



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 412 OF 2016

**IN THE MATTER OF AN APPLICATION BY E N FOR LEAVE TO APPLY FOR ORDERS OF
MANDAMUS, PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF CHILDREN'S CASE NO. 249 OF 2013 AT THE CHILDREN'S COURT
IN MILIMANI**

AND

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTION 84 OF THE CHILDREN'S ACT

AND

**IN THE MATTER OF RULE 4 OF THE CIVIL CHILDREN'S (PRACTICE & PROCEDURE
PARENTAL RESPONSIBILITY) REGULATIONS, 2002**

IN THE MATTER OF ABUSE OF JUDICIAL AUTHORITY

REPUBLICAPPLICANT

AND

E N

(Applying as father and next friend of

S K (MINOR).....EX-PARTE APPLICANT

VERSUS

LINDA WANJIKU1ST RESPONDENT

HON. G.M. GITONGA (MR) RM.....2ND RESPONDENT

JUDGMENT

1. On 7th September 2016, Honourable Odunga J granted the applicant herein E N (applying as father and next friend of S K (minor) leave to file Judicial Review proceedings pursuant to the chamber summons date 6th September 2016.
2. The learned judge further directed that the matter comes up for directions on 27th September 2016; with costs in the cause.
3. The record shows that the applicant filed the substantive motion on 19th September 2016. The official court stamp and receipt for fees received being 18,835 vide receipt No. [particulars withheld] is clear on the date that the substantive motion was filed.
4. The order granting leave to apply for Judicial Review proceedings as per the chamber summons dated 6th September 2016 is clear that the applicant was to commence Judicial Review proceedings within 7 days from the date of leave which was 7th September, 2016.
5. However, the application was filed on 19th September 2016 which was the twelfth day of the date when leave was granted. The seventh day fell on 14th September 2016.
6. There was no application for enlargement of the period of 7 days originally granted. That being the case, the only question for determination in the substantive notice of motion dated 19th September 2016 and filed on the same day is whether the said motion is competent before this court, to warrant an indepth consideration of the merits thereof.
7. Order 53 of the Civil Procedure Rules is clear that once leave is granted to apply for Judicial Review orders of mandamus, certiorari and prohibition, the substantive motion shall be filed within 21 days of the date of such order for leave.
8. However, the court having granted a shorter period than the 21 days stipulated in the Rules, it was upon the applicant to file the substantive notice of motion within the time frame stipulated in the order for leave and failure to comply with the order for leave on the time lines renders the substantive motion as filed incompetent.
9. I am fortified by the Court of Appeal decision rendered in **United Housing Estate Limited v Nyals (Kenya) Ltd Civil Application No. Nairobi 84 of 1996** where the Court of Appeal pronounced itself as follows:

“ A party who obtained an order of a court on certain specified conditions can only continue enjoying the benefits of that order if the conditions attaching to it are scrupulously honoured and in the event of a proved failure to comply with the attached conditions, the court has inherent power to recall or vacate such an order.”
10. What emerges from the above decision of the Court of Appeal is that a party cannot unilaterally decide not to comply with the conditions attached to the exercise of the discretion of the court in his or her favour on the ground that he or she ought to have access to justice.
11. In the instant case, the applicant had the option of moving the court to enlarge the time or to seek to regularize the record where the motion has already been lodged out of the stipulated time frame.
12. Failure to apply for enlargement of time for filing of the substantive notice of motion automatically disentitled the exparte applicant the favourable exercise of this court’s discretion.

13. To enjoy the discretion of the court, the applicant must approach the court with an application for enlargement of time. In **Wilson Osolo Vs John Ojiambo Ochola & Another CA 6 of 1995** where the Court of Appeal while appreciating that Section 9(3) of the Law Reform Act Cap 26 Laws of Kenya quite clearly shows that an application for leave to apply for an order of 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 period prescribed there under was nevertheless of the view that:

“ It was a mandatory requirement under 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 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.

14. In this case, as Order 50 (6) of the Civil Procedure Rules provides for enlargement of the time originally given by the court or set by the Rules, the applicant should have taken advantage of those provisions, which he did not.

15. In **John Ongeri Mariaria & 2 others vs Paul Matundura Civil Application No. Nairobi 301 of 2003[2004] 2 EA 163** the Court of Appeal held:

“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.”

16. In my humble view, this court cannot ignore the Order of 7th September 2016 stipulating the time frame within which the exparte applicant was expected to file the substantive notice of motion, as it is only by filing the motion within the stipulated time that this court would then be vested with the jurisdiction to hear and determine an application for judicial review. Non compliance with court order cannot be a procedural technicality curable by application of Article 159 of the Constitution.

17. Odunga J in **Republic vs Cabinet Secretary, Information Communication & Technology & Another Exparte Celestine Okuta & Others [2016] e KLR** was faced with a similar situation as the one herein where the applicant failed to file the substantive motion within the time frame stipulated in the order leave. In striking out the notice of motion, the learned judge held, and I agree:

“In my view, court orders are serious decisions that can only be excused 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.”

18. In the premises, without jurisdiction to consider an application filed out of the stipulated period, this court would be wasting all the precious judicial time to delve into the merits of the motion dated 19th September 2016 and filed on the same day.

19. In the end, I find that there is no competent notice of motion filed before this court which is capable of being adjudicated upon by application of the law.

20. The notice of motion dated 19th September 2016 and filed on the same day is hereby struck out.

21. Owing to the apparent familial relationship between the applicant and the 1st respondent and the minor issue subject of the proceedings in the Children's Court at Nairobi Children's Case No. 249 of 2013, and considering that the court had to first determine this issue of whether there was a competent motion before it without the input of the parties since the court is deemed to know the law, I order that each party do bear their own costs of these Judicial Review proceedings which have been struck out.

Dated, signed and delivered in open court at Nairobi this 21st day of February 2017.

R.E. ABURILI

JUDGE