



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

JUDICIAL REVIEW NO 16 OF 2017

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF SOCIETIES.....RESPONDENT

AND MOHAMED YUNIS.....EX-PARTE APPLICANT

AHMED BASHIR GELEINTERESTED PARTY

RULING

INTRODUCTION

1. The *ex-parte* applicant filed this application under certificate of urgency and was certified as such. This court was requested to stay the delivery of its ruling scheduled for 25/7/2018 in order to enable the *ex-parte* applicant to file both a replying affidavit and submissions out of time. Additionally, the *ex-parte* applicant sought an order for provision of costs.
2. The application was brought pursuant to sections 1A, 1B and the inherent powers of the court.
3. The application is opposed by the respondent (the Registrar of societies) on the basis that the *ex-parte* leave that was granted to the *ex-parte* applicant automatically lapsed upon the expiry of the period within which to file the substantive notice of motion, amongst other reasons.
4. Finally, the interested parties (Ahmed Bashir Gele) on his own behalf and on behalf of the members of the Narok Muslim Welfare Society) have opposed the application on the basis that the *ex-parte* applicant has unreasonably delayed in filing his application amongst other reasons.

The case for the *ex-parte* applicant

5. The *ex-parte* applicant's application is based on eleven grounds that are set out on the face of the notice of motion dated 23/7/2018. Additionally, there is a supporting affidavit sworn to by Mohamed Dahir Kahim on behalf of the *ex-parte* applicants.
6. The major grounds in support of the application are as follows. First, the ruling in this matter was scheduled for 25/7/2018 and unless the delivery of the ruling is not stayed, the *ex-parte* applicants' application will be rendered nugatory and will suffer grave prejudice.
7. Furthermore, the *ex-parte* applicants appointed Messrs R. H. Wanga & Co. Advocates to represent them. They have not represented them despite having been paid. The said advocates failed to represent them after obtaining *ex-parte* leave to file a substantive notice of motion.
8. As a result of the said failure the interested parties filed an application to strike out the judicial review proceedings. Their said advocates have not to date filed any response and/or submissions to the said application of the interested parties, who are seeking to have the application dismissed.
9. Furthermore, the *ex-parte* applicants have stated that there is no participation on their part in the matter, whose ruling is scheduled for 25/7/2018. They have also stated that the lack of their participation has been due to the mistake and/or deliberate malice of their advocates.
10. Additionally, the *ex-parte* applicants have stated that they have diligently and dutifully sought to know the progress of their case from Messrs Wanga & Advocates, but the said advocates have deliberately declined to respond. And that their various telephone calls to them have gone unanswered.

11. Finally, the *ex-parte* applicants have urged the court to allow them to participate in these proceedings.

12. In addition to the foregoing grounds, the *ex-parte* applicants have also relied on the thirteen (13) paragraphs affidavit evidence of Mohamed Dahir Kahim. In that affidavit the *ex-parte* applicants have replicated the grounds in support of the notice of motion, except that they have added the following matters. First, the applicant has deponed that they had diligently and dutifully sought to know the progress of the application from their advocates but they deliberately declined to respond to their enquiry. Additionally, the applicant has averred that his several telephone calls to their former advocate (Mr. Wanga) were unanswered. It is for those reasons that the applicant has urged the court to allow them to participate in these proceedings so that the matter can be heard and determined on the merits.

13. Counsel for the *ex-parte* applicant has filed written submissions in support of the application. He has cited a number of authorities including *R. v. Public Procurement Administrative Review Board Ex-parte Syner – Chemie Limited (2016) eKLR*, in which the High Court enlarged time upon the application of the applicant under Order 53 of the 2010 Civil Procedure Rules. In doing so, the court stated that the provisions of Order 53 were not intended to pre-clude meritorious claims that have been filed in court.

The case for the respondent

14. The respondent filed four grounds of opposition. In ground one, counsel for the respondent has stated that the *ex-parte* applicant's notice of motion dated 23/7/2018 is defective and lacks merit. He has also stated that there are no judicial review proceedings pending in this court as the *ex-parte* leave that was granted, automatically lapsed upon expiry of the period granted to the *ex-parte* applicant to file a substantive notice of motion. Additionally, he has also stated that their participation will not change that part.

