



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO. 17 OF 2019

IN THE MATTER OF THE COMMON RULES AND

REGULATIONS FOR UNDERGRADUATE EXAMINATION GOVERNING MASENO UNIVERSITY

AND

IN THE MATTER OF AN APPLICATION BY

RAPHAEL MUTINDA KYALO FOR LEAVE TO APPLY FOR AN ORDER OR CERTIORARI PROHIBITION AND

MANDAMUS

AND

IN THE MATTER OF SECTION 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FAIR ADMINISTRATION ACT AND

ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE DECISION OF THE SENATE DATED 8TH FEBRUARY 2019 AND

IN THE APPEAL COMMITTEE OF MASENO UNIVERSITY CONTAINED IN THE LETTER DATED

2ND APRIL 2019

REPUBLIC.....APPLICANT

RAPHAEL MUTINDA KYALO.....EX-PARTE APPLICANT

-VERSUS-

MASENO UNIVERSITY.....RESPONDENT

RULING

The ex-parte Applicant, **RAPHAEL MUTINDA KYALO**, has moved the Court by way of a Notice of Motion dated 8th November 2019. He is asking the Court to extend, by a period of eight (8) days, the 30 days period which he had been allowed, for the lodging of the substantive Judicial Review Proceedings.

1. It is common ground that on 2nd October 2019, the Court granted Leave to the ex-parte Applicant, to institute Judicial Review Proceedings.
2. When granting him leave, the Court directed the ex-parte Applicant to lodge the substantive proceedings for Judicial Review within 30

days.

3. The application for extension of time was supported by the affidavit of **FAITH MUTIO MUTUKU**, the learned advocate for the ex-parte Applicant.

4. It was the deponent's case that after the court had granted leave for the institution of the substantive proceedings for Judicial Review, she got down to work, putting together the requisite substantive Notice of Motion.

5. However, the deponent was taken ill on the weekend of 26th October 2019, prompting her to seek medication attention on 28th October 2019.

6. Annexed to the supporting affidavit was a Sick Sheet issued by **The NAIROBI WOMEN'S HOSPITAL**, showing that the Advocate Faith Mutuku had been advised to be off-duty for four (4) days, between 28th October 2019 and 1st November 2019.

7. Having complied with the advice of the doctor, Advocate Faith Mutuku resumed work on 5th November 2019. By that date, the 30 days period, during which the substantive application for Judicial Review should have been filed, had already lapsed.

8. The Applicant has filed the substantive application. However, as it was filed later than had been directed, the Applicant was now seeking an extension of time, so that the substantive application be deemed to have been filed within time, as may be extended by this court.

9. In answer to the application, the Respondent, **MASENO UNIVERSITY**, filed a Replying Affidavit which was sworn by **JOY AKINYI**, who is the Respondent's Legal Officer.

10. The Respondent pointed out that if the substantive application had already been prepared by the time the Applicant's advocate was taken ill, there is no reason why the application was not filed on time.

11. The Applicant's advocate, in her further affidavit, explained that what she had worked on before falling ill was a draft of the substantive application.

12. Secondly, the Respondent pointed out that the Applicant's advocate had failed to make available to the court, the Treatment Records.

13. In my understanding, the Respondent was casting doubts on the deposition by Advocate Faith Mutuku, concerning her state of health.

14. Indeed, the Respondent went as far as saying that the Sick Sheet was simply;

“..... a document just prepared to mislead the court and should therefore not be given any consideration by the court.”

15. That deposition means that the Sick Sheet was a fabrication or a forgery, which was not based on the truth.

16. It pains me to imagine that a lawyer can actually suggest that her counterpart simply had a document prepared with the sole intention of misleading the court.

17. If there was any basis for that serious assertion, the same ought to have been provided to the court. Since the Applicant's advocate provided a document to back-up her position, prudence dictates that the person doubting the authenticity of that document should provide something like either an affidavit from the Nairobi Women's Hospital, disowning the Sick Sheet, or a Report from a Handwriting Expert or any other relevant Expert, explaining why the Sick Sheet was not authentic.

