



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISCELLANEOUS CIVIL APP. JR NO. 12 OF 2014
R E P U B L I C
VERSUS
THE GENERAL MANAGER, MOI INTERNATIONAL AIRPORT.....1ST RESPONDENT
THE CHIEF MAGISTRATE'S COURT, MOMBASA LAW COURTS...2ND RESPONDENT
EX PARTE
JARED ADIMO ODHIAMBO
GRACE NASONGO APPLICANTS

RULING

ISSUES

1. The issue for determination by the court is whether the court has discretion to extend time within which a party may file the substantive application for judicial review beyond 21 days prescribed under Order 53 rule 3 (1) of the Civil Procedure Rules and whether the application for judicial review filed herein after expiry of 21 days from the grant of leave may be admitted as being properly on record.

Background

2. The ex parte applicants are toll booth operators and employees of Mason Services Limited which is contracted by the Kenya Airport Authority to collect parking revenue on its behalf. They were separately arrested at the Mombasa airport between 12th March 2014 and 13th March 2014 and charged before the Magistrate's Court at Mombasa with the offence of disobeying a lawful order by the airport manager contrary to section 51 (1) (b) of the Kenya Civil Aviation (Security) Regulations, 2013. They both claimed to have been ignorant of any such order or communication from the airport manager and attributed their arrest to bad blood between the said airport manager (the 1st respondent) and their employer.

3. By an application dated 1st April 2014, the ex parte applicants approached the court under Certificate of Urgency seeking leave to apply for the judicial review orders of certiorari and prohibition against the 1st respondent's decision preventing the applicants from entering Mombasa International Airport and their subsequent prosecution or other enforcement of the said decision, and a further order that the grant of

leave do operate a stay of enforcement of the decisions and further prosecution of the criminal cases against the applicants.

4. On the 2nd April 2014, upon hearing the application for leave the court certified the application as urgent and granted the applicants leave to file for the judicial review orders within 21 days. An order for the grant of leave operating as stay was subsequently made by consent of the parties on 30th April 2014, when the question of leave operating as stay came up for hearing inter parties.

The Notice of Motion

5. The ex parte applicants filed the Notice of Motion on 30th April 2014 pursuant to leave granted by the court on 1st April 2014, seeking the following judicial review orders of certiorari and prohibition, as follows:

“1. AN ORDER OF CERTIORARI to remove to this honorable court and quash the decision by the 1st Respondent dated 12th and 13th day of March 2014 preventing the applicant from entering Mombasa International Airport.

2. AN ORDER OF PROHIBITION to issue prohibiting the respondents or any person acting under their behest from prosecuting criminal cases number 209, 213 and 214 or enforcing the decision of the 1st Respondent made on the 12th and 13th day of March 2014.

3. Costs of this application be provided for.”

The Preliminary Objection

6. The respondents filed a Notice of Preliminary Objection dated 8th May 2014 on the following grounds:

1. The Ex parte Applicants filed the Notice of Motion dated 30th April, 2014 without the leave of the Court in total disregard to established principles governing judicial review proceedings and further in total disregard to the mandatory provisions of Order 53 rule 1 of the Civil Procedure Rules and therefore these proceedings should be struck out.

2. The Notice of Motion dated 30th April 2014 is bad in law, an abuse of the Court process and incompetent, and the same should be struck out.

3. The Notice of Motion dated 30th April 2014 was filed in total disregard to the express order issued by this Honourable Court and the same amounts to contempt of court and therefore this Honourable Court cannot entertain the same.”

Application for extension of time

7. The ex parte applicants sought the extension of time for filing of the Notice of Motion beyond the 21 days prescribed under Order 53 rule 3(1) of the Civil Procedure Rules submitting that the four-day delay was occasioned by circumstances surrounding their need to send the Notice of Motion from their advocates’ offices in Nairobi for filing in Mombasa.

8. The merits of the Notice of Motion dated the 30th April 2014 do not arise for determination at this preliminary stage.

Arguments

9. In support of the preliminary objection, counsel for the 1st respondent urged that the Notice of Motion was incompetent for having been filed outside the 21-day period allowed under Order 53 3(1) of the Civil

Procedure Rules for which there was no provision for extension, in disobedience of the court order granting leave, and without any reason being given for the delay. It was contended that the ex parte applicant may commence a civil suit in the normal way.

10. For the ex applicants, it was acknowledged that the Notice of Motion was filed out of time and extension was sought on the grounds that the delay was a short one of four days, that court had inherent jurisdiction under section 3A, Articles 159 and 165 (7) of the Constitution to extend the time for the filing of the Notice of Motion and that the respondent would not suffer any prejudice if the extension was granted. The ex parte applicant contended that as a striking out of the application would not result in the matter becoming *res judicata*, the applicant may still repeat the Judicial Review procedure, even if time for filing of the Notice of Motion is not extended.

