REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

MISCELLANEOUS APPLICATION JR NO. 391 OF 2014

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE ADVOCATES ACT

IN THE MATTER OF AN APPLICATION BY GILBERT HEZEKIAH MIYA FOR JUDICIAL REVIEW BY

WAY OF THE ORDER OF CERTIORARI DIRECTED TO THE ADVOCATES DISCIPLINARY COMMITTEE

BETWEEN

GILBERT HEZEKIAH MIYA.....APPLICANT

AND

ADVOCATES DISCIPLINARY COMMITTEE.....RESPONDENT

RULING

1. By a Notice of Motion filed herein on 27th October, 2014, the *ex parte* applicant herein, **Gilbert Hezekiah Miya,** substantially seeks an order of certiorari to remove into this Court and quash the decision made by the Respondent requiring charges against **Bernard Mung'ata Muteti** be dismissed and an order of certiorari to remove into this Court and quash the decision by the Respondents requiring them to quash their decision requiring that one **Bernard Mung'ata Muteti** not to refund Kshs 4,400,000.00 being the amount paid to him to complete the sale transaction together with 10% interest.

2. However by his chamber summons dated 13th October, 2014, the *ex parte* applicant only applied for leave to apply for the first prayer. Apart from that the second prayer seems to have been directed at the Respondents to quash their own decision rather than to this Court to quash the same. Whether the

Respondents have power to quash their own decision is a power that is unknown to this Court.

3. Before the application could be heard, the interested filed a Notice of Preliminary Objection dated 4th December, 2014 in which it was alleged that the application is time barred as it was filed six (6) months after the Judgement which was delivered on 3rd March, 2014 and it therefore offends the provisions of Order 53 rule 2 of the ***Civil Procedure Rules***; hence the application is fatally defective, hopelessly misconceived, misdirected and misleading.

4. In support of the preliminary objection **Mr Nzuba**, learned counsel for the interested party submitted that the application is time barred as it was filed on 14th October, 2014, 6 months after judgement sought to be quashed had been delivered on 3rd March, 2014, contrary to Order 53 rule 2 of the said Rules. In his view the 6 months' period lapsed on 3rd September, 2014.

5. Although the applicant contended that they were issued with the judgement in 24th April, 2014, it was submitted that from the record, the judgement was delivered on 3rd March, 2014 hence the application is incompetent and ought to be dismissed with costs.

6. In support of the said submissions learned counsel relied on the case of **Kimanzi Mboo vs. David Mulwa Civil Appeal No. 233 of 1996** cited in **Justus Makhande Ioli & Another vs. Loice Alili Omboto & 3 Others [2013] eKLR**.

7. The objection was supported by **Mr Kiongera**, learned counsel for the respondent who apart from associating himself with the interested party's submissions, contended that the provisions of Order 53 as read with section 9 of the ***Law Reform Act*** are mandatory that an application for leave must be made within 6 months of the date of the judgement sought to be quashed.

8. In the instant case, it was submitted that the application ought to have been made by latest 4th September, 2014. In his view even if the applicant was issued with the judgement later, it was submitted that the position would remain the same as the provisions are mandatory. In support of the submissions, learned counsel relied on **Joseph Gathumbi vs. Mwea Division Land Disputes Tribunal & 2 Others [2013] eKLR** and **R vs. Githunguri Land Disputes Tribunal [2003] eKLR**.

9. In opposing the objection, **Mr Change** for the ex parte applicant submitted that the application does not offend the provisions of Order 53 Rule 2 of the ***Civil Procedure Rules*** which talks about the application being brought not later than 6 months from the date of the proceedings. In his view, in this case the date of the proceedings was 14th October, 2014 and not 3rd March, 2014.

10. It was submitted that on 3rd March, 2014, the parties were informed that the applicant's application had been dismissed and that was all. It was submitted that the reason for the dismissal of the application was not brought to the attention of the parties till the judgement was given to the parties and the reason was that there were no submissions on record.

11. It was submitted that as the applicant was not aware of this reason, the 3rd day of March was not the last day of the proceedings as the applicant was not aware of the reasons for the decision.

12. This court was therefore urged to look at the matter on case to case basis. This court was urged to invoke the provisions of section 1A and 1B of the ***Civil Procedure Act*** (the overriding objective) to ensure that justice is delivered in every case. As the applicant contends that he has never been afforded an opportunity of being heard, this Court was urged to consider do justice to the applicant.

13. It was contended that throwing out the applicant at this stage would occasion great injustice to the applicant hence the Court ought to do justice by dismissing the objection.

14. Section 9(3) the ***Law Reform Act***, Cap 26 Laws of Kenya provides:

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.

15. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve millions and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.**

16. In **Republic vs. The Minister For Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** it was held that legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.

