



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW APPLICATION NO. 3 OF 2014

REPUBLIC..... APPLICANT

VERSUS

DISTRICT EDUCATION BOARD.....1ST RESPONDENT

SUBCOUNTY HEALTH OFFICER,

NYERI SOUTH DISTRICT.....2ND RESPONDENT

ex parte:

BRIDGE INTERNATIONAL ACADEMIES LIMITED

JUDGMENT

By a chamber summons dated 21st of January, 2014 the *ex parte* applicant sought for leave from this court to apply for the judicial review orders of certiorari and prohibition; the order for certiorari was intended to remove to this honourable court and quash the 2nd respondent's letter dated 9th of January, 2014 requiring the *ex parte* applicant to close its school in Othaya, Nyeri County while that of prohibition targeted the two respondents from implementing the decision of the 2nd respondent to close the school aforesaid. The application was made under **section 3A** of the **Civil Procedure Act** and **order 53 rule 1(1)(2)(3)** and **(4)** of the **Civil Procedure Rules**.

The application was heard *ex parte* in the 1st instance under a certificate of urgency on 22nd January, 2014; on that date, the court (Wakiaga, J) granted the applicant leave to file the substantive motion for the orders of judicial review. Apart from granting leave, the court also directed that the application should be filed within 14 days of the date of the order in view of the urgency of the matter at hand.

The *ex parte* applicant did not file the application as directed; it filed the substantive motion on 18th February, 2014, which was 27 days later.

The respondents opposed the application and inevitably one of the issues they raised as a preliminary point is that the substantive motion is incompetent for violating **order 53 rule 3(1)** of the **Civil Procedure Rules**.

In his submissions, the learned counsel for the *ex parte* applicant did not address this issue but largely dwelt on the merits of the motion. I reckon that counsel simply did not have any answer to this question.

Certainly, this honourable court cannot overlook the question of the timing of the *ex parte* applicant's

motion, particularly when the respondents have raised it as point of dispute and therefore calls for determination. It is appropriate to determine this question at this particular point because before the court proceeds to determine whether or not the ex parte applicant's motion is meritorious, it is necessary that it should first consider whether there is in fact a competent motion before it in the first place.

While granting leave to the applicant, this court prescribed the time within which the substantive motion for judicial review orders should be filed. The motion was filed 14 days outside the period granted by the court. If the court had not prescribed the time within which to file the motion, the law itself provides that the motion must be filed within 21 days of the date of the order granting leave. **Order 53 rule 3(1)** states as follows: -

3. (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing

The applicant neither filed a motion within the time prescribed either by the court or by the rules.

When there is a clear prescription in the rules of the time to do a particular thing, that thing must be done within that time. Such a prescription of time is neither in vain nor is it for cosmetic purposes; it must be adhered to. I reckon it is for this reason that the rules themselves provide for applications for extension of time if for one reason or another, a party could not take a particular action or proceedings within the prescribed time; in particular **Order 50 Rule 6** of the **Civil Procedure Rules** states that:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

There no evidence on record that the ex parte applicant ever made such an application for enlargement of time when he was caught out by the time prescribed by the court or the rules. It follows that the substantive motion for judicial review orders was filed in violation of the court order of 22nd January, 2014 and **order 53 rule 3(1)** of the **Civil Procedure Rules**. Both the court order and the rules are couched in mandatory terms implying that this court does not even have the discretion to entertain the motion filed in breach of its order and the prescribed rules.

It follows therefore that there is no competent application before this court for its determination. For this reason, I agree with the counsel for the respondents that the applicant's motion dated 18th February, 2014 is incompetent. Accordingly, I hereby strike it out with costs to the respondents. It is so ordered.

Dated, signed and delivered in open court this 13th day of January, 2017

Ngaah Jairus

JUDGE