Determination

11. To be sure the Notice of Motion dated and filed on the 30th April 2014 should have been filed by the 23rd April 2014 being 21 days after the grant of leave on the 2nd April 2014, and it was therefore delayed by 7 days and not four days as submitted by counsel for the ex parte applicants.

12. Order 53 Rule 3 (1) of the Civil Procedure Rules provides that when leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by Notice of Motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

13. Although power to extend time is not expressly granted in Order 53 rule 3 on the period for the filing of the Notice of Motion, there must be, consistently with the Article 159 principle of justice without undue regard to technicalities of procedure, inherent jurisdiction to extend the time in the interests of substantial justice. This must be so especially where the time is prescribed not by Statute but by the rules of Court.

14. In *Wanguhu vs Kania (1987) KLR 51, Nakuru Court of Appeal, Civil Appeal No. 101 of 1984* (Hancox, Nyarangi, JJA & Platt Ag JA), it was held that the court has inherent power in it to control its process for the ends of justice and that section 3A of the Civil Procedure Act preserves the inherent powers when there are no rules.

15. Indeed, under Order 50 rule 6 of the Civil Procedure Rules, it is provided for extension of time limited for the doing of any act under the Rules as follows:

“6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

16. The provisions of Order 50 rule 6 of the Civil Procedure Rules reflects the position with regard to statutory authority to enlarge time under section 59 of the Interpretation and General Provisions Act which provides as follows:

“Where in a written law a time is prescribed for an act or taking a proceeding, and the 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 upon expiration of time prescribed.”

17. The decision of the Court of Appeal in *Hunker Trading Company Ltd v. Elf Oil Kenya Ltd (2010)*

eKLR is distinguishable. In that case the Court of Appeal refused to exercise its concurrent jurisdiction to grant a new stay of execution after the applicant had been granted, and had failed to comply with the terms of, a stay by the High Court upon terms that the applicant deposited 50% of the decretal sum within 30 days in default of which the order of stay would lapse. In this case, the ex parte applicant only seeks extension of time to file the Notice of Motion by the same court which granted and is not seeking fresh leave to commence judicial review proceedings before another court.

18. The ex parte applicants herein cannot be accused of seeking to defeat the cause of justice by seeking extension of time to file the Notice of Motion for judicial review, as in the *Hunker* case where the Court of Appeal objected that –

“As the applicant did not appeal against the order of stay on terms and has not challenged it in any way for example demonstrating that it was onerous or unjust but just ignored the order, in our view, the application falls outside the provisions of Rule 5 (2) (b) and section 3 A and is therefore incompetent. The order of stay of execution on terms was subsequent to the decree. In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate, where as in this case, the lower court has exercised a parallel jurisdiction. It must be demonstrated to this court that the jurisdiction of the lower court has not been properly exercised, otherwise, we would be encouraging duplication of effort and poor management of the available resources. The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain the [Overriding Objective] ‘O2’ principle. We would act unjustly if we were to allow it another chance in this court to defeat the cause of justice by failing to obey an important order of the Superior Court.”

19. There is no consensus of judicial opinion with regard to authority to enlarge time and I have noted decisions of the Court taking the view that judicial review is a special procedure to which the regular Civil Procedure Rules do not apply, and that therefore there is no power to enlarge time since it is not provided for under the applicable Order 53 of the Civil Procedure Rules. See for example Nyamu, J. in *Kithome v The District Land Adjudication and Settlement Officer Mwingi District and others* [2006] 1 EA 116 (HCK), holding that it is trite law that the Civil Procedure Rules and the Civil Procedure Act do not apply to judicial review. It was further held in that case that the provisions of Order LIII, rule 3(1) are mandatory and that an application for judicial review must be filed within 21 days, and that there is no provision for extension. See also Angote J. in *Republic v Kahindi Nyafula & 3 others Ex Parte Kilifi South East Farmers Co-Operative* [2014] eKLR; and Emukule, J. in *R vs Nyandarua District Oljoro Orok Division Land Disputes Tribunal & Moses Ndirangu Njuguna ex parte Cyrus Kamau Ng'ang'a, Susan Njoki Ndirangu & Godfrey Kinyori Wamwega*, (2010) eKLR, Nakuru HC Misc. Appl. 505 of 2006 (JR).

20. With respect, I take the view that the substantial justice principle of Article 159 of the Constitution applies to empower the court to enlarge time prescribed for doing any act or taking any step under the procedure rules of the court. In my view, the time prescribed for filing of the Notice of Motion for judicial review orders is a matter of procedure for litigating the judicial review claims and not a rule of substantive law on sustainability, enforceability or justiciability of the claims, and it is, therefore, properly amenable to Article 159 principle.

