



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 335 OF 2010**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF  
CERTIORARI AND PROHIBITION AGAINST THE REGISTRAR OF TRADE UNIONS**

**BETWEEN**

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....APPLICANT**

**VERSUS**

- 1. REGISTRAR OF TRADE UNIONS.....1<sup>ST</sup> RESPONDENT**
- 2. THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

On 16<sup>th</sup> November, 2010 the applicant, through an affidavit sworn by Thomas Ochieng Alloyce, filed an application seeking leave to apply for an order of Certiorari to quash the decision of the Registrar of Trade Unions made on 4<sup>th</sup> November, 2010 purporting to interpret the 1<sup>st</sup> interested party's request for a study leave as a resignation from the office of Secretary General of the applicant. On 23<sup>rd</sup> November, 2010 leave was granted as sought and the court directed that the substantive motion be filed and served within 14 days from the said date. However, the intended application was not filed within the stipulated period of time.

There is now before the court an application dated 16<sup>th</sup> March, 2011 seeking leave to file the substantive

motion out of time. The application is supported by an affidavit sworn by Samson Wanjala Matete.

He deposed that on 23<sup>rd</sup> November, 2010 the interested party filed an application seeking to set aside the grant of leave. The application was heard inter partes and ruling delivered on 10<sup>th</sup> December, 2010. He stated that the substantive motion could not be filed because by that time their advocate had already closed his office for Christmas holidays. When the advocate came back he could not trace the court file at the Civil Registry. In the meantime, the interested parties had filed an application before the Industrial Court and obtained an injunctive order against Mr. Matete on 23<sup>rd</sup> December, 2010. For the aforesaid reasons, he urged the court to allow the application.

Mr. Isaac G.M. Andabwa filed a replying affidavit and stated that he is the General Secretary of the ex parte applicant. He denied that Samson Wanjala Matete is the Acting Secretary General of the ex parte applicant since he had been replaced during the National Executive Council's meeting held on 21<sup>st</sup> August, 2010. His application is therefore an abuse of **Section 35(6)** of the **Labour Relations Act**, the deponent stated. He added that no sufficient reasons had been given for failure to file the substantive motion in time.

The 1<sup>st</sup> respondent supported the depositions of Mr. Andabwa. He further stated that these proceedings were commenced by Thomas Ochieng Alloyce who sought the leave granted on 23<sup>rd</sup> November, 2010. In his view therefore, Samson Wanjala Matete has no capacity to ask for extension of time to file the substantive motion.

William Kibet Langat is the Registrar of Trade Unions. He filed a replying affidavit sworn on 1<sup>st</sup> April, 2011. He stated that Mr. Samson Wanjala Matete is neither an official nor the Secretary General of Kenya National Private Security Workers Union. He annexed to his affidavits a true copy of the extracts of the Register of the Kenya National Private Security Workers Union which shows the names of all the office bearers and the respective dates of their appointments. He pointed out that this cause was commenced by Thomas Ochieng Alloyce and the leave that was granted on 23<sup>rd</sup> November, 2010 was granted to him and not Samson Wanjala Matete, who was also not a party to Industrial Court Cause No. 1612 of 2010. Mr. Langat urged the court to find that there are no reasonable grounds to warrant extension of time.

Mr. Kenyatta for the applicant, Mr. Wati for the 2<sup>nd</sup> interested party and Mr. Kipkoge for the 1<sup>st</sup> and 2<sup>nd</sup> respondents made brief submissions which I have taken into account. **Order 53 rule 3(1)** of the **Civil Procedure Rules** states as follows:

**“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.”**

From the aforesaid rule it appears that upon grant of leave the substantive application has to be filed within twenty one days. That notwithstanding, I believe the court, in exercise of its inherent jurisdiction, in appropriate circumstances, may extend the period for filing the substantive application. As in all instances where court is called upon to exercise its discretion, it must do so judicially and not in arbitrary manner. An applicant seeking extension of time must satisfy the court that there are good and sufficient reasons that prevented him or her from complying with the provisions of **Order 53 rule 3(1)**.

When the court granted leave on 23<sup>rd</sup> November, 2010 it directed that the substantive motion be filed and served within fourteen days from the said date. The court further directed that the matter be mentioned on 7<sup>th</sup> of December, 2011 by which date the fourteen days period would have lapsed. That order was not varied even though parties filed other applications before the said date. At the time of grant of leave the affidavit in support of the application was sworn by Thomas Ochieng Alloyce who stated that he was the Secretary General of the ex parte applicant. The affidavit in support of the present application is sworn by a different person, Samson Wanjala Matete, who described himself as the Acting Secretary General of the ex parte applicant. The affidavit does not state anything about Thomas Ochieng Alloyce.

The fourteen days period that was ordered by the court for filing of the substantive motion expired on 5<sup>th</sup> December, 2010. In the affidavit sworn by Mr. Matete he did not state any good reason as to why the said court order was not complied with. Even though there was an application filed by the applicant seeking to set aside the leave that was granted, the court did not at any time vary the orders that it had made regarding filing of the substantive motion. In paragraphs 5 and 6 of Mr. Matete's affidavit he stated that:

**“5. That the said application was heard inter partes and the ruling delivered on 10<sup>th</sup> December, 2010.**

**6. That however we could not file our substantive Notice of Motion because by that time our advocates on record had already closed office for Christmas holidays.”**

The record shows that though the ruling that sought the setting aside of the leave was scheduled to be delivered on 10<sup>th</sup> December, 2010 it was actually delivered on 17<sup>th</sup> December, 2010 before Gacheche, J. Mr. Nderitu held brief for Mr. Kenyatta for the ex parte applicant. None of the other advocates appeared. No reason has been given as to why Mr. Kenyatta chose to close his office several days before the Christmas day, knowing that he had not yet filed the substantive motion.

Even if the court file was not available at any particular time after 17<sup>th</sup> December, 2010, as at that date the fourteen days period had already lapsed. In any event when the court re-opened after the Christmas and New Year holidays none of the advocates in this matter appeared before court and sought leave to open a skeleton file on the basis that the original file was not available. After 17<sup>th</sup> December, 2010 Mr. Kenyatta did not appear before this court until 7<sup>th</sup> March, 2011. That is when he first told the court that he had not filed the substantive motion because the court file had been missing. As at that date the substantive motion had not been filed. The court pointed out that the leave that had been granted had lapsed and there was therefore nothing that could be stayed.

Having taken into consideration the reasons advanced by the applicant in seeking extension of time, I do not find them sufficient to warrant the exercise of the court's discretion in its favour. The leave that was granted having lapsed the applicant's remedy lies in filing a fresh application as the application for extension of time lacks basis. Consequently, I dismiss the application with costs to the respondents and the interested parties.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MAY, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – Court Clerk**

**Mr. Agwara holding brief for Mr. Kenyatta for the Applicants**

**Mr. Kipkogei for the Respondents**