On the contrary, his obstinate adherence to his wrong belief shows that he genuinely, though mistakenly, believed his view was correct. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake.”

46. It has therefore been held that mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. In my view the explanation for not filing the Motion though not warranted on the first ground, is excusable on the second ground.

47. The next issue is the length of the delay. In this case the delay is only 5 days and the Motion itself has been filed. In **Republic vs. General Manager, Moi International Airport & Another Ex parte Jared Adimo Odhiambo & Another** (supra) the Court expressed itself as follows:

“In exercising the discretion to enlarge time in this case, I have taken into account the fact that the delay was a short one, seven days by my calculation, and that the Notice of Motion has already been filed and no further delay will arise. From the explanation by counsel for the ex parte applicant, I am not prepared to hold that there were no good reasons given for the delay. I have further considered that declining the Notice of Motion dated 30th April 2014 which is already filed and thereby compelling the ex parte applicants to file a civil suit or to repeat the judicial review process from the beginning, will only escalate the cost in time and money for the parties, contrary to the overriding objective of the civil process under section 1A of the Civil Procedure Act and the substantial justice principle of Article 159. I will, therefore, grant the enlargement of time sought by seven days so that the Notice of Motion dated and filed on 30th April 2014 is deemed to have been filed within time and properly on record.”

48. In the circumstances of this case, it cannot be said that the delay was inordinate.

49. With respect to the merits of the application, the applicant approached this Court lamenting that the process which was adopted by the Respondent violated its rights to a fair hearing. In my view the right to a hearing is such a fundamental right that ought not to be taken away lightly. The answer to that weighty matter would not be to advise the applicant of the recourse open to it is to file fresh proceedings. However in **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009** the Court of Appeal appreciated that:

“...the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out.”

50. Similarly, in **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the said court held that *the applicant’s submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act. To the Court the advantage of the current Civil Procedure Rules over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out and in applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives. In this case the court*

declined to strike out the appeal on the ground that if the record of appeal was struck out, it was certain that the appellant would return to the court with an application for extension of time, which would result in further delay of the final disposal of the case and would inevitably result in further increase in costs. The court then allowed a supplementary record to be filed to incorporate the omitted hitherto primary documents.

51. This is however not to say that procedural rules ought not to be followed. As was held in **Chelashaw vs. Attorney General & Another [2005] 1 EA 33**, without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. The purpose of adhering to the rules of procedure was emphasised in **Bayusuf & Sons Ltd Vs. Attorney General [2002] 2 KLR 279** where it was held that the obligation to obey the Civil Procedure Rules is for the purpose of establishing and maintaining orderliness in the process of deciding, establishing and protection of citizens' constitutional basic rights.

52. With respect to costs, I did not hear the Respondent contend if the application is allowed it will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188**.

53. In the instant case, I am satisfied that the failure by the applicant to comply with the Court's directions is excusable and further that there is no prejudice likely to be occasioned to the Respondent by the grant of the orders sought by the applicant herein. In the premises I find the Notice of Motion dated 29th November, 2016 merited and I allow the same with the result that time is hereby enlarged for the filing and service of the substantive with such period as would validate the already filed Motion. In effect the said Motion is now deemed to have been filed and served within time.

54. It follows that the preliminary objections fail. The Respondent will however have the costs application in an event.

55. It is so ordered.

Dated at Nairobi this 26th day of October, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Makokha for the applicant

Mr Ontweka for the Respondent

CA Mwangi