



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 130 OF 2016

IN THE MATTER OF THE KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, SECTION 47 OF THE CONSTITUTION OF KENYA, 2010, SECTION 5 OF THE MEDICAL LABORATORIES TECHNICIANS AND TECHNOLOGISTS ACT, SECTION 3 AND 4 OF THE FAIR ADMINISTRATIVE ACTION ACT.

AND

IN THE MATTER OF AN APPLICATION BY EDNA MWENDE KAVINDU FO THE ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

BETWEEN

**REPUBLIC.....
.....APPLICANT**

VERSUS

THE KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD.....RESPONDENT

**EDNA MWENDE KAVINDU.....EX
PARTE APLICANT**

JUDGMENT

1. By a chamber summons dated 15th March 2016 the applicant Edna Mwende Kavindu sought leave of this court to institute Judicial Review proceedings seeking for Judicial Review orders of certiorari, mandamus s and prohibition.

2. On 18th March 2016, Honourable Justice Korir granted to the exparte applicant leave to file Judicial Review proceedings and also ordered that the leave so granted do operate as stay of the respondent’s decision of charging the applicant’s annual practice license from A05218 to MO5218. The stay order was to be in force for a period of 60 days only but subject to further orders by the court.

3. The applicant was directed to file and serve the substantive motion, skeletal submissions and list of authorities within ten (10) days from 18th March 2016; and costs of the application were to abide by the outcome of the substantive notice of motion.

4. The matter was then scheduled for mention on 31st March 2016 to confirm compliance and for issuance of further directions.

5. On 31st March 2016 the matter came up before Honourable Korir J as scheduled but none of the parties advocates were present hence the court fixed the matter for mention on 20th April 2016 and directed the Deputy Registrar to issue mention notices. On 20th April 2016, Mr Mungania holding brief for Mr Nzioka for the applicant was present but there was no representation on the part of the respondent.

6. Mr Mungania informed the court that on 18th March 2016 they were given ten days to file and serve the notice of motion but that the court file went missing until 7th April 2016 when they filed the notice of motion and that the ten days had already expired. He prayed for ten more days to serve the respondent.

7. The court made the following order:

“Court

Mention on 27th April 2016. Applicant to issue mention notice to the respondent.”

Signed Korir J

20.4. 2016”

8. On 27th April 2016 both parties advocates were present and Mr Enonda holding brief for Mr Githinji for the respondent informed the court that Mr Githinji’s clients were served on 22nd April 2016 and he had put in a notice of appointment on 25th April 2016. He sought leave to put in a replying affidavit within the next 7 days.

9. Mr Komu holding brief for Mr Nzioka for the applicant did not object to that request and the court gave directions to the effect that the respondent to file and serve replies to the application and submissions within 14 days from that date 27th April 2016.

10. Further, that upon service, the exparte applicant be at liberty to file and serve further affidavits and supplementary submissions within 7 days and highlighting of submissions was fixed for 5th July 2016.

11. By 5th July 2016, Honourable Korir J had been transferred to Busia High Court hence I was seized of this matter and only Mr Githinji counsel for the respondent appeared in court seeking for more time to serve documents upon the applicant’s counsel, which leave was granted and the matter was fixed for mention on 26th July 2016.

12. I have taken the liberty to given an analysis of the matter from the commencement of the proceedings until the time i took over its conduct from Honourable Korir J and heard the parties’ submissions on 31st October 2016 for the very reason that albeit leave to file the substantive motion was granted on 18th March 2016 and whereas the substantive motion, according to the leave granted was expected to be filed on or before 29th March 2016 which was within 10 days from the date of the order for leave granted on 18th March 2016, the exparte applicant admittedly filed the substantive motion on 7th April 2016. The motion is dated 19th March 2016.

13. No doubt, the substantive motion was filed outside the 10 days leave granted on 18th March 2016. It is for that reason that when the matter came up for mention before Honourable Korir on 20th April 2016, Mr Mungania counsel holding brief for Mr Nzioka for the applicant intimated to court that indeed they had filed the notice of motion outside the 10 days granted on 18th March 2016 and he sought for ten more days to serve the respondent. He however did not seek for enlargement of time for the court to make any order enlarging the period within which the notice of motion ought to have been filed. Such application would have been made and considered pursuant to the provisions of Order 50 Rule 6 of the Civil Procedure Rules or even under the court's own inherent jurisdiction.

14. The record is clear that albeit the learned judge Korir J adjourned the matter to 27th April 2016 for mention and directed the applicant's counsel to issue mention notice to the respondent, no order enlarging or extending the time for filing for the notice of motion was sought and or granted to the applicant. The parties then proceeded with the matter on the subsequent dates until the hearing date as if the notice of motion was validly on record, as filed out of the 10 days stipulated by the order of 18th March 2016.

15. Albeit the parties' advocates have ably put forward their arguments for and against the substance of the notice of motion, this court must first and foremost determine whether the substantive motion is validly on record.

16. Order 53 Rule 1(1) and (2) of the Civil Procedure Rules stipulates:

“1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore had been granted in accordance with this rule.

2. An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out and the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

17. From the above provisions, it is clear that for an applicant to apply for Judicial Review he or she must apply for leave to institute the judicial review proceedings. Therefore, without such leave, the court has no power to hear and grant Judicial Review orders as espoused in Sections 8 and 9 of the Law Reform Act which sections of the law must be read with Order 53 of the Civil Procedure Rules.

18. Under Order 53 Rule 4(1) of the Civil Procedure Rules, no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

19. The statement referred to in Rule 4(1) is the one that the applicant is required to file with the application for leave.

