



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JR MISC. APPLICATION NO. 46 OF 2013

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL
REVIEW ORDERS UNDER ORDER 53 OF THE CIVIL
PROCEDURE RULES 2010

AND

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

AND

IN THE MATTER OF: MOHAMEDAN MARRIAGE AND
DIVORCE REGISTRATON ACT CAP 155 LAWS OF KENYA

AND

IN THE MATTER OF: KADHI'S COURT AT MOMBASA
CIVIL SUIT NO. 27 OF 2013

AND

IN THE MATTER OF: AN APPLICATION BY KHADIJA
ABDULREHMAN KARAMA FOR LEAVE TO APPLY FOR
ORDERS OF JUDICIAL REVIEW AGAINST THE ORDER AND
DECISION OF THE PRINCIPAL KADHI CONFIRMING
DIVORCE BETWEEN RUMI SALIM PALSHA AND KHADIJA
ABDULREHAMAN KARAMA AND ISSUING DIVORCE
CERTIFICATE

REPUBLIC..... APPLICANT

VERSUS

PRINCIPAL KADHI MOMBASA.....RESPONDENT

EX-PARTE: KHADIJA ABDULREHMAN KARAMA

RULING

By way of this Notice of Motion dated 25th October, 2013 the Interested Party **RUMI SALIM PALSHA** sought *inter alia* the following orders:

“(b) THAT leave granted to the *Ex-parte* applicant herein by this Honourable Court on 17th July, 2013 for her to apply for orders of certiorari and prohibition be set aside.

(c) THAT the order of this court staying the decision and order made on 19th February, 2013 by the Principal Kadhi in Mombasa Kadhi’s Court Civil Sit No. 27 of 2013 be accordingly discharged.

(d) THAT the main petition [motion] said to have filed (sic) by the *Ex parte* applicant on 26th July, 2013 be struck out with costs.

(e) THAT the costs of this application be provided for.”

The genesis of this motion was a chamber summons application dated 17th July, 2013 seeking leave to commence judicial review proceedings against the Chief Kadhi, Mombasa. The order granting leave was made on 17th July, 2013 and the court in addition gave the following directions

“Main petition to be filed and served within 21 days of today’s date”

The main motion was filed on 26th July, 2013 which was **nine (9) days** after leave had been granted. However service was not effected on the Principal Kadhi until 6th August, 2013. This is as per the affidavit of service sworn by one **ESTONE AKUMONYO** on 5th November, 2013. Therefore though the motion was filed within the 21 days allowed by the court, service was not effected until way beyond the 21 days.

This application was disposed of by way of written submissions. Counsel did appear in court on 28th April, 2014 in order to highlight said submissions. The question here is whether the failure to serve the main motion within the 21 days was a ground for setting aside the stay and for striking out the substantive motion. It has been stated severally by legal minds far greater than mine that striking out is a draconian measure which should be reserved for only the most hopeless of cases. Where the possibility to inject life into a suit exists then striking out ought not be an option. The motion was duly filed as required within the 21 days. Had this not been done then the situation would have been different since if the motion was filed after the expiry of 21 days then it would have been deemed to be improperly on record. As it is I find that the motion filed on 26th July, 2013 is properly filed and on record.

The court is guided by Article 159(2) (d) of the Constitution which mandates courts to administer justice without undue regard to technicalities. In my view, failure to effect service within a specified time frame amounts to a procedural technicality. It is not in my view a gross and substantive error. I also take into account the fact that this delay in service has not occasioned prejudice to any party. The interested party has not demonstrated precisely how the late service has prejudiced him. It must be remembered that on 17th July, 2013 when the orders in question were been made the interested party was **not** a party to these proceedings. The delay of service in my view has not been shown to be inordinate or deliberate and therefore ought not lead to the striking out of a motion which is properly on record. For the above reasons I dismiss this present application. Costs in the cause.

Dated and delivered in Mombasa this 15th day of August, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Njenga h/b for Asige for Respondent

Ms. Aruna h/b Mr. Maoso for Applicant

Court Clerk Mutisya