Republic v Attorney General & 2 others; Hassan (Exparte); Mvurya & 20 others (Interested Party) (Judicial Review Miscellaneous Application 14 of 2020) [2021] KEHC 239 (KLR) (3 November 2021) (Ruling)

Neutral citation: [2021] KEHC 239 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW MISCELLANEOUS APPLICATION 14 OF 2020

JM MATIVO, J

NOVEMBER 3, 2021

BETWEEN

REPUBLIC ..... APPLICANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

CABINET SECRETARY, PETROLEUM AND MINING ..... 2ND RESPONDENT

BASE TITANIUM ..... 3RD RESPONDENT

AND

ZULEKHA JUMA HASSAN ..... EXPARTE

AND

SALIM MVURYA & 20 OTHERS ..... INTERESTED PARTY

RULING

1. Before embarking on the judgment, I find myself compelled to address a pertinent issue which is manifestly glaring from the court record. For starters, a casual review of the court record discloses a pertinent question which touches on the competency or otherwise of the applicant's application dated 1st September 2020. A history of the court file, albeit briefly, is necessary to bring out this pertinent issue.

2. By way of a Chamber Summons dated 19th March 2020, the ex parte applicant sought the following orders: -

    a. Spent.

b. Leave to institute Judicial Review proceedings seeking orders of certiorari to quash Gazette Notice Nos. 1626 and 1627 dated 21st February 2020 published on 28th February 2020 appointing the Interested Parties as Committee Members for Kwale Community Development Agreement Committees for Lunga Lunga and Msambweni Sub-counties.

c. An order of injunction restraining the Interested Parties from taking office as the Kwale Community Development Agreement Committees Members until this matter is heard and determined.

d. An order that the 3rd Respondent carries out mass civic education to enlighten the communities affected by their activities about the 1% royalty entitled to them.

e. That this court directs that the communities to be allowed to carry out fresh elections after mass civic education and have their preferred elected members names forwarded to the 2nd Respondent for Gazettement.

f. That the 3rd Respondent meets all the costs involved in prayers 4 and 5 of the application.

g. A declaration that having a member of the national assembly and county government in the Community Development Agreement Committee amounts to conflict of interest and therefore unconstitutional or in the alternative this court declares the section 7 of the *Mining Act* (Community Development Agreement Regulations, 2017) unconstitutional and therefore null and void.

h. Costs of the application to be in the cause.

3. On 19th March 2020, Justice P.J. Otieno granted the applicant leave to apply for judicial review orders as prayed in prayer 2 of the application. He directed that the substantive application be filed within 14 days from the said date. Regarding prayers 3 to 7 of the application, he directed the applicant to take a date at the registry and serve the Respondents.

4. The record shows that the applicant did not comply with the said order. The applicant did not file the substantive application within the 14 days as directed by the court nor did the applicant seek leave for extension of time. Despite the default and without leave of the court, on 3rd September 2020, after an inordinate delay of 5 months and 13 days from the date of the above order, the applicant filed the instant application dated 1st September 200. A perusal of the application shows that it is essentially a replica of the leave application dated 19th March 2020. Its not clear why the applicant rehashed his earlier application instead of filing the substantive application. Despite the replication, even if I were to be persuaded to treat the application dated 1st September 2020, as the substantive application, it still has to surmount a pertinent question, namely, whether it is properly before the court having been filed out of time. This is the acid test which the application must undergo. It is not clear why the Respondent's advocates never detected this glaring anomaly.

5. Also, the record shows the existence of an unexplained lull of 10 months during which period the applicant took no action at all. On 19th January 2021, a representative of the applicant's advocates firm fixed the application dated 19th January 2020 for hearing 25th March 2021. However, from the record, and for unexplained reasons, on the said date, instead of the matter being cause listed for hearing as

scheduled, a representative of the applicant's advocates firm, took a date ex parte at the registry for hearing of the said application on 12th April 2021.

6. On 12th April 2021, the matter was listed before Ogola J who directed that the application dated 1st September 2020 be served upon the parties who had not replied. Again, the Respondent's counsel did not detect the anomaly. Subsequently, on 26th July 2021 and 29th September 2021, the parties were directed to file submissions. The matter was mentioned before me on 14th October 2021 to confirm compliance and 19th October 2021 when the parties confirmed that they had complied and a judgment date was reserved.