18. I find that the failure by the Applicant's advocate, to provide the Court with copies of Treatment Records does not render the Sick Sheet fake.

19. If the Respondent had provided the court with material to show that the Sick Sheet was only prepared to mislead the court, I would not only have disregarded the contents thereof, I would have been obliged to ask the Director of Criminal Investigation to take appropriate action after carrying out the requisite investigations.

20. The Respondent submitted that this court lacks jurisdiction to grant an extension of time, as **Section 9** of the **Law Reform Act** has no provision for so doing.

21. The Respondent cited the decision in **REPUBLIC Vs KAHINDI NYAFULA & 3 OTHERS, ELC JUDICIAL REVIEW NO. 3 OF 2013 (Malindi)**, to back its position. In that case. O.A. Angote J. held as follows;

“Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure. A party, other than invoking the provisions of Order 53 cannot invoke the provisions of the Civil Procedure Act and the Rules made thereunder.

.....

Consequently, the provisions of Order 50 Rule 6 of the Civil Procedure Rules, which allows the enlargement of time by the court, for doing of a particular act, does not come to the Ex-parte Applicant's aid, neither does Article 159 (2) of the Constitution."

22. The other case cited by the Respondent is **REPUBLIC Vs PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & OTHERS EX-PARTE FIREFOX KENYA LIMITED, JUDICIAL REVIEW NO. 180 OF 2018**. In that case Mativo J. held as follows;

"It is also important to point out that the provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010, which grant the Court power to enlarge time cannot override the express provisions of the statute, namely Section 9 (3) of the Law Reform Act."

23. Of course, Rules made under an Act of Parliament are subsidiary legislation, and they cannot therefore amend the statute.

24. The third authority cited by the Respondent was **DONALD O. RABALLA Vs THE JUDICIAL SERVICE COMMISSION & ANOTHER, CIVIL APPLICATION NO. NAIROBI 10 OF 2015**. In that case, the single Judge of Appeal was persuaded that **Article 159 (2) (d)** of the **Constitution** was not applicable in an application for extension of time to file and to serve a Notice of Appeal and a Record of Appeal, out of time.

25. The Judge said that;

"Statutory timelines are set for good reasons and in instances where the court was permitted to exercise its discretion to extend time for compliance, the law requires that the reasons for failure to meet the timelines be sufficiently set out."

26. In the case of **FIRST NATIONAL FINANCE BANK LIMITED Vs UNIVERSAL APPARES (EPZ) LTD & 2 OTHERS HCCC NO. 2496 OF 1997**, I held as follows;

"Where the statute or the applicable rules stipulate a procedure to be followed, parties ought to comply. It is only when rules are followed that there is orderliness in the manner in which proceedings are handled. If the courts were to totally disregard the rules of procedure, the result is likely to be total anarchy.

Nonetheless, Articles 159 (2) (d) of the Constitution makes it clear that when called upon to administer Justice, the courts or any other tribunals which exercise judicial authority, shall not be blindly enslaved by procedural technicalities."

27. As stated in that case, the Constitution does not urge either the courts or the parties to disregard procedural rules altogether.

28. The courts are required not to have undue regard to procedural technicalities.

29. Having taken into account that constitutional dictate, the court, (in the case of **FIRST NATIONAL FINANCE BANK LIMITED**) set aside the orders that had been made by the Deputy Registrar, when she had undertaken the exercise of Taxing Accounts.

30. Meanwhile, the Applicant also cited a number of authorities which held that the courts have the discretion to extend time for filing the substantive Motion for Judicial Review.

31. In the case of **REPUBLIC Vs SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY & ANOTHER, EXPARTE EVANS KIDERO, JUDICIAL RREVIEW NO.OF 2016**, Aburili J. expressed herself thus;

"..... Even if there was no specific provision for enlargement of time in a procedural rule like Order 53 Rule 3 of the Civil Procedure Rules, what this court needs to satisfy itself is that there is no demonstrable prejudice caused to the adverse party because of delay, and whether refusal to enlarge time would occasion hardship and result in an injustice to the applicant.