20. In other words, once leave is granted to institute Judicial Review proceeding the applicant is expected to file the substantive notice of motion in accordance with the leave granted under Order 53 Rule (1) of the Civil Procedure Rules. And once leave is granted to the applicant to apply for Judicial Review orders, the substantive motion shall be filed within 21 days from such dated of leave.

21. In this case, the learned judge Honourable Korir ordered that the substantive notice of motion be filed within 10 days from 18th March 2016 and by 29th March 2016 which was the last day, no such notice of motion had been filed. The motion was filed on 7th April 2016. The applicant never sought leave of court to enlarge or extend the time for filing the motion as the time originally granted had lapsed.

22. Albeit this court exists to do justice to the parties, it is an umpire and unless its jurisdiction whether inherent or otherwise is invoked, it does not exist to exercise unsolicited advisory jurisdiction. It is upon the parties who approach the seat of justice to ensure that what they seek is available to them.

23. The filing of the substantive notice of motion outside the period granted by the court goes to the root and jurisdiction of the court to entertain the substantive motion. It is not a procedural technicality curable by application of Article 159(2) of the Constitution. Where there is no specific application whether formal or informal, made to the court for enlargement of the expired time, this court would therefore not even determine whether the failure to file the notice of motion within the stipulated time granted in the order for leave is excusable or not.

24. Had the exparte applicant sought leave of court for enlargement of time within which to file the notice of motion and to deem the already filed motion as duly filed within the enlarged period of time, this court would have considered that application on its merits.

25. As matters stand now, there is no such application and since the court is deemed to know the law, it would not proceed to determine the merits of the substantive notice of motion which is incompetently on record.

26. I reiterate that albeit Order 53(3) (1) of the Civil Procedure Rules provides that the leave once granted to apply for Judicial Review orders of certiorari, prohibition or mandamus, the substantive motion shall be filed within 21 days of the date of leave, nonetheless, this court having granted a shorter period than 21 days, it was upon the applicant to file the motion within the time frame granted by the court. Failure to comply with the timelines given by the court renders the substantive motion as filed out of time inept.

27. This court has had the opportunity to determine a similar issue in **JR 97 of 2016 Linda Okello Vs Inspector General of Police and the National Police Service and Others**; citing with approval the Court of Appeal decision in **United Housing Estate Limited Vs Nyals (Kenya) Limited Civil Application No. Nairobi 84 of 1996** where the Court of Appeal stated:

“ A party who obtains an order of a court on certain specified conditions can only continue enjoying the benefits of that order if the condition attaching to it are scrupulously Honoured and in the event of a proved failure to comply with the attached condition, the court has inherent power to recall or vacate such an order.”

28. Therefore, a party cannot unilaterally choose not to comply with conditions attached to the exercise of the court's discretion in his or her favour on the ground that he or she ought to access justice.

29. As earlier stated, the exparte applicant in the instant case had the option of moving the court to extend time or seek to regularize the record where the notice of motion had been filed. By declining to exercise any of the available options, the applicant has effectively disintitiled herself of the favourable exercise of the court's discretion.

30. In **Wilson Osolo Vs John Ojiambo Ochola & Another CA 6 of 1995**, the Court of Appeal while appreciating that Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya; quite clearly stipulates that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed and that there is no provision for extending the time prescribed there under, was nevertheless of the view that:

“ It was a mandatory requirement of Order 53 Rule 3(1) of the Civil Procedure Rules when 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 of 15th February 1982, there was no proper application before the

Superior Court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules. There was no such application save the one dated 28th April 1994. That came too late in the day in any event and the learned judge erred in even considering the extension of time some 12 years after the event.

31. In **John Onger Mariaria & 2 Others Vs Paul Matundura Civil Application Nairobi 301 of 2003[2004] 2 EA 163**, the Court of Appeal stated:

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work.....must fall on their shoulders.....whereas it is true that the court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone.....justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.”

32. It therefore follows that this court cannot ignore its order stipulating the timeframe within which the exparte applicant was supposed to have filed her substantive notice of motion. Failure to comply with the court order cannot be a procedural technicality curable under Article 159 of the Constitution.

33. Odunga J in **Republic Vs Cabinet Secretary, Information, Communication & Technology & Another Exparte Celestine Okuta & Others [2016] eKLR** faced with a similar situation where the applicant failed to file the substantive notice of motion within the timeline stipulated in the order for leave to apply, expressed himself thus, and I concur that:

“ In my view, court orders are serious decisions that can only be exercised based on material placed before the court and cannot be ignored on the ground that they are technicalities . In my view, the law is that technicalities of procedure ought not to automatically lead to termination of proceedings and that the court must have the power to save the same where material exist before the court to justify non-compliance. However, where there is none, and where in fact the applicant adopts an incorrect position of the law to justify his inaction, such omission cannot be excused.”

34. For the above reasons, this court finds that to proceed to determine the applicant’s notice of motion on its merits will be doing no more than engaging in a wild goose chase and achieve nothing at the end of the day since the motion as filed is untenably on record.

35. Accordingly, I find that there is no competent notice of motion filed before this court capable of adjudication on its merits. The notice of motion dated 19th March 2016 and filed in court on 7th April 2016 by the exparte applicant Edna Mwendu Kavindu is therefore hereby struck out for being incompetent.

36. As the respondent was all along oblivious of this fundamental state of affairs and point of law and therefore proceeded to oppose the motion as if it was properly on record, and the court having found on its own accord that the orders of 18th March 2016 were not complied with, for , it is upon the court to know the law, and as the flaw is fundamental to the main cause, I order that each party bear their own costs of the application for leave and for the incompetent notice of motion as struck out.

Dated, signed and delivered in open court at Nairobi this 17th day of January 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Githinji for the Respondents

Edna Mwendu the Exparte applicant present(her advocate is said to be engaged elsewhere and send his clerk Sebastian to take the judgment).

CA: George.