



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Judicial Review 56 of 2009**

**ISMAIL KIBET HASSAN.....APPLICANT**

**VERSUS**

**NAKURU KADHI COURT.....RESPONDENT**

**RULING**

The Respondent in the instant motion on notice dated 19<sup>th</sup> August, 2008 brought an application on 31<sup>st</sup> July, 2009 for leave to institute judicial review proceedings in the form of *certiorari* to quash the decision of the Kadhi in Nakuru Kadhi's Court Civil Case No.18 of 2006. The application also sought that leave if granted was to operate as a stay of the judgment dated 22<sup>nd</sup> September, 2006 and the decree dated 22<sup>nd</sup> February, 2007.

In granting those prayers, the court (Nyamu, J as he then was) made the following extracted order (in pertinent part):

**“1. THAT leave be and is hereby granted to the applicant to institute Judicial Review proceedings for an Order of Certiorari to bring to the High Court to quash the Nakuru Kadhi's courts Judgment dated 22<sup>nd</sup> September, 2006 and Decree dated 23<sup>rd</sup> February, 2007 in Nakuru Kadhi's Court Civil Case No.18 of 2006.**

**2. ....**

**3. ....**

**4. THAT the application be filed within 21 days and served within 8 days failing which the orders granted shall automatically lapse.”**

The interested party has brought the present application seeking that the orders made on 31<sup>st</sup> July, 2007 be vacated on the ground that the respondent has failed to comply with those orders; that she was served with the orders of 31<sup>st</sup> July, 2007 but not the application. I have not seen any response from the respondent in this application or from the respondent in the judicial review application. The latter's

counsel supports this application and confirms having been served with the substantive motion on 28<sup>th</sup> May, 2008.

Learned counsel for the respondent herein conceded the terms of the order of 31<sup>st</sup> July, 2007 limiting to 21 days the period for filing the motion and 8 days for serving it, but submitted that notwithstanding, parties have subsequently appeared in court and the order extended. **Order 53(3)(1)** of the **Civil Procedure Rules** provides that:

**“3(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 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”** (Emphasis supplied)

Two questions arise from the above provision. Was the motion filed within twenty one (21) days and were there eight clear days between service and the date for hearing of the motion?

Leave and stay were granted on 31<sup>st</sup> July, 2007 and the motion filed on 21<sup>st</sup> August, 2007. Computing time in accordance with the provisions of **section 57** of the **Interpretation and General Provisions Act (cap 2)** the motion ought to have been filed not later than 27<sup>th</sup> August, 2007. It was filed on 21<sup>st</sup> August, 2007, well within the prescribed time.

The eight days limit to serve the motion imposed by the court (Nyamu, J) is not provided for under **order 53**. What is provided for is that there must be eight clear days between the date of service and the date set for the hearing of the motion.

But of significance in this matter is the question of service; that is what the applicant has complained of; that after leave and stay were granted, the respondent served these orders upon her but not the notice of motion which was served on 23<sup>rd</sup> August, 2008, one year after leave and stay were granted and a few days after the filing of this

application. **Order 53** attaches great importance to service of the application upon parties who may be affected by the proceedings.

Relevant to this matter is **subrule (2) of rule 3** which provides that:

**“(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court,  
..... the notice of motion shall be served on the presiding officer of that court and on all parties to the proceedings”**

It is conceded that there was no service either on the applicant or the respondent in the judicial review application.

The fact that orders have subsequently been extended cannot oust a clear requirement of the law. The motion was not served at all until this application was brought.

For these reasons, the application dated 19<sup>th</sup> August, 2008 is allowed and the orders of 31<sup>st</sup> July, 2007 set aside. Costs to the applicant and the respondent in the judicial review application.

**Dated, Signed and Delivered at Nakuru this 5<sup>th</sup> day of February, 2010.**

**W. OUKO**

**JUDGE**