In so doing, this court's inherent jurisdiction is not fettered, to ensure that justice is done to the parties, since there is no prohibition for enlargement of time; and in the absence of a specific prohibition by the Rules Committee, the court infers that the Civil Procedure Rules were not meant or intended to preclude meritorious claims."

32. The learned Judge added that;

"..... this court retains its inherent power to extend time limited by Order 53 Rule 3, as a strict application of the rule would not be a legitimate restriction on the right of access to justice, which is a constitutional right stipulated in Article 48 of the Constitution."

33. In that case, there had been a delay of seven (7) days in filing the substantive Motion. Nonetheless, the learned Judge extended the time, so that the Motion was deemed to have been filed within time, as extended by the court.

34. In the case of **REPUBLIC Vs KENYA REVENUE AUTHORITY EXPARTE STANLEY NOMBO AMUTI, JUDICIAL REVIEW APPLICATION NO.102 OF 2018**, Mativo J. examined numerous authorities from Kenya, noting that there were two schools of thought on

the question as to whether or not the Court has jurisdiction to extend time.

35. The learned Judge observed that there was a line of decisions which were rendered before the promulgation of the 2010 Constitution, and which adopted a rigid construction of **Section 9 (3) of the Law Reform Act**. He then posed the following question, for consideration;

“The question that warrants a candid interrogation is whether the argument that the court upholds a statutory provision which is based on traditional common law Judicial Review principles can now hold sway on the face of our current constitutional dispensation.”

36. Having set down the said question, the court proceeded to answer it as follows;

“35. All law must conform to the Constitutional edifice. It follows that the provisions of Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules must conform to the Constitution or be construed with such adaptations, alterations or modifications so as to conform with the Constitution.”

37. And why should that be the position?

38. Again, the answer was provided by Mativo J. as follows;

“37. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion of the court to, in such cases, be guided by the purposes, values and principles of the Constitution and the constitutional dictate to develop the law on that front.”

39. I am in full agreement with those views, because the new constitutional dispensation is firmly anchored on the recognition that courts ought to facilitate access to effective Justice.

40. Accordingly, where the court is persuaded that the Respondent would not be prejudiced, when the court exercises its discretion, the court ought to adopt flexibility in its application of the law.

41. I am persuaded that unless a statute expressly prohibits it, the court ought to always retain and be ready to exercise its inherent jurisdiction judiciously.

42. I share the following viewpoint of Mativo J. in the case of **REPUBLIC Vs KENYA REVENUE AUTHORITY, EX PARTE STANLEY MOMBO AMUTI** (supra);

“Second, the right to access the Court is now constitutionally guaranteed. It would require a compelling reason that would pass an Article 24 analysis test to deny a litigant the right to approach the court. Where a party applies for extension of time as in this case, the court should exercise its discretion and examine the period of the delay and the reasons offered for the delay.”

43. In this case, the advocate for the Applicant prepared the draft substantive application, but she became unwell before she made the final document.

44. The doctor advised her to stay off-duty between 28th October 2019 and 1st November 2019. The doctor indicated, on the Sick Sheet that the Applicant’s advocate would resume duty on 5th November 2019.

45. I find that the reason for the delay in filing the substantive application has been adequately explained. The advocate was unwell, and was unable to file the application within the time allowed.

46. I also find that the delay of 8 days was not inordinate or inexcusable.

47. Finally, I find that the Respondent cannot suffer any prejudice if the time for the lodging of the substantive Motion were extended.

48. Accordingly, I now grant an extension of the time for the lodging of the substantive Motion, so that the same is now deemed to have been filed within time, as now extended.

49. As regards the costs of the application, I find no reason why the Respondent should be saddled with the same, as the delay was wholly attributable to the ailment which befell the Applicant’s advocate. Therefore, I order each party to pay his own costs of the application.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 6TH DAY OF MAY 2020

FRED A. OCHIENG

JUDGE