REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILLIMANI LAW COURTS

Judicial Review 7 of 2012

ALICE WAHITO NDEGWA .....1ST APPLICANT

CALEB KEPTEN .....2ND APPLICANT

JACK TUMWA .....3RD APPLICANT

KENNEDY KUBASU .....4TH APPLICANT

KENNEDY DENDE .....5TH APPLICANT

JANE W NGANGA .....6TH APPLICANT

VERSUS

THE CITY COUNCIL OF NAIROBI .....1ST RESPONDENT

THE ARCHDIOCESE OF NAIROBI

KENYA REGISTERED TRUSTEES .....2ND RESPONDENT

PROVIDENCE SISTERS FOR

ABANDONED CHILDREN .....3RD RESPONDENT

RULING

In these judicial review proceedings the ex-parte applicants are Alice WahitoNdegwa, Caleb Kepten, Jack Tumwa, Kennedy Kubasu, Kennedy Dendeand Jane W Ng'ang'a. The City Council of Nairobi is the 1st respondent whereas the Archdiocese of Nairobi Kenya Registered Trustees and Providence Sisters for Abandoned Children are the 2nd and 3rdrespondents respectively. This ruling is in response to the ex-parte applicants' notice of motion dated 15th May, 2012 brought under Section 95 of the Civil Procedure Act, and Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. The prayers in the application are:-

"1. THAT the court do hereby extend the time within which the application dated 23rd February, 2012 was filed.

2. THAT the application be deemed to be filed within time.

3. THAT costs of and occasioned by this motion be in the cause."

The application is supported by grounds on its face and an affidavit sworn on 15th May, 2012 by Willis Oluga, an advocate of the High Court of Kenya. Briefly, the ex-parte applicants argue that the substantive notice of motion was not filed within the statutory period of 21 days because Mr. Willis Oluga the advocate who had obtained leave to file judicial review proceedings had the mistaken impression that the filing of the substantive notice of motion would only be done once the application for stay of proceedings was heard inter-partes and dispensed with. The ex-parte applicants therefore submit that the mistake of their counsel should not be visited upon them and the court should enlarge time within which to file the substantive notice of motion.

The 2nd respondent opposed the application through grounds of opposition dated 12th July, 2012 whereas the 3rd respondent opposed the same through grounds of opposition dated 9th July, 2012 and a replying affidavit sworn by Sr. Lettekidan Kidanmariam Tesfa on the same date. The 1st respondent did not file any document in opposition to the motion but its advocate opposed the application on grounds of law at the hearing.

The main ground in opposition to the notice of motion is that the same is incompetent, bad in law and incurably defective. The respondents argue that the application is brought under the wrong rules since this being a judicial review matter the only applicable laws are sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

It is now well established that judicial review proceedings are of a special jurisdiction governed by sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. Bringing any application in judicial review proceedings under any other rules of the Civil Procedure Act or any other statute may not be appropriate. Whenever a party wishes to bring an application not provided for under Order 53 of the Civil Procedure Rules or the relevant sections of the Law Reform Act the best way to do so is to bring it under the inherent jurisdiction of the court.

However, the fact that a party has cited other rules and statutes in bringing an application within judicial review proceedings should not render the application fatally defective. After all, justice should be done without undue regard to technicalities **(Article 159 (2) (d) of the Constitution).** I will therefore not dismiss the ex-parte applicants' application merely because the wrong provisions of the law have been cited. It cannot be doubted that through the application before the court the applicants are asking the court to exercise its inherent jurisdiction.

The remaining question therefore is whether this court should enlarge time for filing the substantive notice of motion. I am of the view that time can be enlarged in appropriate circumstances. In the case before me the ex-parte applicants appeared before Warsame, J on 23rd February, 2012 and they were granted leave to commence judicial review proceedings. The application as to whether leave was to operate as stay was to be argued inter-partes on 6th March, 2012. Noting happened on the appointed date and on 12th March, 2012 the ex-parte applicants' counsel took a mention date for 21st March, 2012 but failed to appear in court on the said date. The court nevertheless fixed the application for stay of proceedings for hearing on 30th April, 2012. On the said date the application was rescheduled for hearing on 9th May, 2012. On 9th May, 2012 the ex-parte applicants were given moretime to put their house in order and on 15th May, 2012 the ex-parte applicants filed the application at hand.

Order 53 Rule 3(1) of the Civil Procedure Rules, 2010 provides that when leave has been granted to commence judicial review proceedings, the application shall be made within twenty one days by notice of

motion to the High Court. Upon the grant of leave therefore, an applicant has 21 days within which to file the notice of motion. The fact that the application for leave to act as stay of proceedings has been set down for inter-partes hearing does not stop the time running. The grant of leave is a separate matter from the issue as to whether the leave granted should operate as stay of proceedings. The rules are so clear that the ex-parte applicants' advocates cannot be excused for failing to file the substantive notice of motion within 21 days from 23rd February, 2012 when leave was granted. This court therefore finds it unfair and prejudicial to the respondents to enlarge the time within which the substantive notice of motion should be filed. Good reasons must be advanced for such an application to be allowed. The notice of motion dated 15th May, 2012 is therefore dismissed. The end result is that the leave granted to ex-parte applicants on 23rd February, 2012 lapsed 21 days thereafter and these judicial review proceedings have died in accordance with the provisions of Order 53 Rule 3(1) of the Civil Procedure Rules, 2010. Since the proceedings were initially ex-parte and the respondents have only concentrated their firepower on the application dated 15th May, 2012, they will have the costs for that application alone.

Dated and signed at Nairobi this **26th** day of **September** , 2012

W. K. KORIR, J