



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 376 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS**

**AND**

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

**AND**

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

**AND**

**IN THE MATTER OF: SPORTS ACT, 2013(ACT NO. 25 OF 2013, LAWS OF KENYA)**

**AND**

**IN THE MATTER OF; VIOLATION OF ARTICLES 27, 28, 32, 33, 36, 41 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: SUSPENSIONS OF ALL OFFICIALS OF EXTREME SPORTS LTD FOR PARTICIPATING IN SUPER 8 TOURNAMENTS AND LEAGUES FOR A PERIOD OF SIX(6) YEARS.**

**BETWEEN**

**ATHANAS OBALA OBANGO.....APPLICANT**

**AND**

**FOOTBALL KENYA FEDERATION.....1<sup>ST</sup> RESPONDENT**

**NICK MWENDWA.....2<sup>ND</sup> RESPONDENT**

**ROBERT MUTHOMI .....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

### **RULING**

1. On 29<sup>th</sup> August 2016, the exparte applicant's application dated 28th August 2015 was considered under certificate of urgency. The court certified the matter as urgent and directed the exparte applicant to serve the respondents for interpartes mention on 1<sup>st</sup> September 2016 for further orders/ directions.
2. On 1<sup>st</sup> September 2016, the matter came up for interpartes mention upon which the respondent's counsel indicated to court that the respondents had no objection to leave to apply for Judicial Review orders being granted but that nonetheless the matter was similar to HCC 216/2016 in Nairobi in a similar matter.
3. However, the exparte applicant's counsel was quick to indicate that the High Court suit was between different parties although the circumstances were the same.
4. The court did grant leave to apply for Judicial Review orders sought in the application dated 25<sup>th</sup> August 2016 and accorded the exparte applicants 10 days within which to file the substantive motion.
5. On 15<sup>th</sup> September 2016, the exparte applicant brought another application by way of Notice of motion under Order 50 Rule 6 of the Civil Procedure Rules seeking for enlargement of time within which the substantive motion seeking for Judicial Review Orders, pursuant to leave to apply granted on 1<sup>st</sup> September 2016 ought to have been filed.
6. That is the application subject of this ruling. In the subject application which is supported by two affidavits sworn by Eunice Mukuvi Mutile and Grace Waringa Muigai, the exparte applicant claims that the time for filing of the substantive motion as per leave granted on 1<sup>st</sup> September 2016 lapsed on 13<sup>th</sup> September 2016.
7. That although the substantive motion was drawn expeditiously, the court clerk committed an inadvertent error on calculating the last day allowed for filing and presented the Notice of Motion to the registry on 14<sup>th</sup> September 2016 for assessment which was a day after the last date allowed for filing of the substantive motion.
8. That it was only after the clerk returned the assessed documents to the office that it was discovered that time for filing of the motion had lapsed, which delay was not due to any complacency, dilatoriness, laxity or indolence on the part of the applicant whose case it is and who deserves to be heard on merit despite the technical inadvertent error.
9. In addition, it is contended that the enlargement of time will not prejudice the respondents in any way, whereas the denial of the application for enlargement of time will prejudice the applicant's expeditious pursuit of a Judicial Review of his Constitutional rights and finally, that the application for enlargement of time was filed with all haste and immediately upon discovery of the error.
10. The supporting affidavit sworn by Grace Waringa Muigai advocate explains that she drew, signed and handed over to her firm's court clerk Eunice Mukuvi Mutile the substantive notice of motion on 7<sup>th</sup> September 2016 and instructed her to take the motion to court for assessment of court fees for filing as a matter of priority before end of that week being 9<sup>th</sup> September, 2016 in view of the 10 days allowed; and that it was not until the 14<sup>th</sup> September 2016 when the file was handed to the advocate for disbursement of court filing fees that she discovered that the clerk had not abided by the instructions to ensure the motion was filed within the 10 days granted by the court.

11. Further, that the clerk explained the inadvertent error in calculating the days.

12. The clerk Eunice Mukuvi Mutile has also sworn an affidavit on 14<sup>th</sup> September 2016 explaining her inadvertence that caused the delay in filing of the substantive motion in that she did not know that Saturdays and Sundays are to be factored in calculating the days allowed for filing or complying with the order of the court hence she thought that they had upto 16<sup>th</sup> September 2016 to file the notice of motion, which misconception, she did not consult her employer advocate to confirm, and that therefore she took to court the documents for assessment on 14<sup>th</sup> September 2016 and upon returning them to the advocate, she discovered that the time allowed had expired the previous day.

13. I have carefully considered the application dated 15<sup>th</sup> September 2016 by the exparte applicant seeking for enlargement of time within which to file substantive notice of motion seeking for Judicial Review orders pursuant to the leave of court grated on 1<sup>st</sup> September 2016.

