REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 480 OF 2016

IN THE MATER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 2(1),3(1),10,21(1),22(1),23(1)23(3)(f),27(1),47(1),50(2) 174,175,176,181,185(3),229(8),236(a)& (b) & of CONSTITUTION OF KENYA,2010.

AND

IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE NAIROBI CITY COUNTY ASSEMBLY STANDING ORDERS

BETWEEN

REPUBLIC ……..… ……..……...APPLICANT

VERSUS

THE SPEAKER OF NAIROBI CITY

COUNTY ASSEMBLY ……..…….……...….1ST RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY …….…..…….....2ND RESPONDENT

HON. DR. EVANS KIDERO……...…..……..…..EXPARTE APPLICANT

RULING

Issue: whether the Court exercising Judicial Review jurisdiction has power to extend time for filing of the substantive Notice of Motion under Order 53 of the Civil Procedure Rules.

1. By a notice of motion dated 13th December 2016 the exparte applicant Dr. Evans Kidero who is the Governor for Nairobi City County seeks from this court orders:

> ***a) Spent***
>
> ***b) That the court be pleased to extend the 21 days period that was allowed for the filing of the notice of motion application by 6 days;***
>
> ***c) That the court does admit the notice of motion filed on 7th November 2016 as having been duly filed.***
>
> ***d) The court grants such further or other reliefs it may deem just and expedient to grant.***

2. The application was expressly brought under the provisions of Order 50 Rule 6 of the Civil Procedure Rules, Order 53 Rule 3(1) of the Civil Procedure Rules, 2012 Article 159 of the Constitution, Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya and all enabling provisions of the law.

3. The application is predicated on the grounds on the face of the notice of motion and supported by an affidavit sworn by Vera Lucy Awour advocate on 13th December 2016.

4. According to the grounds and as replicated in the depositions of Ms. Vera Lucy Awour, who is an associate advocate in the applicant counsel's law firm of Professor Tom Ojienda & Associates, on 10th October 2016 this court did grant leave to the exparte applicant to institute Judicial Review proceedings as sought in the chamber summons dated 10th October 2016; and also ordered that such leave do operate as stay of both the summons dated 5th October 2016 issued to the applicant and the impeachment process against him in the manner that had been contemplated by the respondents' Speaker of and the Nairobi City County Assembly.

5. That the said orders were subsequently served upon the respondents on 12th October 2016 and the respondents then filed a comprehensive application seeking to set aside the stay orders that had been obtained by the exparte applicant.

6. That counsel for the exparte applicant then focused on filing substantive responses to the application which sought to lift the stay orders based on erroneous humogous accusations that the applicant had misrepresented facts and failed to disclose material facts to the court hence, the preparation and filing of a 152 paged replying affidavit dated 5th November 2016 and the 311 paged submissions dated the same day.

7. That it took counsel for the applicant considerable time coming up with the comprehensive responses which consumed time hence the delay in filing of the substantive notice of motion within 21 days as had been directed by the court and that instead the motion was filed 5 days later than the 21 days period allowed by the court on 10th October 2016.

8. Further, that counsel was also under the mistaken belief that Sundays are excluded in the computation of time which was a mistake on her part and not on the part of the applicant.

9. That mistakes of counsel should never be visited upon an innocent client and that the court has wide discretion to extend time within which the substantive motion is to be filed if it establishes that the delay is not inordinate, is excusable and has not occasioned prejudice to the respondents as is provided for under Order 50 Rule 6 of the Civil Procedure Rules.

10. Further, that Article 159 of the Constitution enjoins the courts not to pay undue regard to procedural technicalities but that instead focus on meting out substantive justice hence courts of law should pay homage to their core duty of serving substantive justice in Judicial Review proceedings before them so as to ensure that justice is served.

11. It was deposed that it was in the interest of justice, fairness and the public interest that application be allowed.

12. The respondents opposed the application vide a replying affidavit sworn on 12th January 2017 by Alex Ole Magelo the Speaker of Nairobi City County Assembly deposing that the allegations by the applicant are incredulous since counsel Professor Tom Ojienda who has had the conduct of this matter on behalf of the applicant from the outset is an advocate of the rank of Senior Counsel and therefore he knew or ought to have known that Saturdays and Sundays are not excluded from the court's computation of time unless explicitly provided as such by the court.

13. Further, that Articles 159 (2) (d) of the Constitution cannot be invoked to oust mandatory rules of procedure. That the applicant's counsels have breached the court's rules and procedure and that no credible reasons have been preferred for failure to file or serve the substantive application in time, which fatal omissions cannot be wished away by the applicant and his advocates under the guise of Article 159(2) (d) of the Constitution.

