REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 406 OF 2016

REPUBLIC..APPLICANT

VERSUS

TAX APPEALS TRIBUNAL................................RESPONDENT

EX PARTE: DIAMOND INDUSTRIES LIMITED

RULING

1. On 6th day of September, 2016, I granted the ex parte applicant herein leave to apply for judicial review orders and directed that the substantive Motion be filed and served in seven 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 7 days, 6th day of September, 2016 would be excluded while the last day being 13th September, 2016 would be included. The substantive Motion therefore ought to have been filed and served by latest 13th September, 2015. That Motion was however not filed till 16th September, 2016, which was 3 days out of time.

3. By a Notice of Motion dated 27th September, 2016, the applicant herein has applied for orders that the said Motion be struck out on the grounds that the same was filed out of time. That the Motion was filed out of time is not in dispute.

4. The Applicant however filed a Notice of Motion dated 4th October, 2016 by which it sought that leave be granted to it for extension of time within which to file and serve the substantive Motion and that the Motion filed herein be deemed as having been filed and served within time. According to the applicant, the failure to file the Motion within time was due to the delay by the applicant's advocates in receiving the signed copies of the supporting affidavit in respect of the substantive Motion from the applicant who is based in Mombasa. It was averred that the said signed copies were received on 14th September, 2016 but due to inability to trace the court file in the registry, the same was not filed till 16th September, 2016 when the court file was retrieved. To the applicant the three days delay cannot in the circumstances be termed as inordinate and that no prejudice would be occasioned to the Respondent if the orders sought are

granted. However if the orders sought are not granted the Respondent will proceed to deliver its judgement with the effect that the applicant will have been denied an opportunity of being heard once the judgement on its appeal is delivered. These contentions were reiterated by **Miss Makori**, learned counsel for the applicant.

5. In opposing the application, it was contended by **Miss Maina** learned counsel for the Respondent that the applicant had not placed before the Court material to warrant the exercise of discretion in its favour. According to learned counsel, since the supporting affidavit was expressed to have been sworn in Nairobi, the contention that the same was sent to Mombasa was untenable. Further Order 53 does not require a party to file any further affidavit apart from the verifying affidavit. The Court was therefore urged to dismiss the applicant's application and allow the Respondent's application.

6. 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.***

7. 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].

8. 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.

9. 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].

10. 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.

13. With respect to the explanation for the delay, the applicant contends that they sent the affidavit in support of the substantive Motion to their client in Mombasa. It is however clear that there is no place for a supporting affidavit in an application for leave 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. 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."**

11. 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. "**

12. 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."

13. Similarly in **Blueshield Insurance Co. Ltd. vs. Raymond Buuri M'rimberia Civil Application No. Nai. 57 of 1997, Shah, JA** held that an advocate's error in misreading or misconstruing the effect of a statute is an error, which is excusable and ought not be laid at the door of the client. 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.

14. The next issue is the length of the delay. In this case the delay is only 3 days and the Motion itself has been filed. In the circumstances of this case, it cannot be said that the delay was inordinate.

15. 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 as that would amount to driving the applicant out of the seat of justice empty handed when the Court has what might have well amount to an excusable mistake visited upon the applicant by its advocate. Therefore where such an allegation is made the Court ought to, as much as possible accommodate the aggrieved party so that the party does not go away believing that on both occasions he has been chased away from the seat of justice unheard. Accordingly, the applicant's application cannot be termed as frivolous.

16. 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.**

17. The Respondents however relied on **Republic vs. Cabinet Secretary, Information Communication & Technology Judicial Review Application No. 270 of 2016**, in which this Court struck out similar proceedings. That case must be distinguished from the instant application. In that case the applicant adopted what was clearly an untenable position that the application was within time and did not bother to regularize the pleadings. That conduct was clearly inimical to favourable exercise of the discretion as there was no material on the basis of which the failure to comply with the Court's directions could be excused.

18. 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 4th October, 2016 merited and I allow the same with the result that time is hereby enlarged for the filing and service of the substantive Motion dated 14th September, 2016 with such period as would validate the same. In effect the said Motion is now deemed to have been filed and served within time.

19. It follows that the Motion dated 26th September, 2016 by the Respondent nolonger falls for determination and the same is marked as compromised. The Respondent will however have the costs of both applications in an event.

20. It is so ordered.

Dated at Nairobi this 26th day of October, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Makori for the ex parte applicant

Mr Munene for Miss Maina for the Respondent

CA Mwangi