

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 703 of 2007

WILBERFORCE OSODO.....APPLICANT

Versus

ATTORNEY GENERAL & 2 OTHERS.....RESPONDENT

RULING

The Chamber Summons Application dated 3rd July 2007 is brought pursuant to Rule 20, and 23 of the Constitution of Kenya

Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and procedure Rules, 2006, the inherent powers of court and the court's original jurisdiction under S.84 (2) of the Constitution. The Applicant/Petitioner, Wilberforce Osodo prays that the time limited for service of the Petition under rule 15 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 be extended and the Petition herein No. 703/07 filed on 28th June 2007 and served on 10th July 2007 on the Attorney General & Public Service Commission of Kenya and the Permanent Secretary Treasury on 12th July 2007 be deemed to have been served within the extended period beyond 4th July 2005 and that the costs be costs in the Petition. The Application is premised on grounds found on the face of the Application and the supporting Affidavits of Musaha Mwenesi, Counsel for the Applicant and that of Eddy Ahuga Lihasi a clerk employed by the firm of Musalia Mwenesi Advocate.

The Application is brought on the ground that due to inadvertence in the Petitioner's Advocate's Office, service of the Petition was delayed. That time allowed to serve the petition under R. 15 of the Rules made pursuant to legal notice 6/06 in 7 days and the same expired on 4th July 2007. The process server deponed that he had gone to serve process in Manderu HCC 662/07 on 26th June 2007 and returned to Nairobi on 5th July 2007 only to find that this Petition had been filed. He received the Petition on 10th July 2007 and effected service on Attorney General on 12th July 2007. Counsel urges that the fault of the Advocate should not be visited on the client, and the court should invoke its inherent powers to do justice to the Petitioner since there is a lapse in the rules circumstances.

The Application was opposed and the Respondent filed grounds of opposition to the effect that the Rules made under S. 84 (6) of the Constitution do not provide for extension of time and the order sought is inconsistent with the object of the rules. That in making the rules, no extension of time was allowed and the rationale behind it must be that it was intended to expedite the Applications made under the Constitution. Counsel relied on the case of **SERUGUU KAMPALA CITY COUNCIL (2002) 2 EA**, where the Court of Appeal in Uganda in interpreting a rule made under the Constitution, that are similar to ours, declined to extend the time allowed to file a Petition for reasons that the rules were meant to expedite the hearing of the Constitutional Applications.

This Petition was filed on 28th June 2007. Rule 15 of the rules made pursuant to legal notice 6/06, provides that the Petition "shall" be served on the Attorney General within 7 days of filing. It means that the petition should have been served as of 5th July 2007. The same was not served until 12th July 2007, 7 days later, for reasons explained by the process server.

Admittedly there is no provision for extension of time within the rules made under legal notice 6/06. There is also no doubt that the Application and References made under the Constitution are supposed to be given priority and heard expeditiously. (Rule 32 of the Rules explicitly says so) and so I have no doubt that the Limitation on time set by the rules is meant to achieve that purpose.

The Rules made pursuant to S. 84 (6) of the Constitution are supposed to be enabling vehicles to the courts to hear and determine Applications relating to peoples rights and freedoms under the Bill of Rights. Unlike the Ugandan Constitution; There is no limitation on the time of bringing Petitions under the Constitution. See **SERUGA CASE**. Rule 15 is meant to ensure that after the Petition is filed the process is expedited. There is no doubt that there is a lapse in the Rules as relates to extension of time and in the event such as the court faces. The question is whether due to flouting rules, which lapse has been explained by the Process Server, the Petitioner should be shut out from ventilating his case which is already before the court. Since there is a lapse in the Rules as to whether time for serving of the Petition can be extended, can the court's inherent jurisdiction be invoked. The court's inherent jurisdiction will be invoked where there is a lapse in the law or procedure. In doing so the court would consider what prejudice either party would suffer if the order extending time were granted. The delay in serving the Attorney General is 7 days. If the extension is not allowed it means that the Petition would be struck out for non service and the Petitioner would be denied his right to a hearing to ventilate his rights. On the other hand, even if the Petition is struck out, the Petitioner can repeat the process by filing another Petition and serving it in time. It would be expensive and a waste of both this court's time to take that long winded route of declining to extend the time as prayed.

In my view, the justice of this case requires that time to serve the Attorney General be expanded and the service that was effected on the Respondents on 10th July 2007 and 12th July 2007 be deemed as proper service. The Respondents will be compensated in terms of costs and I will award the costs of this Application to the Respondent.

Dated and delivered this 21st day of September 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of

Ms Njeri Thuku holding brief for the Applicant

Mr. Meso for the Respondent

Daniel: Court Clerk