7. As stated above, the applicant's application dated 1st September 2020 was filed outside the 14 days directed by the court and without courts leave. The leave granted by the court had lapsed with the expiry of the 14 days. Even if the applicant had sought leave, its doubtful whether the omission was curable. Our superior courts have on numerous decisions held that under Order 53 of the Civil Procedure Rules, the court cannot grant extension of time. For example, in *Wilson Osolo v John Ojiambo Ochola & Another*[1] the Court of Appeal held that "it was a mandatory requirement of order 53 Rule 3(1) of the Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days ...there was no proper application before the Superior Court."

8. Also relevant is *Republic v Linda Wanjiku & 2 Others ex parte E.N. (Applying as father and next of friend of SK(Minor)*[2] in which the court observed that "..failure to comply with the order for leave on the time lines the substantive motion as filed is incompetent." Further, in the said case the court cited the Court of Appeal in *United Housing Estate Limited v Nyals (Kenya) Ltd*[3] which stated that "what emerges from the decision of the Court of Appeal is that a party cannot unilaterally decide not to comply with the conditions attached to the exercise of discretion of the court... Non-compliance with court order cannot be a procedural technicality curable by application of Article 159 of the Constitution."

9. Also useful is *Republic v Medical Laboratory Technologists Board ex parte Anastacia Ngithi Wahu & 177 Others*[4] in which the court held that the words "shall be made" in orders 53 Rule 3(1) of the Civil Procedure Rules 2010 demonstrate that the time lines are mandatory rules of procedure that ought to be strictly adhered to and *Republic v Cabinet Secretary, Information Communication & Technology & Another ex parte Celestine Okuta & Others*[5] in which the court addressing a similar situation remarked that "the applicants expect the court to ignore directions of the court and treat their failure to comply with the courts directions as inconsequential."

10. In *R v Chairman, Amangoro Land Disputes Tribunal & Another ex parte Alfred Ididi Eketon Ididi & Another*[6] the court held that it had no discretion to extent time in Judicial Review proceedings while in

1 {1996} eKLR.

2 {2017}eKLR.

3 Civil Application No. Nairobi 84 of 1996.

4 {2017}eKLR.

5 {2016}eKLR.

6 {2015}eKLR.

Republic v Medical Laboratory Technicians and Technologists Board ex parte Edna Mwende Kavindu[7] the court found that there was no competent application before it and struck it off for being filed out of time. In the same vein, the Court of Appeal in *Wilson Osolo v John Ojiambo Ochola & Another*[8] expressed itself thus: -

> " It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the *Law Reform Act*. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the *Law Reform Act*". There is no provision for extension of time to apply for such leave in the *Limitation of Actions Act* (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here."

11. In *Republic v Public Procurement Administrative Review Board ex parte Syner-Chemie*[9] the court observed that there are two schools of thought on the issue whether the court can extent time in Judicial Review proceedings. The first school of thought represented by the above cited decisions holds the view that no enlargement of time for filing of a substantive motion is envisaged in Order 53 of the Civil Procedure Rules. The second school of thought which supports the view that the court has jurisdiction to enlarge the period cites Articles 47 and 48 of the Constitution and the *Fair Administrative Action Act*. However, even if I were to be persuaded by the second school of thought, I also find that the applicant never sought extension of time.

12. Generally, our courts have adopted a strict interpretation of the provisions of Orde 53 holding that the word shall in the said provision connotes a mandatory obligation, a position upheld The Court Appeal in *Ako v Special District Commissioner, Kisumu & Another*[10] which held that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provisions of sub-section (3) of Section 9 of the *Law Reform Act*.[11] In *Re an application by Gideon Waweru Gthunguri*[12] the colonial Supreme Court held that the said section imposes an absolute period of limitation.

13. Since the application was not filed within 14 days ordered by the court, there is no proper application before me. It follows that the applicant could not purport to properly file the application after the lapse of the 14 days without the leave of the court. The import of this is that the said application is not properly before this court and on this ground alone, the applicant's application collapses. Flowing from the foregoing, it is my finding that the applicant failed to comply with a court order and filed the application dated 1st September 2020 out of time and without leave. The effect is that there is no competent application before this court for determination. The application dated 1st September 2020 is struck out with costs to the Respondents.

7 {2017}eKLR.

8 {1995} eKLR.

9 *Republic vs Public Procurement Administrative Review Board ex parte Syner-Chemie* {2016} eKLR.

10 Civil Appeal No. 27 of 1989, Nyarangi JA., Gachuhi JA., Kwach Ag. JA.

11 Supra.

12 {1962} 1 EA 520.

Orders accordingly

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3RD DAY OF NOVEMBER 2021

JOHN M. MATIVO

JUDGE