15. Furthermore, counsel for the respondent has also stated that the *ex-parte* applicant have displayed unmatched reluctance and indolence in prosecuting their application. And for that reason the court should not exercise discretion in their favour. Finally, counsel has urged the court to hear and determine their preliminary objection before proceeding to entertain and determine the instant application.

16. In addition to the grounds of objection, the respondent's counsel has filed written submissions in which he cited *R. v. Public Procurement Administrative Review Board & 2 others (2013) eKLR*, in which the court emphasized the importance of expeditious disposal of Judicial Review applications within the permitted time frames. The court went further and pointed out that Judicial Review proceedings are in the nature of public litigation and stressed the need for speedy certainty, because the legitimacy of public bodies is disputed and should be clarified in a speedy manner. Counsel has therefore urged the court to dismiss the *ex-parte* applicant's application on account of being indolent, frivolous and an abuse of the court process.

The case for the interested party

17. Counsel for the interested party has opposed the *ex-parte* applicant's application dated 23/7/2018 on three grounds. First, there has been unreasonable delay on the part of the applicant. Second, counsel has stated that the *ex-parte* applicants have always been in court when the court gave directions. And therefore, they cannot blame their former counsel for not representing them. Finally, they have urged the court to dismiss the application as it amounts to an abuse of the court process.

18. In addition to the grounds of opposition, counsel for the interested party has submitted that the *ex-parte* applicant is seeking leave to file submissions out of time in respect of the interested party's preliminary objection dated 21/5/2018. More importantly he has pointed out that counsel for the *ex-parte* applicant has not sought leave to file the substantive notice of motion out of time. Counsel has cited *J. G. Builders v. Plan International (2015) eKLR*, in which the court held that a litigant should not blame his counsel's inaction since it is his case and if there is delay he should blame himself and not his counsel. He has also distinguished the case of *Republic v. Procurement Administrative Review Board Ex-parte Syner Chemie Limited (2016) eKLR*. Counsel has pointed out that in that case, the application for enlargement of time was filed timeously.

19. Furthermore, counsel has submitted that the *ex-parte* applicant has not filed a substantive notice of motion. Instead, he seeks time to file submissions in response to a preliminary objection, three months after that the preliminary objection was filed. He has also pointed out that his application dated 23/7/2018 was filed eight months after the grant of the *ex-parte* leave to file the substantive notice of motion. It is for those reasons that he has urged the court to dismiss the *ex-parte* applicant's application with costs.

20. In the light of the foregoing affidavit evidence of the *ex-parte* applicant, the grounds of opposition and submissions of all counsel, I find the following to be the issues for determination.

1. Whether or not the *ex-parte* applicant has made out a case for the grant of leave to participate in the application.

2. Who bears the costs of this application?

Issue 1

21. The *ex-parte* applicant was granted leave to file his application on 22/6/2017. The inter-parties hearing was ordered to be heard on 28/6/2017. To date, the *ex-parte* applicant has not filed a substantive notice of motion. This is a delay and inaction of over one year. Furthermore, the *ex-parte* applicant in the instant application is seeking an order of this court to enable him file a replying affidavit and submission out of time in response to the preliminary objection raised by the interested party and the respondent.

22. In the circumstances, I find that the delay and inaction has not been explained. I also find it to be unreasonable. I therefore find that he has not made out a case for the grant of an order to be allowed to participate in these proceedings.

Issue 2

23. Costs follow the event in terms of section 27 of the Civil Procedure Act (Cap 21) Laws of Kenya.

24. I therefore find that the *ex-parte* applicant is hereby ordered to pay the costs of the interested party and those of the respondent.

25. The application of the *ex-parte* application is hereby dismissed in its entirety with costs to the interested party and the respondent.

Ruling delivered in open court this 21st day of November, 2018 in the absent of all the parties.

J. M. Bwonwonga

Judge

21/11/2018