



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 316 OF 2008

**IN THE MATTER OF AN APPLICATION BY MOHAMUD MUHUMED SIRAT FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE
MINISTER FOR IMMIGRATION AND REGISTRATION OF PERSONS AND THE
HONOURABLE ATTORNEY GENERAL**

AND

IN THE MATTER OF THE IMMIGRATION ACT, CAP 172 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF THE REGISTRATIONS OF PERSONS ACT, CAP 107 OF THE LAWS
OF KENYA**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26, OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER LIII OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

**HON. OTIENO KAJWANG', THE MINISTER FOR IMMIGRATION AND REGISTRATION
OF PERSONS.....1ST RESPONDENT**

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Applicant/Interested Party's Case

1. By a Chamber Summons dated 1st July, 2014, the applicant in this ruling who was the interested party in the main application, **Abdirahman Ali Hassan** seeks the following orders:
 1. **THAT, this application be certified urgent and service be dispensed with in the first instance.**
 2. **THAT, there be a stay of execution of the Ruling on Taxation dated 2nd July 2010 pending the hearing and determination of this application or until further orders of this Honourable Court.**
 3. **THAT, this Honourable Court be pleased to grant the Interested Party leave to file its Reference from the decision of the Taxing Officer dated 2nd July 2010 out of time.**
 4. **. THAT, the costs of this application be awarded to the Interested Party.**
2. The application supported by an affidavit sworn by the interested party/applicant on 1st July, 2014.
3. According to him, Judgment was delivered in this matter by **Justice Dulu** on **9th October 2009** where the Ex-parte Applicant was awarded costs of the suit and he was condemned to pay one third (1/3) of the costs.
4. Pursuant thereto the Ex-parte Applicant filed its Bill of Costs dated **1st February 2010** on **4th February 2010** and a ruling thereon delivered on **2nd July 2010**.
5. He however deposed that despite requests by his Advocates on record dated **5th July 2010** and **6th August 2010**, the Taxing Officer did not provide the reasons for his ruling. His advocates however filed a reference on the decision of the Taxing Officer on **9th December 2010** premised on *inter alia* the grounds that the failure of the Taxing Officer to furnish reasons for his decision is a proper ground for lodging a competent reference against such a decision and for setting aside the decision of the Deputy Registrar and he was granted ex-parte orders for stay of execution on **10th December 2010**. The taxing master thereafter provided reasons for the taxation in **August 2011**, eight (8) months after the filing of the reference.
6. It was deposed that thereafter, the *Ex-parte* Applicant filed an application dated **14th February 2012** to set aside the *ex-parte* orders granted to the Interested Party on **10th December 2010** and in his ruling dated **18th December 2012**, **Justice Korir** dismissed the *Ex-parte* Applicant's application and directed the Interested Party to set the application dated **9th December 2010** down for hearing.
7. Upon hearing the Interested Party's reference dated **9th December 2010** the same was struck out in a Ruling by this dated **13th November 2013** on the grounds *inter alia* that it was incompetent for being filed way out of the fourteen (14) days period stipulated under **Rule 11 of the Advocates (Remuneration) Order**.
8. It was the interested party's case that the delay in filing this application was occasioned by the fact that his Advocates on record only received the Ruling delivered on **13th November 2013** and certified copy of the Order on **13th February 2014** as the file could not be traced in the Registry.
9. By a letter dated **26th June 2014**, the Ex-Parte Applicant's Advocates, M/s Kilonzo & Company Advocates, demanded payment of **Kshs. 383,283.70**, being a third of the party and party costs awarded by the Taxing Master, failure to which, they would institute legal proceedings to recover the amount from the Interested Party.
10. The interested party deposed that due the demands of his office as Senator, Wajir County and deputy Minority leader in the Senate coupled with frequent travel out of Nairobi and abroad he was only able to avail himself recently to swear this affidavit. It was however his view that no

prejudice will be occasioned to the Applicant/Respondent if this application is allowed and the Reference allowed to proceed on merit. He however was of the view that the Reference would be rendered nugatory unless a stay of execution is granted and in the premises it was in the interests of justice that the prayers sought in the application be granted as prayed.

Ex Parte Applicant's Case

11. In opposing the application, the ex parte applicant filed the following grounds of opposition:

- 1. THAT the application has been brought after unreasonable delay.**
- 2. THAT the ruling of the court giving rise to the application was given on 13th November 2013.**
- 3. THAT the court gave notice of the Ruling on 11th October 2013.**
- 4. THAT the Applicant obtained the order of the court dated 13th November 2013 on 13th February 2014.**
- 5. THAT no explanation is given for failure to take action between 13th February 2014 and 1st July 2014 a period of 138 days.**
- 6. THAT no action was taken by the Advocates of the Applicant until demand was issued to him on 26th June 2014 to meet his part of the costs.**
- 7. THAT the application dated 1st July 2014 is *res judicata*.**
- 8. THAT the application is a backdoor attempt to appeal from the ruling of 13th November 2013.**
- 9. THAT the only remedy available to the Applicant after 13th November 2013 was an appeal. The window for appeal has closed.**
- 10. THAT litigation must come to an end.**
- 11. THAT the Respondent is entitled to the costs of the proceedings.**
- 12. THAT the Respondent will suffer prejudice should the application be allowed.**
- 13. THAT the Chamber Summons dated 1st July 2014 will only serve to unfairly delay the Respondent's enjoyment of the fruits of his judgment.**
- 14. THAT extension of time is granted in the exercise of the court's discretion.**
- 15. THAT there are no circumstances that merit the exercise of the court's discretion**

12. Apart from the said grounds, the ex parte applicant filed a replying affidavit sworn by **Jenipher Makobu**, an advocate of the High Court practising in the firm of **Messrs Kilonzo & Company Advocates** on 18th July, 2014.

