REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 239 OF 2016

REPUBLIC……..……..……..…..APPLICANT

VERSUS

1. THE KADHI, KIBERA COURT…….1ST RESPONDENT

2. ABDALLA RAMADHAN….……2ND RESPONDENT

EX PARTE: HAWA MOHAMED

RULING

Introduction

1. By a Notice of Motion dated 13th June, 2016, the ex parte applicant herein, **Hawa Mohamed**, seeks the following orders:

> **1. THAT a writ of certiorari do issue for the judgement and orders made in Kadhi's Court at Kibera in Succession Cause number 13 of 2014 – Abdalla Ramadhan vs. Hawa Mohamed on 16th May, 2016 and subsequent thereto by the 1st Respondent herein be brought to this Honourable Court and to be quashed forthwith.**
>
> **2. THAT a writ or order of Prohibition do issue to prohibit the execution of the orders by the 2nd Respondent made in Kadhi's Court at Kibera in Succession Cause number 13 of 2014 – Abdalla Ramadhan vs. Hawa Mohamed made on 16th May, 2016 and subsequent thereto by the 1st Respondent.**
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> **3. THAT the Honourable Court be pleased to make such further orders as it may deem fit.**
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> **4. THAT cost of the application be provided for.**

Ex Parte Applicant's Case

2. According to the Applicant, he was the Respondent in **Kadhi's Court at Kibera in Succession Cause number 13 of 2014 – Abdalla Ramadhan vs. Hawa Mohamed** (hereinafter referred to as "the said case").

3. He averred that on 4th March, 2016 when the said case came up for hearing, the 2nd Respondent's counsel did not come to Court in time and the applicant's advocate applied for adjournment pursuant to

which the Court ordered that the matter mentioned on 12th May, 2016. According to the Applicant, his counsel who was rushing to attend to other duties met with the 2nd Respondent's counsel within the precincts and informed him of the orders of the Court.

4. The applicant was therefore surprised when he was informed by his advocates that they had been served on 3rd May, 2016 with a judgement notice for 12th May, 2016, which was supposed to be a mention date. However, on 12th May, 2016, the Court adjourned the delivery of the judgement to 16th May, 2016 when judgement was delivered in favour of the 2nd Respondent without hearing the applicant or allowing his advocate to cross-examine the 2nd Respondent even after ordering the matter adjourned to 12th May, 2016.

5. It was averred by the applicant that in the said judgement the Court did not consider or refer to his defence which formed part of the Court records. To him this was biased and a breach of the rules of natural justice. That the adjournment was granted, it was averred was clear from the judgement though from the proceedings the order adjourning the case was erased and altered.

6. According to the applicant the hearing of the case in his absence was a gross violation of his rights to a fair hearing hence the proceedings which took place on 24th March, 2016 were null and void ab initio as the same were in excess of jurisdiction.

2nd Respondent's Case

7. According to the 2nd Respondent, apart from giving the history of the cause of action, the applicant persist in her abstentions from Court dates with her advocate giving all sorts of excuses securing several adjournments of the matter at the applicant's behest. It was averred that when the presiding Kadhi had had enough of the applicant's charade, he directed the parties to file written submissions which was done but before the judgement could be delivered the applicant's advocates applied to arrest the same which application the 2nd Respondent conceded to and it was agreed that the parties be heard on evidence.

8. It was averred that after several procrastinations on behalf of the applicant on 3rd March, 2016, a hearing date was fixed for 24th March, 2016 on which date the applicant did not turn up and her advocate sought to adjourn the matter by misleading the Kadhi that the witnesses were absent despite the 2nd Respondent being present outside the Court.

9. On coming across the 2ndRespondent's advocates, the applicant's advocate declined to return to Court. It was thereafter that the 2nd Respondent's advocate requested the Kadhi to peruse the Court file and upon doing so the Kadhi, based on the applicant's previous conduct decided that the matter proceeds ex parte.

10. After taking the evidence, it was averred, that the Kadhi directed that parties do file written submissions which directions the applicant did not comply with and no action was taken until after the judgement when the applicant applied to arrest the judgement but the application was refused. It was that refusal that provoked these proceedings.

11. In the 2nd Respondent's view, the Kadhi, faced with a rogue litigant, proceeded with the only option available and therefore his action was neither arbitrary, oppressive, irrational, unreasonable and/or biased.

12. It was further contended that the Motion herein was filed outside the period directed by the Court hence was null and void.

Determinations

13. I have considered the application, the affidavits filed, the preliminary objection, the submissions on record as well as the authorities relied upon.

14. Since the 2nd Respondent has raised the issue of the competency of the application, it is only right that I dispose of the same first.

15. On 25th May, 2016, the Court granted leave to the applicant to commence judicial review proceedings and directed the applicant to file and serve the substantive Motion within 14 days from that date. Based on my calculations, the Motion ought to have been filed and served by latest 8th June, 2016. The Motion was, however filed on 14th June, 2016 which, as the 2nd Respondent rightly points out, was 6 days out of time.

16. 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.***

17. 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].

18. 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.

19. 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].

20. Although the ex parte applicant seemed to have been of the view that she was entitled to 21 days within which to file their substantive Motion notwithstanding directions to the contrary, she ought to 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. The Court's role in preventing abuse of its process is even greater in public law litigation where the delay in disposing of such matters on occasion has the effect of stalling or delaying administration of justice. As was held by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: "***Speed and promptness are the hallmarks of judicial review.***"** Judicial review, it has therefore been held**,** acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**

21. Therefore whereas under the **Civil Procedure Rules** prescribe 21 days within which a Motion is to be filed, nothing stops the Court from prescribing a lesser period which period is, of course, subject to extension on good cause.

22. This position was similarly appreciated in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** where the learned Judge pronounced himself as hereunder:

> ***"The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and***
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> ***Fulham (Respondents) and Other Exparte Burkett &***
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> ***Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,***
>
> > ***"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision…But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."***

23. 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.

24. In my view a party cannot adopt its own procedure which is contrary to the Court's directions and rely on the same to seek favourable orders. Judicial review being discretionary, a party who approaches the Court with unclean hands does not deserve such discretionary remedies.

25. 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".**

26. 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.

27. In this case, the applicant instead of showing why the Motion was not filed in time has taken the incorrect and an untenable position that she was entitled to file the Motion within 21 days despite the express directions of the Court. Based on that incorrect position she did not even bother to apply for enlargement of time. Yet she seeks that this Court should ignore its order stipulating the period within which she was 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. I hold the view that whereas 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, where there is none and where in fact the applicant adopts an incorrect position of the law to justify her inaction, such omission cannot be excused.

28. 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."**

29. 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 applicant had the option of moving the Court to extend time or seeking to regularise the record where the Motion had been filed. By failing to exercise any of the available options the applicants disentitled herself to the favourable exercise of discretion.

30. In the result I find that the Notice of Motion dated 13th June, 2016 is incompetent and these proceedings are misconceived. In light of that finding it would be unnecessary and futile to deal with the merits of the case.

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

Dated at Nairobi this 19th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:.

Mr Makokha for Mr Orina for the 2nd Respondent

CA Mwangi