



Masha v Office of the Director of Public Prosecution & 2 others (Constitutional Petition E013 of 2021) [2024] KEHC 15982 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION E013 OF 2021
SM GITHINJI, J
DECEMBER 17, 2024**

BETWEEN

CHRISPUS CHENGO MASHA PETITIONER

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION .. 1ST RESPONDENT

DCIO MALINDI 2ND RESPONDENT

OCS MALINDI 3RD RESPONDENT

RULING

Representations:

Petitioner in Person

Ms Ochola for the State

Ms Mwashushe for the Interested Party

1. For determination is the Applicant's notice of motion dated 12/10/2022 expressed under Article 22 (3) (b) & (d), 48, 50 and 159 of *the Constitution* of Kenya; and Rule 3, 16, 19 and 30 of *the Constitution* of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules, 2013. The orders sought are framed as follows: -
 - a. Spent.
 - b. Spent.
 - c. That the Honourable Court be pleased to grant leave to the Interested Party to file its Replying Affidavit out of time.
 - d. That the Interested Party's Replying Affidavit be deemed properly filed.



- e. That the costs of this application be provided for.
2. The application which is supported by a supporting affidavit and supplementary affidavit sworn by the Applicant on 12/10/2022 and 19/9/2024 respectively, is premised on the following grounds: -
 1. That the issues raised in the application and Petition and order of the Court may affect the Interested Party's fundamental right to liberty.
 2. That the delay in filing the Replying Affidavit was caused by the former advocate on record.
 3. That the Interested Party's Replying Affidavit ought to be heard on merit.
 4. That it is in the interest of justice that the orders sought are granted.
3. The Petitioner opposed the application. He swore a Replying Affidavit on 24/6/2022 stating that the application is an abuse of the Court process and intended to delay the determination of the Petition. According to the Petitioner, the Applicant is guilty of filing an application with dirty hands for failure to comply with this Court's directions concerning service of the application.
4. The application was canvassed by way of written submissions. On record we have only the Applicant's written submissions which I have perused and understood. The main issue for determination is whether leave should be granted for the Applicant to file its replying affidavit out of time and the annexed affidavit be deemed properly filed.
5. The Court's power to enlarge time is based on Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules, 2010. In the words of Kemei J. in *Margaret Njoki Kamau v Reuben Ndivo Mwangi* (2021) eKLR: -

“Order 50 Rule 6 provides that where a specific time is fixed for doing an act or taking any proceedings, the court has powers to enlarge such time on terms notwithstanding that the application is brought after the time prescribed has lapsed. The courts power to enlarge time is unfettered. The discretion must however be exercised judiciously and not capriciously.”

6. The principles that govern the exercise of discretion to extend time were authoritatively enunciated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR as follows;
 - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay.
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.



7. I am equally guided by the sentiments in *Harun Osoro Nyamboki v Peter Mujunga Gathuru* [2019] eKLR, where the Court held: -

“In determining such an application for time extension, the court has to consider whether the explanation given for any delay is reasonable and credible, whether there also exist extenuating circumstances to enable the court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an applicant has been slothful and filed such an application as an afterthought.”

8. The suit herein was filed on 10/11/2021. As per the affidavit of service sworn by Benard Munyasya on 24/11/2021, the Applicant was served on 17/11/2021. The Applicant admits that her former advocate one Mr. Karita of N.K Karita Advocates who was instructed by FIDA-Kenya failed to enter appearance and file a response to the Petition on time. She exhibited a copy of the instruction letter from FIDA-K to the advocate and the Advocate’s response thereto. Both letters are dated 7/4/2022. While the Applicant does not disclose when she sought FIDA’s assistance, it is evident from the content of the Advocate’s letter, that the said Advocate was instructed via email on 6/4/2022, approximately 5 months after service. This delay has not been explained. Nonetheless, even upon receipt of the instructions to represent the Applicant, the said Advocate did not make any attempts to enter appearance or file a response. However, the firm of Ms. Bunde Mangaro & Company Advocates had filed a notice of appointment on 30/3/2022. The Applicant denies ever instructing the said firm. It is also clear that the Applicant’s present counsel filed a notice of change of advocates on 6/7/2022. Why she did not promptly file the present application remains a mystery.

9. I am minded that although Article 159(2)(d) of *the Constitution* of Kenya, 2010 enjoins courts and tribunals to administer justice without undue regard to procedural technicalities, the Article does not oust procedural precepts necessary for the efficient and expeditious administration of justice. In any case, it is trite that procedure is the handmaiden of substantive law. The same Article is explicit that “justice shall not be delayed.”

10. Weighing the series of events above, it is vivid that the delay has been long and inordinate. No explanation has been given as to why the current advocate had to wait for a period of three months to file the present application.

11. Be that as it may, I have considered the nature of the present Petition and perused the draft replying affidavit annexed to the application. I am also alive to the principle that striking out a pleading is a draconian act, which may only be resorted to, in plain cases. I will therefore exercise the Court’s discretion in the Applicant’s favour but condemn her to costs.

12. In the foregoing, prayer c and d of the application are hereby allowed. The Applicant is to pay the Petitioner costs of Kshs. 20,000/= within 14 days from the date hereof, failure to which the interest on the said sum will accrue monthly at court’s rate.

13. Mention for further directions on January 29, 2025.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF DECEMBER, 2024.

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S.M. GITHINJI

JUDGE



In the presence of; -

1. Ms Ochola for the ODPP
2. Mwashushe for the interested party
3. Petitioner (absent)