17. In **Raila Odinga & 6 Others vs. Nairobi City Council Nairob**

18. HCCC No. 899 of 1993; [1990-1994] EA 482, it was held:

"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s. 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads "unless the High Court considers that there is good reason for extending the period within which the application shall be made" is ultra vires section 9(2) of the Act. *Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose*…As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred." [Emphasis mine].

19. It is therefore clear that applications for judicial review must be commenced within 6 from the date

when the ground for the application arose. The law does not state that the application be made from the date when the applicant became aware of the decision or when the decision was issued to the parties. As to whether time may be extended in the former situations is moot. This Court is however of the view that it is high time the provisions of Section 9 of the ***Law Reform Act*** were amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period. Whether the Court would be entitled to "read in" a provision for extension of time in line with the new Constitutional dispensation, is outside the scope of this decision since the matter before me is not an application for extension of time.

20. The Court is however, of the opinion that in order to uphold the values of the Constitution, the Court would be perfectly entitled where an Act of Parliament exhibits certain deficiencies which make it insufficient to properly realise the Constitutional aspirations to "read in" the omitted words so as to bring the Legislation in line with the Constitutional aspirations without the necessity of declaring the Legislation unconstitutional. This remedy was invoked by the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others vs. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17.**

21. In **Roodal vs. State of Trinidad and Tobago [2004] UKPC 78,** the majority in the Privy Council cited with approval the South African case of **State vs. Manamela [2000] (3) SA 1** in which it was held:

> **"Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential".**

22. The applicant has however contended that the date of the proceedings is the date when the decision was made available to him since the Respondent only pronounced the decision without reasons and availed the reasons later. That brings to fore the effect of pronouncing a decision and furnishing reasons therefor at a later date. In **John F Hogan and Others vs. Homi D Adrianwalla Civil Appeal No. 28 of 1965 [1965] EA 594**, the East African Court of Appeal expressed itself as follows:

> **"'Judgement' in the Appellate Jurisdiction Ordinance, 1961, Tanganyika, is not given the restricted meaning as in the Indian Civil Procedure Code, and while the definition is obviously not exclusive, applying the *"noscitur a sociis"* principle of interpretation, that it can include any acts which determine an issue and certainly not mere reasons which explain why a particular decision was given, the reasons for the decision given are, therefore, not a decree, order, judgement, decision or finding of the High Court as set out in section 7(1) of the Appellate Jurisdiction Ordinance and it is this Ordinance which gives and governs the right of appeal from the High Court of Tanganyika in this court and not the Civil Procedure Code of India…Therefore the decision against which an appeal lies in this case is the decision of April 7 as this was a definite finding of the court and comes within the purview of section 7(c) of the Appellate Jurisdiction Ordinance, 1961. The further statement of April 28 was in fact only an explanation given by the learned judge to support and fully set out his reasons for the ruling that he gave on April 7, and no further legal significance can be attached to this statement. To hold otherwise would mean that the same decision was given on two different dates and there would be different periods within which an appeal against the same decision would lie, and this period might be extended indefinitely if for instance the judge delayed giving his reasons or chose to file a further amplification of the reasons of his original, and, in fact the only decision on this matter."**

23. It therefore follows that the relevant date for the purposes of the impugned proceedings is the date when the decision was made and not the date when the reasons thereof were furnished or made available to the *ex parte* applicant.

24. Section 9(3) of the ***Law Reform Act***, talks of "*the date of that judgment, order, decree, conviction or other proceeding****".*** It does not talk about the date of "issuance" of the "*judgment, order, decree, conviction or other proceeding"*. In paragraph 19 of the verifying affidavit the applicant deposed that:

> ***"…on the 3rd of March, 2014 the Advocates Disciplinary Committee delivered judgement disallowing the vendor's advocate from paying out the above sums as well as discharging the advocate from all complaints levied against him by the applicant."***

25. The application for leave was however filed on 14th October, 2014. Pursuant to section 9(3) aforesaid, the said application ought to have been filed by 3rd September, 2014. It follows that these proceedings were clearly commenced outside the 6 months' statutory mandated period. Failure to adhere to the provisions of an enactment cannot in my view be treated as a procedural technicality so as to be capable of being cured by Article 159(2)(d) of the Constitution. Where a particular cause of action is declared to be barred by limitation, the Court would lack jurisdiction to entertain the matter unless there is provision for extension of time and time has been extended. Article 159(2)(d) of the Constitution in my view requires the Court to determine the rights of parties without undue regard to procedural technicalities. It does not confer rights or revive rights which have been extinguished by statute.

Order

26. In the result, these proceedings are incompetent and are struck out with costs.

Dated at Nairobi this 12th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kiongera for the Respondent

Cc Patricia