



**Republic v Town Administrator, Eldama Ravine Sub-County, Baringo
 County Government & 8 others; Henry (Exparte Applicant) (Judicial Review
 Application 3 of 2019) [2023] KEHC 18907 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18907 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT KABARNET
 JUDICIAL REVIEW APPLICATION 3 OF 2019**

RB NGETICH, J

JUNE 15, 2023

**IN THE MATTER OF AN APPLICATION BY MOLLY CHEPTUBE HARRY FOR THE
 JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF BARINGO COUNTY
 GOVERNMENT SINGLE BUSINESS PERMIT BY-LAWS**

AND

IN THE MATTER OF ALCOHOLIC DRINKS CONTROL, ACT 2010

AND

**IN THE MATTER OF BARINGO COUNTY GOVERNMENT, ELDAMA
 RAVINE ALCOHOLIC DRINKS LICENSING ACT, 2014 AND
 BARINGO COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2014**

AND

**IN THE MATTER OF THE FOOD, DRUGS AND CHEMICAL SUBSTANCE
 (FOOD HYGIENE) REGULATIONS CAP 254 LAWS OF KENYA**

AND

**IN THE MATTER OF LIQUOR LICENSING OR ALCOHOLIC DRINK LICENSE
 FOR THE YEAR 2020 FOR THE KIPSAFARI RAVINE PUB, ELDAMA RAVINE**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC APPLICANT

AND



**TOWN ADMINISTRATOR, ELDAMA RAVINE SUB-COUNTY, BARINGO
COUTY GOVERNMENT 1ST RESPONDENT**

**THE CHAIRMAN, ELDAMA RAVINE ALCOHOLIC DRINKS REGULATION
COMMITTEE 2ND RESPONDENT**

**THE COMMITTEE SECRETARY, ELDAMA RAVINE ALCOHOLIC DRINKS
REGULATION COMMITTEE 3RD RESPONDENT**

**BARINGO COUNTY ALCOHOLIC DRINKS REGULATIONS
ADMINISTRATIVE REVIEW 4TH RESPONDENT**

**THE COUNTY SECRETARY BARINGO COUNTY GOVERNMENT 5TH
RESPONDENT**

THE CEC, HEALTH BARINGO COUNTY GOVERNMENT . 6TH RESPONDENT

**DEPUTY COUNTY COMMISSIONER, ELDAMA RAVINE SUB-
COUNTY 7TH RESPONDENT**

OCPD ELDAMA RAVINE POLICE DIVISION 8TH RESPONDENT

ACP, ELDAMA RAVINE SUB-COUNTY 9TH RESPONDENT

AND

MOLLY CHETUBE HENRY EXPARTE APPLICANT

RULING

1. The ex-parte Applicant has moved this court through notice of motion application dated 19.03.21 seeking the following orders:-
 - i. Spent
 - ii. That in the alternative, the Honourable court be pleased to grant leave to enlarge time for filing and service of the substantive Notice of motion filed on 2nd December, 2020 and on record.
 - iii. That this Honourable court be pleased to grant an order that the Notice of Motion dated 20th day of January, 2020 and filed on 2nd day of December, 2020 be deemed as having been duly filed and properly on record.
 - iv. That the court grants such further or other reliefs it may deem just and expedient to grant in the circumstances of the case.
 - v. That costs of this application be in the cause.
2. The application is founded on the following grounds:-
 - i. That the ex-parte chamber summons for leave to commence judicial review proceedings and statement in the instant judicial review were filed within the stipulated period required in law.
 - ii. That on the 2nd January, 2020 the court granted orders issued on 3rd January, 2020 granting leave to the applicant to file substantive Notice of motion.