14. It was further deposed that Order 53 Rule 3 of the Civil Procedure Rules mandates the filing of the substantive motion within 21 days of the orders of leave which period is absolute and therefore not challengeable under Order 50 Rule 6 of the Civil Procedure Rules. Further, that the Law Reform Act, the substantive law governing prerogative orders, does not provide for enlargement of time within which a party should file the substantive motion; and that therefore this court has no jurisdiction to grant the applicant leave to file the substantive application out of time.

15. That whenever an advocate by his inexcusable delay deprives a client of his cause of action, the proper recourse for the client is to claim damages against the advocate. Consequently, that for legal business to be conducted efficiently, the applicants' advocates should bear the consequences of their own professional negligence for failing to file the substantive application in time and that similarly, the applicant should bear the consequences of his choice of advocates.

16. That even if this court had jurisdiction to grant extension of time, such extension is not as of right, but is only available to a deserving party, at the discretion of the court but that the conduct of the applicant throughout these proceedings is unworthy of such discretion.

17. That the applicant has not discharged the burden of proving why he seeks for extension of time and that the reasons advanced for such failure are not only incredulous but frivolous. That an extension should not be granted where the respondents will be adversely affected, as is the case herein; and that the application for extension of time which is dated 13th December 2016 was filed 30 days after the date of filing the motion out of time on 7th November 2016 and that it was only filed on 12th January 2017.

18. That Judicial Review proceedings are a special jurisdiction and the statutory timelines set are not intended to be extended but that instead, they should be strictly adhered to hence the application is an abuse of the court process for being filed out of time hence it should be dismissed with costs.

19. The parties' advocates canvassed the motion orally before me on 30th January 2017 with Senior Counsel Professor Tom Ojienda urging the application on behalf of the applicant whereas Mr Karanja represented the respondents.

20. Professor Ojienda also relied on his written submissions filed on 27th January 2017 and reiterated the grounds and depositions made by Veralucy Awour Advocate maintaining that this court has wide

discretion to extend the time under Order 50 Rule 6 of the Civil Procedure rules as read with Section 9(1) of the Law Reform Act. Reliance was placed on **Miscellaneous Civil Application JR 8/2014 Kenya Bureau of Standards and 3 Others V Kenya Maritime Authority Exparte Car Importers Association [2014] e KLR** where Honourable Mureithi J held inter alia, that whereas the provision relating to the 6 months period for commencement of proceedings for certiorari is statutory being expressed by Section 9 of the Law Reform Act, the requirement for filing of the notice of motion upon grant of leave is prescribed by the subsidiary legislation of the Civil Procedure Rules, which contain a rule (Order 50 rule 6) providing expressly for enlargement of time for doing anything prescribed under the Rules.

21. Further reliance was placed on this courts own decision in **JR 371 & 372 of 2015 Republic V Public Procurement Administrative Review Board Exparte Syner Chemie Limited [2016] e KLR** where the court enlarged time stipulated under Order 53 of the Civil Procedure Rules.

22. Further reliance was placed on **Miscellaneous Application 699 of 2007 Lucy Bosire V Kehancha Divisional Land Disputes Tribunal & 2 Others [2013] e KLR** citing with approval **Branco Arabe Spanol vs Bank of Uganda [1999] 2 EA 22** in submissions that the court should apply Article 159 2 (d) of the Constitution to serve substantive justice.

23. Further reliance was placed on **Miscellaneous Civil Application 12/2014 Republic Vs General Manager, Moi International Airport & Another Exparte Jared Adimo Odhiambo & Another [2014] e KLR** where the court emphasized the need to place Order 53 Rule 3 of the Civil Procedure Rules in consistency with Article 159 principle that justice should be administered without due regard to procedural technicalities and therefore that the court should invoke its inherent powers to extend time to achieve substantive justice.

24. It was submitted that sufficient explanation was provided for the delay in that the applicant swore the affidavit early enough and that there were only five days late due to the bulky documents that had to be prepared and filed to challenge the respondent's application seeking to vacate the orders issued by this court on 10th October 2016, which delay was due to an inadvertent error of the applicant's advocate who has owned up and absolved the party.

25. It was submitted, replying on **JR 12/14 Republic V GM Moil Int'l Airport** (supra) case that 5 days delay could not be inordinate in the circumstances, bearing in mind the fact that the substantive motion has already been filed hence no prejudice is occasioned to the respondents.

26. In response to the submissions by Professor Tom Ojienda Senior Counsel, Mr Karanja submitted in opposition reiterating the contents of the replying affidavit sworn by Mr Alex Magelo while replying on written submissions filed on 27th January 2017, emphasizing that there was inordinate delay of 39 days of filing of the motion out of time. Reliance was placed on the decision in **Aviation & Allied workers Union (K) KQ & 3 Others [2015] e KLR** which lays down principles for extension of time and that the Court of Appeal made it clear that extension of time is not a right; that there must be prove why a party seeks such extension; that there should be no extension where the respondent will be adversely affected; and that the application must have been brought timeously.

