REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 99 OF 2014

REPUBLIC ....APPLICANT

VERSUS

CENTRAL BANK OF KENYA........................RESPONDENT

Ex-parte

FINERATE FOREX BUREAU LTD

RULING

Through the notice of motion application dated 4th March, 2014 the Applicant, Finerate Forex Bureau Limited asks this Court to enlarge the time to enable it to apply for an order of certiorari to quash the Central Bank of Kenya's decision contained in Gazette Notice No. 11988 published in the Kenya Gazette on 23rd August, 2013. The Central Bank of Kenya is the Respondent in the matter.

The application is supported by an affidavit sworn on 28th February, 2014 by the Managing Director of the Applicant, Alfred N. Mwaniki. The application is opposed by the Respondent by way of a replying affidavit sworn on 29th May, 2014 by Elizabeth Mbugua, the Manager in Charge of Forex Bureau Surveillance.

From the documents filed in Court, it is apparent that the decision the Applicant seeks to challenge was published in the Kenya Gazette on 23rd August, 2013. The instant application was filed in Court on 12th March, 2013.

An application for leave to apply for an order of certiorari should be made within six months from the date of the impugned decision – see **Order 53 Rule 2** of the **Civil Procedure Rules, 2010**. This rule is a replica of **Section 9(3)** of the **Law Reform Act, Cap 26** which states that:

> **"In the case of an application for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."**

The **Interpretation and General Provisions Act, Cap 2** which provides for interpretation of statutes addresses the issue of time through **sections 57, 58** and **59.**

Section 57 provides for computation of time as follows:

> **"57. Computation of time**
>
> **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;**
>
> **(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;**
>
> **(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;**
>
> **(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."**

Section 58 then proceeds to provide for situations where no time is prescribed in the following words:

> **"58. Provisions where no time prescribed**
>
> **Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises."**

At **Section 59** guidance is given on the exercise of power to enlarge time. It is stated that:

> **"59. Construction of power to extend time**
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> **Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed."**

Looking at the cited provisions, it is clear that **Cap 2** only provides for enlargement of time where the statute expressly allows for extension of time. Section **9** of the **Law Reform Act, Cap 26** does not provide for enlargement of time.

The law governing enlargement of time is found in **Order 50** of the **Civil Procedure Rules, 2010**. **Rule 4** states:

> **"Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:**

Provided that this rule shall not apply to any application in respect of a temporary injunction."

This rule cannot however supersede **Section 9(3)** of the **Law Reform Act, Cap 26** which is a statutory provision.

The question as to whether the time for seeking leave to apply for orders of certiorari can be extended was addressed in the case of **AKO v SPECIAL DISTRICT COMMISSIONER KISUMU AND ANOTHER [1989] KLR 163** where the Court of Appeal considered the import of **Section 9(3)** of the **Law Reform Act, Cap 26** and concluded that:

> **"It is plain that under sub-section (3) of Section 9 of Law Reform Act Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of Section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of sub-section (3) of section 9 of the Law Reform Act."**

It is clear from the decision of the Court of Appeal that the time for seeking leave to apply for an order of certiorari cannot be enlarged. An application for leave must therefore be made within six months from the date of the impugned decision. The purpose of this rule is to ensure that any person who desires to challenge an administrative action or decision should do so promptly. Public organisations are not supposed to be unnecessarily held back by challenges to their decisions. Even where an application is brought within the statutory period and it discloses meritorious grounds for the grant of judicial review orders, the orders can still be denied if there is evidence that the person seeking the orders sat on his rights and failed to seek relief in good time and with due diligence

Whoever wants to challenge the action of a public body is therefore expected to move to court promptly once the decision is made. The reasons for the need to move with speed were well explained by Lord Hope of Craighead in **REGINA v. LONDON BOROUGH OF HAMMMERSMITH AND FULHAM (RESPONDENTS) AND OTHERS EX PARTE BURKETT AND ANOTHER (FC) (APPELLANTS) [2002] UKHL 23** when he opined that:

> **"On the other hand it has repeatedly been acknowledged that applications in such cases should be brought 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* 2AC 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; see also *R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell [1990]* 2AC 738. 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:**
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> > **"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."**
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> **In Ex p Caswell [1990] 2AC 738,749-750 Lord Goff of Chieveley said that he did not think that it would be wise to attempt to formulate any precise definition or description of what**

> **constitutes detriment to good administration. As he pointed out, interest in good administration lies essentially in a regular flow of consistent decisions and in citizens knowing where they stand and how they can order their affairs. Matters of particular importance, apart from the length of time itself, would be the extent of the effect of the relevant decision and the impact which would be felt if it were to be reopened."**

The Applicant before me slept on its rights and this Court cannot come to its aid. In the circumstances of this case, I find that the application before this Court has no merit. The application is therefore dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 26th day of February , 2015

W. KORIR,

JUDGE OF THE HIGH COURT