- iii. That on the 20th January, 2020 counsel filed the substantive motion in his Nairobi office and forwarded to his Eldama Ravine office branch for filing at Kabarnet.
 - iv. That shortly thereafter, the country was struck by Corona Virus which affected the courts normal operations and the law firm offices which were closed for several months' effective 16th March, 2020.
 - v. That towards the end of November, 2020 counsel upon inquiry from the Eldama Ravine offices on the status of all matters filed in Kabarnet inclusive of this matter and the Eldama Ravine realized that the substantive application had not been filed and proceeded to file on 2nd December 2020 and was fixed for hearing on 9th December, 2020 but the court was not sitting and another date given of 21st January, 2021 and again given another date of 9th February, 2021 for directions.
 - vi. That it was not until 23rd February, 2021 that counsel realized that the substantive notice of motion had been filed out of time and thus instructed counsel holding brief to seek time for them to file the instant application.
 - vii. That the delay in filing the substantive Notice of Motion was occasioned by the unfortunate and most regrettable inadvertence.
 - viii. That this Honourable court has discretion to grant the orders sought and no prejudice would be occasioned to the Respondents who have already entered appearance and are participating in the proceedings.
3. The application is supported by affidavit dated 19th March 2020 and supplementary affidavit sworn on the 24th March, 2023 sworn by William Arusei Advocate who in conduct of this matter. He states that the application for leave to institute judicial review proceedings was filed within the stipulated period required in law i.e within 6 months of the occurrence of the grievance and the same was allowed on the 2nd day of January, 2020.
 4. He avers that they prepared the substantive Notice of Motion on the 20th January, 2020 in Nairobi office and forwarded to his Eldama Ravine office for filing at Kabarnet law courts.
 5. That the Eldama Ravine office was supposed to communicate the dates and/or directions of the court to Nairobi office but unfortunately shortly thereafter, the country was struck by Covid 19 which affected the operations in courts and in offices.
 6. He further avers that towards the end of November 2020, he inquired from the Eldama Ravine office of the status of the case and realized that the Eldama ravine had not filed the same and they proceeded to file on 2nd December 2020 and matter fixed for hearing on 9th December 2020 but the Honorable court was not sitting and were given another date of 21st January 2020 where again they were given another date for 9th February 2021 for directions.
 7. That it was not until the 23rd February 2021 that he realized that the substantive application had been filed out of time and instructed counsel holding his brief to seek time for them to file the instant application.
 8. That the delay in filing the substantive notice of motion application was occasioned by the unfortunate and most regrettable inadvertence.
 9. He further states that his client travelled to Germany and has not returned although she follows up on the matter through phone calls.



10. That this Honorable court has the discretion to allow this application and no prejudice will be occasioned to the Respondents should this application be allowed for reason that despite service in January, 2020 only the 1st to 6th Respondents entered appearance in December 2020; and explanation for the delay has been offered and apart from counsel's inadvertence which is regretted, there is the issue of Covid 19 which ought to be considered.

Replying Affidavit

11. In response to the application, the 1st -6th Respondents filed a replying affidavit sworn by Vincent Kiptoon Advocate on 17th January, 2023. He states that on 22nd January, 2020, the office of the county attorney, Baringo County was served with orders emanating from chamber summon application instituted by the applicant not to interfere with Applicant's business at Kipsafari Ravine Pub at Umoja Estate.
12. Counsel further states that no document was served on 1st to 6th Respondent until 3rd December, 2020 when the office of the county Attorney was served with the substantive motion filed on 2nd December, 2020 and upon receipt, the County Government on behalf of the 1st to 6th Respondents through the office of the county attorney instructed them to enter appearance and file a response.
13. Counsel states that he filed a memorandum of appearance and served upon the Applicant's counsel on 16th December 2020; applicants fixed a mention date for 23rd February, 2021 and filed preliminary objection dated 17th February on 18th February, 2020 and served Applicant's counsel on 22nd February, 2021.
14. And on being served with preliminary objection, the Applicants filed the application dated 19th March, 2021 seeking extension of time within which to file and serve a substantive notice of motion.
15. He further states that during the mention of the matter on the 23rd March 2021, the court directed that the preliminary objection dated 17th February 2021 be heard first but later further orders were issued that the application dated 19th March, 2021 be heard first.
16. Counsel states that the applicants do not deserve the extension of time to file the substantive motion as the application is a reaction to the preliminary objection on point of law and extension of time for a party to file a substantive notice of motion is an equitable remedy that can only be granted to deserving parties and not the applicants as they have not demonstrated any basis to warrant the grant of such remedy.
17. Counsel further states that delay in filing the substantive notice application for a period of about one year is an indication of laxity and complacency on the part of the Applicants and are not deserving the orders sought as equity aids the vigilant.
18. That the explanation of the delay in filing at paragraph 5 of the supporting affidavit sworn on 19.03.21 is not satisfactory and that it is not true that when covid 19 struck, it grounded all the court operations until November 2021 as the judiciary devised new measures of handling court matters; and no explanation has been given as to why the substantive application was filed in December 2020 yet he realized in November that it had not been filed; that counsel has not explained why he filed the motion knowing that timelines had lapsed by then.
19. He further states that applicant's counsel has not explained who informed him that his Notice of Motion application was to be heard on the 9th December 2020 neither has he tabled evidence to demonstrate that the court was not sitting on the said 9th December 2020 nor 21st January as alleged.