27. According to Mr Karanja, the court has no jurisdiction to enlarge time in Judicial Review proceedings as the rest of the provisions of the Civil Procedure Act and Rules, apart from Order 53 thereof do not apply to Judicial Review proceedings hence this application is an abuse of the court process and therefore it should be dismissed with costs. Reliance was placed on **Commissioner of Lands V Hotel Kunste CA 234/1995; M.M. Ole Keiuwa & J.V. Odera Juma V Yash Pal Ghai [2002] e KLR** where the court made it clear that Judicial Review proceedings are special jurisdiction proceedings, neither civil nor criminal hence Order 50 Rule 6 of the Civil procedure Rule is not applicable as the prohibition is statutory, as was held in **Republic V Kahindi Nyafula & 3 Others Exparte Kilifi South East Farmers Co-operative Union [2014]** and that therefore Order 50 Rule 6 and Article 159 (2) of the Constitution is not available to the applicant. Further reliance was placed on Section 3 of the Civil Procedure Act which recognizes special procedure prescribed by or under any

other law.

28. On the submission that Article 159 of the Constitution is applicable, a warning shot came from **Nicholas Kiptoo Salat V IEBC & 6 Others [2013] e KLR** where the Court of Appeal held that courts must never provide comfort and cover to parties who exhibit scant respect for rules and timelines hence, the applicant cannot invoke Article 159(2) (d) of the Constitution to oust mandatory rules of procedure as was held in **Africa Oil Turkana Limited & 2 Others V Edward Kings Onyancha Maina & 2 Others [2016] e KLR.**

29. It was submitted that in this case, the applicant has brought this application after inordinate delay; the application is highly prejudicial to the respondents who already face contempt proceedings: the applicant filed the motion out of time without first obtaining leave of court; and that the applicant is guilty of abuse of the court's process for abandoning Judicial Review proceedings midway after securing exparte orders to the detriment of the respondent. That all the electorate of Nairobi County is prejudiced as they await the outcome of these proceedings. It was further submitted that the applicant's remedy lies in the applicant seeking for damages against his advocate and not extension of time. Reliance was placed on **Michael Muriuki Ngubuini v EA Building Society Ltd [2015] e KLR.** Mr Karanja urged this court to dismiss the application herein with costs.

30. In a brief rejoinder, Professor Ojienda submitted that the delay was only of 5 days not 46 days and that no prejudice had been shown to be occasioned to the respondents if enlargement of time is granted, as the respondent will have an opportunity to respond to the substantive motion which is already filed on record.

DETERMINATION

31. I have carefully considered the applicant's application for enlargement of time within which the substantive notice of motion ought to have been filed. I have also considered the grounds and the supporting affidavit. I have given equal consideration to the replying affidavit filed by the respondents in opposition to the application, and the respective parties' written and oral submissions supported by constitutional, case law and statutory enactments.

32. The main issues for determination in this application are:

1. Whether this court has jurisdiction to enlarge time within which the substantive notice of motion ought to have been filed.

2. If the answer in (1) is in the affirmative, whether there was inordinate delay which is prejudicial to the respondents.

3. What orders should this court make

4. Who should bear the costs of this application?

33. On the first issue of whether this court has jurisdiction to enlarge time within which the substantive motion ought to have been filed, it was contended by the respondents that Judicial Review proceedings are special proceedings which are neither civil nor criminal and therefore the provisions of the Civil Procedure Act and Rules (other than Order 53) do not apply, and that neither would Article 159(2) (d) of the Constitution come to the aid of the applicant as the issue goes to the substance and jurisdiction of the court and not a procedural technicality.

34. In the respondent's views, the substantive law regarding Judicial Review proceedings is Section 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya and that therefore as the said Act whose procedure is stipulated in Order 53 of the Civil Procedure Rules does not provide for extension of time within which the 21 days can be enlarged or extended, this application is an abuse of court process and incompetent hence it should be dismissed with costs. In other words, the respondents

maintain that the period of 21 days stipulated under Order 53 Rule 3 of the Civil Procedure rules is not elastic hence it cannot be enlarged or extended by the court as it is fixed by statute. The respondents relied on the Court of Appeal decision in **Commissioner for Lands & Kunste Hotel Ltd [1997] e KLR** wherein the Court of Appeal held that Judicial Review proceedings are neither civil or criminal and therefore not a suit as defined under Section 2 of the Civil Procedure Act.