13. According to the deponent, she was the advocate defending the applications dated 21st October 2010 and 9th December 2010 on behalf of the Respondent when the matters came up for oral submissions on 11th October 2013 and after listening to submissions the court reserved ruling for 13th November 2013 when the Applicant's application dated 9th December 2010 was dismissed in

the presence of counsel for the Applicant.

14. It was deposed at by a letter dated 10th March 2014 they forwarded a copy of the draft order to the Advocates for the Applicant and the Attorney General by which time the Advocates for the Applicant had already obtained the certified copies of the order of the court on 13th February 2014.

Determinations

15. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.
16. The first issue for determination is whether this application is *res judicata*. In the case of **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

“The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit”.

17. The Court of Appeal in **Uhuru Highway Development Limited vs. Central Bank Of Kenya Limited & 2 Others Civil Appeal No. 36 Of 1996** held that a rejection of a petition does not determine the rights of the parties and that must be so since a rejected petition is like a struck out appeal as opposed to a petition dismissed after a full hearing. To the Court, In order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.

18. In **Abbas G Essaji vs. Gordhan Dewji Solanki Dar-Es-Salaam Hmcc No. 40 of 1967 [1968] EA 218**, Georges, CJ expressed himself as follows:

“Where the court has no jurisdiction to entertain the appeal, what is before it is abortive and not a properly constituted appeal at all and what the court ought to do in such case is to “strike out” the appeal as being incompetent, rather than to have it “dismissed”; for the latter phrase implies that a competent appeal has been disposed of, while the former implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used; and since the earlier matter was capable of being dismissed, that is to say, of being treated as being properly before the court, each must be treated as if it had been struck out, which in effect it was. Since the earlier appeal was incompetent, there was no ‘res’ before the Court capable of being ‘judicata’.” See also **Ngoni-Matengo vs. Alimohamed Osman [1959] EA 577**.

19. I also associate myself with the decision of Maraga, J (as he then was) in **Lawi Duda & Others vs. Bamburi Cement Limited [2006] eKLR** that:

“In this case, however, having perused the ruling of the Commissioner of Assize I am satisfied that the matter is not *res judicata*. This is because the application was not decided on its merits. A matter is not *res judicata* if it has not been decided on its merits...A matter is *res judicata* when it has been heard and finally decided. And a matter is ‘heard and finally decided’ when the court which has heard it has ‘exercised its judicial mind on’ the matter in controversy after it has heard arguments, considered it and come to a decision on it.”

20. Therefore this application is not *res judicata* for two reasons. The first application was not heard and determined on merits. Secondly, the orders being sought herein were not the same orders sought in the earlier application and could not have been sought therein.
21. That this Court has the jurisdiction to extend time for filing a reference is not in doubt. This position was reaffirmed in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** where it was held the court has unfettered discretion under sub paragraph (4) of rule 11 of the Advocates Remuneration Order to extend time prescribed by sub paragraph (1) and (2) of the same rule within which to give notice of objection to the decision on taxation and to file a reference to a Judge in respect of such taxation. In fact that Court appreciated that the law is not that the High Court is only vested with inherent power and jurisdiction to prevent abuse of the Court process or to further the ends of justice only in matters falling within the ***Civil Procedure Act*** and ***Rules*** but that the Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court's inherent power does not lie in section 3A of the Civil Procedure Act but in the nature of the High Court as a Superior Court of judicature.
22. In the said Court 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.
23. In this case the reasons for the delay are placed squarely on the doorstep of the Court in failing to supply the reasons for the decision in time and also the act that the Court could not be traced. The ex parte applicant has not contested these facts. Accordingly I find that there was a satisfactory reason for the delay. On the issue of the merits of the contemplated action, no attempt has been made to show the grounds upon which the intended reference will be based. However, taking into account the fact that the interested party had attempted unsuccessfully to file a reference I am prepared to give him the benefit of doubt on this issue. On prejudice or whether the respondent can be compensated I am satisfied that appropriate orders can be made to secure the ex parte applicant's interests.
24. The interested party is however seeking stay. In support of that limb, it was asserted that unless the stay is granted the reference may be rendered nugatory. No attempt was made to expound on that aspect. It must always be noted that the burden is always on the applicant to explain why it believes that unless a stay is granted the success of the intended action is likely to be rendered nugatory or that he stands to suffer substantial loss.
25. However, considering the fact that the ex parte applicant did not take up the issue I grant prayers 2 and 3 of the Chamber Summons dated 1st July, 2014 on the following conditions:
1. **That the reference shall be filed and served within 14 days.**
 2. **The interested party shall within the same period pay to the ex parte applicant Kshs 200,000.00 being part of the taxed costs.**
 3. **In default the application shall be deemed to have been dismissed with costs.**

G V ODUNGA

JUDGE

Dated at Nairobi this 23rd day of January, 2015

E OGOLA

JUDGE

Delivered in the presence of:

Mr Ogeto for Miss Kethi Kilonzo for the ex parte Applicant

Cc Teresa