20. He further states that the applicant's counsel realized that the Notice of Motion application had not been filed a year after leave to file substantive Notice of motion application was granted which is a clear indication of laxity and complacency which cannot be excused.
21. Counsel further avers that the matter before court involves the public health which affects and touches on the health of the people and has direct effect on revenue of county and hiccups in terms of stay orders for over two years has denied the county Government revenue to carry out its operations and similarly, the citizens have been denied their right to clean environment.
22. That the health of the citizens and quality of the environment which has been compromised as a result of the Applicant's activities for over two years since stay orders were issued cannot be quantified and compensated by way of costs or damages.
23. Counsel avers that the intention of closing the Applicant's business premise emanated from a complaint lodged on the 14th November, 2019; that the 2nd Respondent received a formal complaint letter from the residents of Umoja estate Eldama Ravine over Kipsafari pub protesting the operations of Kipsafari pub and their petition for closure.
24. Counsel further avers that upon receipt of the complaint letter from the residents, a team of public health officers visited the pub and a public health report was filed and a meeting of the 3rd Respondents to deliberate on the issues raised was convened and after a lengthy discussion, it was agreed that the pub was a nuisance to the environment and should be closed down.
25. Further that the outcome of the meeting of the 3rd Respondent was communicated to the Applicant who rushed to court and obtained leave to institute this judicial review proceedings to stay and the orders that were issued has compromised the welfare of the citizens for the last two years.
26. Counsel avers that enlarging time for the Applicant to file substantive motion after two years since leave was granted will only serve to punish the residents of Umoja Estate and Baringo county Government continues to miss out on revenue that would have been generated by issuance of license.
27. He concludes that the application is baseless illusionary, speculative, misconceived, frivolous, vexatious, lacks merit, ill-intended and an abuse of the court process and the same ought to be dismissed.

Ex-parte Applicant's Written Submissions

28. The ex-parte applicant filed submissions dated 31st March, 2023 and argues that the substantive Notice of Motion application does not offend the provisions of Order 53 Rule 3 of the Civil procedure rules. That the courts of law have inherent powers to extend time even after expiry of the 21 days if the court is satisfied that it is fair and just to do so and at any rate costs will adequately compensate the other side for any prejudice if any. The ex-parte applicant places reliance on the case of Republic vs Kenya Revenue Authority Ex-parte Tom Ojienda Sc t/a Prof. Tom Ojienda & Associates [2016] eKLR.
29. Counsel for the exparte applicant re-states averments in the affidavits filed and further submits that it would be idle to admonish the Ex-parte applicant and deny her a chance of being heard for what is clearly a mistake and the application dated 19th March 2021 was neither an application to obstruct justice, delay the course of justice nor it intended to overreach; that it was a mistake which arose as a result of inadvertence, excusable mistake or error.
30. Counsel submitted that it is a matter of calling for substantive justice and therefore calls upon the court of law to rise to a higher calling; that the right to be heard is a fundamental right that ought not to be taken away lightly and the instant case fits in what Ringera J. (as he then was) called rising to a higher



calling to do justice by saving the proceedings in issue and relies on the case of Microsoft corporation v Mitsumi Computer Garage Ltd & Another (2001) eKLR.