14. I have also considered the grounds and supporting affidavits and annexures thereto. The record as stated earlier shows that on 1<sup>st</sup> September 2016 the exparte applicant was granted leave to apply for Judicial Review Orders within 10 days from that date. However, by the last day which was 13<sup>th</sup> September 2016 and since 12<sup>th</sup> September 2016 was a public holiday the application had not been filed because the clerk who was assigned to cause the assessment of court fees and submit it for filing miscalculated the days for the filing of the motion. That she believed that the Saturdays and Sundays are not to be considered in computation of justice.

15. With utmost respect to the advocate for the exparte applicant, I am not persuaded that the reasons for the delay in filing of the substantive motion have been candidly explained to the satisfaction of this court.

16. Furthermore, the advocate's affidavit largely contradicts that of her court clerk in that whereas the advocate claims that she handed her clerk the motion for assessment of fees for filing on 7<sup>th</sup> September 2016 which was a Wednesday and to ensure the filing was done by 9<sup>th</sup> September 2016 which was a Friday, the clerk Ms Eunice Mukuvi Mutile deposes in her affidavit that she received the motion for filing in the High Court by close of Friday 2<sup>nd</sup> September 2016 as a matter of priority but that she miscalculated the days and believed that they had up to Friday 16<sup>th</sup> September 2016 to file the notice of motion and therefore only presented the motion for assessment of court filing fees on 14<sup>th</sup> September 2016 and that upon her return to the office is when it was discovered that time had expired.

17. Enlargement of time is in the discretion of the court as stipulated in Order 50 Rule 6 of the Civil Procedure Rules.

18. In Judicial Review proceedings, time is of essence and any delay on the part of the party seeking Judicial Review orders loses the discretion of the court.

19. In addition, ignorance in calculating days for filing of documents is ignorance of the legal provisions which is no defence.

20. This court cannot excuse ignorance of clear provisions of the law in calculating the days for filing of the substantive motion, which is not a technical or procedural error, excusing ignorance of how days are calculated is excusing ignorance of the law which the court is not permitted to.

21. From the affidavit of Eunice Mukuvi, it is clear that she has worked with the applicant's advocate for a period of 3 years and not a new clerk.

22. Nonetheless, it is the responsibility of the exparte applicant's counsel to diligently instruct her staff

on how to handle client's matters, in accordance with the law.

23. From the sworn affidavits, I do not find that the applicant's counsel acted diligently. She acted hand's off the matter, leaving it in the control of her clerk and that is the very reason why the two supporting affidavits materially differ on the dates when instructions were given to the clerk to deal with the matter.

24. In addition, in Judicial Review proceedings, although a party is granted a period within which to file the substantive motion upon leave being granted, there is not so much documentation required at the later stage for reasons that the applicant, upon obtaining leave, is only expected to file a notice of motion stipulating the substantive prayers for Judicial Review orders. The supporting documentation are those that are used in applying for leave which are: The statutory statement, the verifying affidavit and exhibits; which need not be replicated save for purposes of service upon the respondents. It therefore follows that the advocate was expected to ensure that by 2<sup>nd</sup> September 2016 when she was extracting the order for leave, the substantive motion is ready for filing, and not to wait until towards the end of the 10 days timeline is when she rushes to file the documents. The conduct of the exparte applicant's counsel does not entitle the applicant the discretion of the court, even if the application was prosecuted exparte after the respondents were served but failed to file any response thereto.

25. Counsels who take instructions from their clients to provide legal representation must act diligently or be prepared to face the consequences of their inaction. It is not in every case that mistake of counsel will be excused because the case belongs to the client who is innocent.

26. Advocates take out professional indemnity insurance covers against professional negligence in the event that their clients claim for damages for professional negligence. This is one of those cases where this court cannot accept the casual manner in which the advocate handled the matter, for the advocate to ride on the discretion of the court.

27. Nonetheless, this is a court of justice and the court shall not allow the conduct of the advocate to fetter its discretion in dispensing justice to the party affected, and who had no role to play in the delay.

28. I have examined the principal complaint by the exparte applicant and note that it relates to his employment with super and soccer, and that the alleged actions by the respondents are likely to adversely affect the applicant's employment and livelihood unless those actions are checked by the court.

29. In addition, I find no prejudice that will be occasioned to the respondents if time for filing of the substantive motion to challenge their impugned decision is granted to the applicant.

30. As the application for enlargement of time was filed without inordinate delay, I hereby allow the application and order that the period originally granted for the filing of substantive motion shall be enlarged by a further 5 days from the date hereof. In default, the order for enlargement lapses. Costs of the application shall be in the cause.

**Dated, signed and delivered in open court at Nairobi this 12<sup>th</sup> day of October 2016.**

**R.E. ABURILI**

**JUDGE**