



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL 199 OF 2014

MICHAEL JUMA OTIENO.....APPLICANT

VERSUS

EXECUTIVE DIRECTOR NON-GOVERNMENTAL

ORGANIZATIONS CO-ORDINATION BOARD.....RESPONDENT

RULING

1. By the Notice Motion dated 30th October, 2014 and filed herein on even date the Applicant seeks an order for enlargement of the time limited for applying for an order of certiorari to remove the proceedings and order of the Respondent for purposes of it being quashed.

2. The application which is expressed to be made under **Order 50 Rule 6** of the Civil Procedure Rules and **Sections 3 and 3 (a)** of the Procedure Act is premised on the following grounds:

(a) That the time-frame for applying for an order of certiorari is statutory limited to six months after the date of proceedings and yet it is now three(3) years from the occurrence of the issue at hand.

(b) That the applicant's failure to file the same on time as a result of the subsistence of KISUMU HCC Misc. Application JR No. 7 of 2011 and subsequently Court of Appeal No. 261 of 2011 which touched on the same subject matter but were dismissed on technicalities on the 19/09/2014 but without addressing the merits of the JR application.

(c) That this application is brought in good faith.

3. The application is supported by the affidavit of the applicant sworn on 30th October, 2014 in which he deposes inter- alia that he is the founder of the Center for Peace and Democracy (CEPAD), its founder Secretary and elected Chairperson during its legally convened election held at Oki Grand Hotel in Bondo on 29th October 2010; that he has the authority and consent of the other eight officers who were also elected on the same day; that immediately after the election they filed returns of the elections with the NGO's Co-Ordination Board which is the Public Agency responsible for registering and co-ordinating NGO'S in Kenya but to-date the Board has not communicated whether it ratified the elections or not; that as a result they filed a case seeking an order to compel the Respondent to register the elected officials but the application (**Misc HCCA No. 7 of 2011**) was dismissed on a technicality; that they appealed but that was dismissed too; that while the application was pending the Respondent maliciously and suspiciously made changes in the officials of CEPAD; that this was done without following the due legal procedure and in fundamental breach of CEPAD's constitution and was aimed at defeating the cause of justice; that such conduct exhibited bias, discrimination, unfairness and dishonesty. He deposes that he

only learnt of the illegal changes when a court injunction was obtained against him by an individual who was illegally registered as CEPAD Secretary; That it is for these aforesaid reasons that he seeks the indulgence of this court to file afresh judicial review proceedings for orders of certiorari and mandamus out of time. He has attached several documents to the affidavit.

4. The application is made *ex parte* and the only issue for determination, in my view, is whether this court can extend the time limited for applications for an order of certiorari. It will be noted that in the Notice of Motion he does not make any mention of mandamus.

5. The law applicable to applications for leave to apply for an order of certiorari is section 9 (3) of the law Reform Act which provides as follows:

“(3) In the case of an application for 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 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.”

As can be discerned from section 8(I) of the law Reform Act judicial review is a special jurisdiction and indeed in a recent decision **Kisumu C/Appeal No. 41 of 2013 Paul Mafwabi Wanyama and the Republic & Another**. it was held that a party ought not to invoke the provisions of the **Civil Procedure Act and Rules**. It stated as follows:-

“ The Judicial review proceedings before the learned Judge, which gave rise to this appeal were therefore special in nature and the learned Judge erred in importing the provisions of the civil Procedure Act and Rules to proceedings governed by the said provisions of the law Reform Act and Order 53 of the Civil Procedure Rules”

6. **Section 9(3)** of the law Reform Act limits the period within which leave to file an application for an Order of certiorari can be brought to six months and makes no provision for extension of time. The applicant in this case has disclosed that he had filed another application which though filed within time was dismissed on a technicality. A perusal of the proceedings of the High Court matter **-Hcc Misc. C/App(JR) NO. 7 of 2011** shows that he sought leave for an order of mandamus on 19/1/2011 and the same was granted on 20/1/2011. The substantive motion did not however go for hearing as an objection was raised that leave had been sought and granted to an entity (CEPAD) which did not have a statement to support the application the said statement having described **Michael Juma Otieno** as the applicant. The court found that the leave granted was faulted. The court found that the error went to substance and was not a mere technicality. This finding was upheld by the court of Appeal which held;_

“ We have therefore no difficulty in finding that the defect in the statutory statement was not typographical or procedural as argued by the applicant.

It went to the root of the entire substantive Notice of Motion. Article 159(2) of the constitution 2010 could not therefore come to the aid of the Appellant.” - (See KSMC/APP No. 2610 of 2011 between center for Peace and Democracy (CEPAD) Board of Directors and Non- Governmental Organizations Co-Ordination Board).

The submission by the applicant and his advocate that the earlier application was dismissed on a technicality is not just wrong but is also a misrepresentation.

7. As to whether this court can extend time I am of the view that it cannot. As I have stated **Section 9 (3)** of the law Reform Act does not make provision for extension of time. Indeed faced with a similar application the then supreme court of Kenya in **Re an application Gideon Waweru Githunguri (1962) EA 520** held as follows:-

“ (I) The rules of court made under Section 9 *ibid*; could not defeat the clear provisions of sub-section (3) of the same section which imposed an absolute period of limitation, so that leave should not be granted unless the application for leave was made not later than six months after the date of the conviction and sentence.

(ii) The application for leave should not have been granted since it was made more than six months from the conviction and sentence.”

That court was ruling on a preliminary objection raised on the ground that the application for leave was time barred under **Section 9** of the Law Reform (Miscellaneous Provisions) Ordinance 1956 which was similar to **section 9 of our Law Reform Act**. We may not be here dealing with a conviction and sentence but in my view the principle is the same. In **Mahaja V. Khufwalo (1983) KLR 553** at page 561 Hancox JA- as he then was, did express the view it could not have been intended that time could not be enlarged. He stated as follows:-

“ Nonetheless I would hesitate to reach a finding that no power of enlargement of time was intended to be given in such cases, for there are instances in which to deprive the applicant of the right to apply therefore would work definite injustice. Unless persuaded by cogent argument to the court contrary I would lean against an interpretation of the Sub-Section which would impose an absolute time limit. I derive support for this view from Republic V. London County Council Ex-Parte Swan & Edgar (1927) Ltd (1929)141 LT at page 591 where the Divisional Court held that the Rules of the Supreme Court did give power to enlarge the time limit set by rule 21 of the Crown Office Rules.”

Hancox JA as he then was, was merely expressing his opinion. The opinion does not however seem to hold away because as I have stated the Court of Appeal has now held that even the time limited for bringing the substantive motion cannot be extended-**Kisumu C/Appeal No. 41 of 2013** between Paul **Mafwabi Wanyama** and the Chairman **Amagoro** land Disputes Tribunal.

8. In the upshot I find that the present application cannot be sustained and dismiss it.

9. The applicant shall bear his own costs.

Dated, signed and delivered at Kisumu this 12 th day of February, 2015.

E.N. MAINA

JUDGE

In the presence of:

Mr. Indimuli for Appellant

Moses Okumu Court Interpreter