31. Counsel further submits that the courts of law ought to administer substantive justice without undue regard to infractions of procedure and justice must not be sacrificed at the altar of strict adherence to the provision of procedural law. That procedural rules should not be elevated to a point where they undermine the cause of justice and that is the case here.
32. He further submits that the affidavit of the 1st - 6th Respondents only goes to the procedural timelines and not the substance of the dispute, and what the ex-parte applicant is seeking is to validate the notice of motion application dated 20th January, 2020 and already filed in court and no prejudice has been shown that will be suffered by the Respondents.
33. He submits that the ex-parte applicant is sensitive to the public interest issues and has been given a clean bill of health in the past and the latest about turn is what the ex-parte applicant wants a court of law to weigh in to see whether that was executed illegally, irrationally and whether it was tainted with a procedural impropriety which can be determined if the substantive notice of motion is heard.
34. He further submits that courts of law have a duty to determine the substantive issues between the parties and ought not to give undue regard to infractions of procedure. That rules of procedure are to be regarded as the hand maidens rather than the mistress of justice and relies on the supreme court case in Shabbir Ali Jusab v Anaar Osman Gamrai & Another [2013] eKLR where it stressed on the provisions of Articles 159(2)(d) of *the constitution* which requires the court to administer justice without undue regard to procedural technicalities.
35. Counsel further cites the case of Belinda Muras & 6 Others vs Amos Wainaina [1978] eKLR where the court defined what constitutes a mistake and held that a mistake is a mistake and the door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better.
36. In conclusion, counsel submits that this honourable court granted leave to the ex-parte applicant to apply to file the substantive notice of motion for writs of certiorari, prohibition and mandamus; and the extension of time is a judicial discretion that should be exercised in promoting justice and overriding interests and the court ought to overlook mere technicalities; that primary duty of the court is to do justice and the duty cannot be fettered by procedural technicalities and urged this court to allow the application dated the 19th march, 2021. That the defect herein is not fatal and the ex-parte applicant ought not to be driven away from the judgement seat without a hearing.

The 1st - 6th Respondents Written Submissions

37. Counsel for the 1st -6th Respondents filed written submissions dated 17th April, 2023. He restates averments in affidavit filed. Counsel submits that order 53 rule 3 (1) is couched in mandatory terms and it bestows upon the ex-parte applicant a mandatory obligation to file substantive Notice of Motion within 21 days upon leave being granted.
38. The 1st -6th Respondents submits that the applicant failed to file the substantive motion within 21 days which in essence has ceased the existence of the judicial review proceedings in the strict interpretation of order 53 Rule 3(1). That the leave granted and which operated as stay lapsed after the 21 days. That the ex-parte applicant cannot approach this court to challenge a process which she alleges not to have been properly invoked, but again un-procedurally.
39. The 1st - 6th Respondents argues that the judicial review proceedings is neither civil nor criminal in nature and that it is not a suit as defined under section 2 of the *civil procedure Act*, as was held in the case of M.M Olekeuwa & Another Vs Yash Pal Ghai [2002] eKLR.



40. And the Exparte applicant's notice of motion application filed outside 21 days as set out by order 53 is incompetent and should be struck out with costs as was the position in the case of Republic vs Minister for Lands and Settlement & 3 others Ex-parte Euton Njuki Makungo[2016] eKLR and further rely on the case of Republic vs Administrative Review Board & Another; Mer Security Communications Systems Ltd/Megason Electronics & Control 1978(IV) & Another (interested Parties); Ex-parte Magal Security Systems Ltd/ Firefox Kenya Ltd (IV) 2019eKLR.
41. Further, the ex-parte applicant who is seeking an equitable remedy must comply with the principles laid out by the Supreme Court to warrant granting of prayers sought and there is no proof that the application was prepared on the 20th January, 2020; that counsel has not explained how he forwarded the application, whether by soft copy, an e-mail to the said offices at Eldama Ravine or hard copies and by what means neither has he filed affidavit sworn by the person manning the said offices.
42. Counsel further submitted that it is not a surprise that counsel went ahead to file the substantive Notice of motion on 2nd December, 2020 without leave, aware that the timelines within which substantive motion was to be filed had lapsed long ago, a clear confirmation that indeed this application was filed in reaction to the 1st -6th Respondent's preliminary objection dated 17th February,2021. That the application was brought in as an afterthought.
43. Counsel submits that it is not true that failure or delay in filing the substantive notice of motion was occasioned by covid 19 which affected court's normal operations as when the pandemic struck the country, court operations were not completely shut down; the judiciary devised measures of handling matters and, in any case, at the time Corona Virus struck, timelines within which the ex-parte applicant was required to file a substantive motion had long lapsed
44. That the reasons given by counsel for the ex-parte applicant for the delay in filling the substantive notice of motion is not backed by any iota of evidence and not satisfactory, that a whole year is too long to be excused and just confirms complacency, laxity and lack of seriousness.
45. Further, that there is no explanation at all on what caused the mistake in filling the substantive Notice of Motion, who caused the mistake and why the mistake was only realized a month later when the 1st to 6th Respondents had filed a preliminary objection and cited the case of Almer Farm Limited vs National Land Commission & 2 Others (Sued as the Executrix of the Estate of the late David Rono [2012] eKLR and the case of Rufus Muriithi Nyaga v Juliet Wanja Ireri [2018]eKLR where the court held that the delay of more than one year to file application and to prosecute it in the 4th year since leave was granted is inexcusable and that the explanation given is insufficient and superfluous.
46. Counsel further submits that procedural rules should not be elevated to undermine the cause of justice, however, in some instances, the court is called upon to examine the gist of the suit or the application and where the issues raised have been overtaken by events, then there is no need to entertain such an application before court as it serves no good cause and cited the case of Abdinur Hassan Adan v County Criminal investigations Officer, Marsabit County & 2 others[2019]eKLR where the court held that the court where an application for extension of time is made, the courts may as well consider the merits of the application and if the court is of the view that even if time was to be enlarged, what is to be heard and determined subsequently lacks merit, is frivolous and an abuse of the court process, the court has powers to deny enlargement of time.
47. In conclusion counsel submitted that extending time to file a substantive Notice of motion or validating the same in the circumstances of this case is highly prejudicial to the Respondents and urge this court to find that filing Notice of motion application 12 months after getting leave the entire judicial review proceedings are incompetent and should be struck out with costs.