21. As shown above Order 50 rule 6 of the Civil Procedure Rules contemplates extension of time for purposes of anything prescribed under the Rules without excepting Order 53 of the Rules. Even if the 6-month period for the commencement of judicial review proceedings were taken to be statutorily insulated, by the provisions of section 9 of the Law Reform Act, from the court's power of extension under Order 50 rule 6, the same cannot be said of the 21-day period prescribed only by the Rules.

22. For the reason that the prescription as to time of filing is a matter of procedure rather than substantive ingredient of the right or claim, and consequently subject to Article 159 of the Constitution and Order 50 rule 6 of the Civil Procedure Rules, I agree with the school of opinion that the court has power to extend the 21-day period prescribed by the rules for the filing of the Notice of Motion upon grant of leave under Order 53 Rule 3 (1) of the Civil Procedure Rules. See *R vs City Council of Nairobi & 2 others ex parte*

Alice Wahito Ndegwa & 5 others (2012) eKLR, Nairobi HC Misc. Appl. 7 of 2012; *R vs The Commissioner of Value Added Tax ex parte Iron Art Limited* (2012) eKLR, Nairobi HC JR Misc. Appl. 19 of 2012; *R vs City Council of Nairobi ex parte Wilfred Obiero*, Nairobi HC JR Misc. Appl. of 2012; and *R vs The Commissioner of Value Added Tax ex parte Iron Art Limited* (2012) eKLR, Nairobi HC JR Misc. Appl. 19 of 2012.

23. Even where courts have found that the Order 53 is unaffected by the rest of the provisions of the Civil Procedure Rules, so that reliance cannot be placed on the power to extend under Order 50 rule 6, court have fallen back to their inherent power to ensure justice is done. I particularly concur with the reasoning of Githua J. in *R v. National Environmental management Authority and Anor. ex parte Elizabeth Njeri Hinga and Anor.* (2012) eKLR where the learned judge said:

“It is therefore my finding that since Order 53 Rule 3 (1) is not part of the substantive law governing the conduct of judicial review proceedings, this court can exercise its discretion to extend time within which to file a substantive motion for judicial review even after expiry of the 21 days prescribed under Order 53 Rule 3 (1) under its inherent powers, if it is satisfied that it is fair and just to do so.”

See also W. Korir J. in *R vs City Council of Nairobi & 2 others ex parte Alice Wahito Ndegwa & 5 others* (2012) eKLR, Nairobi HC Misc. Appl. 7 of 2012.

24. Moreover, even with regard to enlargement of the 6 months period prescribed by statute for commencing judicial review proceedings under section 9(3) of the Law Reform Act and Order 53 of the Civil Procedure Rules - which is not in issue here - I have noted the decision of Emukule, J. in *Apex Finance International Ltd & Anor. v Kenya Anti-Corruption Commission* (2012) eKLR upholding the court’s discretion. I agree with the learned judge that the court has authority to enlarge time for the filing of judicial review proceedings even after expiry of the 6 months period in appropriate cases especially cases of nullity or illegality. *A fortiori*, the court has discretion to enlarge the 21-day period for the filing of the Notice of Motion upon grant of leave to commence judicial review proceedings which is sought and granted within six months of the impugned decision.

25. In exercising the discretion to enlarge time in this case, I have taken into account the fact that the delay was a short one, seven days by my calculation, and that the Notice of Motion has already been filed and no further delay will arise. From the explanation by counsel for the ex parte applicant, I am not prepared to hold that there were no good reasons given for the delay. I have further considered that declining the Notice of Motion dated 30th April 2014 which is already filed and thereby compelling the ex parte applicants to file a civil suit or to repeat the judicial review process from the beginning, will only escalate the cost in time and money for the parties, contrary to the overriding objective of the civil process under section 1A of the Civil Procedure Act and the substantial justice principle of Article 159. I will, therefore, grant the enlargement of time sought by seven days so that the Notice of Motion dated and filed on 30th April 2014 is deemed to have been filed within time and properly on record.

Orders

26. Accordingly, for the reasons set out above, I grant the ex parte applicants an extension of the time for the filing of the Notice of Motion in these judicial review proceedings to the effect that the Notice of Motion dated 30th April 2014, which was filed outside the 21-day period since grant of leave to commence judicial review proceedings as prescribed under **Order 53 Rule 3 (1)** of the Civil Procedure Rules, is deemed to be properly before the Court.

27. In accordance with the Proviso to Order 50 rule 6 of the Civil Procedure Rules, the ex parte applicant, being guilty of default in compliance with the rules of the court and thereby making the present proceedings for striking out and extension of time necessary, will pay to the respondents the costs both of the preliminary objection and the application for extension of time. The Notice of Motion dated 30th April 2014 for judicial review orders of certiorari and prohibition will therefore proceed to hearing on a date to be fixed in consultation with the parties.

Dated, signed and delivered on the 22nd September 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Applicants

Ms Fwaya for Mr. Wafula for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the DPP

Ms Linda - Court Assistant