Analysis And Determination

48. I have considered grounds of the application, averments by counsel herein and submissions filed and wish to consider whether the applicant has met threshold for grant of prayers sought. The ex-parte Applicant's argument is that this court ought not give undue regard to procedural technicalities and mistake of failing to file substantive Notice of Motion should be excused as no prejudice will be suffered by Respondents.
49. Counsel argued this court to exercise discretion to enlarge time to file substantive Notice of Motion. I note that leave to file substantive motion was issued on 2nd day of January, 2020. The applicant's Advocate explained that the application was sent on or about the 20th January, 2020 from his Nairobi office to Eldama Ravine office branch for purposes of filing at the Kabarnet Law Courts. According to counsel, he realized in November 2020 that the substantive Notice of Motion was not filed but instead of seeking leave, proceeded to file it on 2nd day of December, 2020. Counsel argue that it was an inadvertence, excusable mistake or error and explained further that operations of court were slowed down by covid 19.
50. Under order 53 rule 3 (1) of Civil Procedure Rules, the substantive Notice of Motion should be filed within 21 days from the date of leave. The word used is "Shall". It is therefore coached in mandatory terms. The leave granted which operated as stay therefore lapsed after 21 days and he should have sought Leave before filing the substantive Notice of Motion in December 2020.
51. Even though ex-parte Applicant's Advocate has indicated that the application was prepared and sent to his Eldama Ravine Office Branch on the 20th January 2020, there is no proof that it was actually sent to Eldama Ravine Branch Office.
52. Further, record show that Preliminary Objection was filed on 17/2/2021. By the time Preliminary Objection was filed, application for enlargement of time had not been filed. Counsel has not explained why he never sought leave in November after realizing that substantive motion had not been filed in time and if indeed the substantive Notice of Motion had been prepared, why he did not file in November.
53. On explanation that court operations were slowed down by Covid -19, I take judicial notice of the fact that courts closed in the month of March and shortly thereafter, the chief justice issued directions for courts to operate virtually and courts operated without interruption during covid period. Further, if Leave was issued on 2/1/2020, 21 days would have lapsed on 23/1/2020. Courts were operational fully in months of January and February 2020. Covid-19 pandemic as a reason for delay cannot therefore stand.
54. Section 9 (1) of *Fair Administrative Action Act* 2015 provides that a person aggrieved by an administrative action may without unreasonable delay apply for Judicial review of any administrative action to the High Court or to the Subordinate court upon which original jurisdiction is conferred pursuant to Article 22 (3) of *the Constitution*.
55. In my view, no satisfactory explanation has been given for prolonged delay in filing substantive Notice of Motion. Delay of a period of 11 months in my view is inordinate and unreasonable. I see no merit in the application herein and decline to enlarge time for filing substantive Notice of Motion.

Final Orders: -

- 56.



1. Application dated 19th march 2021 is hereby dismissed.
2. Costs to the Respondents.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 15TH DAY OF JUNE 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Mr. Kiptoon for 1st to 6th Respondents.

No appearance by Advocate for Exparte Applicant.