35. The respondents also relied on the High Court decision in **M.M. Ole Keiuwa & Another V Yash Pal Ghai [2002] e KLR** wherein the court at page 2/3 of the decision emphasized that the proceedings under Order 53 of the Civil Procedure Rules are special proceedings in nature and that Order 53 stands alone exclusive of other provisions of the Civil Procedure Rules and Act, and that Section 3 of the Act fortifies this position by recognizing special jurisdiction or procedure prescribed by or under any other law for the time being in force. Further reliance was placed on **Republic vs Kahindi Nyafula & 3 Others exparte Kilifi South East Farmers Co-operative [2014] e KLR** where the Angote J citing **Welamondi V Chair Electoral Commission of Kenya eKLR [2002] 285** and **Republic vs KBS & Others [2006] EA 345** held inter alia, that Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure and that a party other than invoking Order 53 cannot invoke the provisions of the Civil Procedure Rules made there under. Consequently, that 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 aid of the exparte applicant; and neither does Article 159 (2) of the Constitution.

36. According to the respondents, the prohibition under Order 53 Rule 3 is statutory and absolute and not challengeable under any procedural provisions of the Civil Procedure Rules which provide for enlargement of time.

37. On the part of the applicant he was emphatic that although Section 9 of the Law Reform Act Cap 26 Laws of Kenya which is a substantive provision for institution of Judicial Review proceedings provides for statutory 6 months within which the application for leave ought to be filed, and gives no room for enlargement thereof, the procedure for filing of the substantive motion is set out in Order 53 of the Civil Procedure Rules and that owing to the fact that the 21 days period is provided for by the Civil Procedure Rules, it goes without saying that a party can ably make an application for extension of the 21 days period under Order 50 rule 6 of the Civil Procedure Rules, for the filing of the motion.

38. The applicant's counsel relied on **Republic vs General Manager Moi Int'l Airport & Another, Exparte Jared Adimo Odhiambo & Another** (supra) where the above principle was upheld with the court holding that the court has power to enlarge the 21 days period stipulated in Order 53 Rule 3 of the Civil Procedure Rules.

39. The applicant's counsel also hailed the decision of this court in **JR 371 & 372/2015 Republic Vs Public Procurement Administrative Review Board Exparte Syner –Chemie Ltd [2016] e KLR; JR 8/2014 KBS & 3 Others v Kenya Maritime Authority Exparte Car Importers Association** (supra); and **Miscellaneous 699/2007 Lucy Bosire V Kehancha Divisional Land Disputes Tribunal & 2 Others** (supra) citing **Branco Arabe Espanol V Bank of Uganda** (supra) where the same position was upheld.

40. What emerges from the two rival positions advanced by both parties' counsels is that there is no settled position, currently, as to whether the period of 21 days stipulated in Order 53 Rule 3 of the Civil Procedure Rules, 2010, can be enlarged by application of Order 50 Rule 6 of the Civil Procedure Rules which provides for enlargement of time.

41. That being the case, this court must endeavour to establish the position. I have already pronounced myself in several decisions including JR 371 and 372 of 2015- **Republic vs Public Procurement Administrative Review Board Exparte Syner –chemie Limited [2016] e KLR** that although some courts have applied strict interpretation regarding extension of time within which the substantive motion should be filed, this court, in the present constitutional framework should not let the former

intricacies and obscurities hamper the provision of effective redress to facilitate access to justice for all, and therefore it should adopt a flexible approach, which is not necessarily crafting or innovating its jurisdiction, but an approach that takes cognizance of the fact that old case law in the reach of Judicial Review remedies may not be of such practical relevance today.

42. Further, that nonetheless, because the legislature has not given any explicit direction on the issue, the court must adopt an interpretation of the silent provisions that best effectuates the legislative intent.

43. Judicial Review has its origin in common law and therefore the question is whether common law can override the spirit and letter of our 2010 Constitution. In the writings of **Professor Louis Jafee, on Judicial Control of Administrative Action, 329[1965]:**

> ***"Common law has been particularly prevalent in Judicial Review, an area that encompasses " a whole congeries of Judicial theories and practices" which constitute " the common law of review" and which is a significant of administrative law of the jurisdiction. Accordingly, it is expected that where there is a specific statutory and Constitutional provision on enactment, then those enactments must slowly replace the traditional common law doctrines."[emphasis Added].***

44. The good Professor Louis was however careful to caution that: ***" the change to embrace the new thinking will be slow and halting because of the doctrine of stare decisis"*** as was observed by the Court of Appeal in **City Chemist (Nairobi & Another V Oriental Commercial Bank Ltd, Civil Application No. Nairobi 302 of 2008 (unreported 192/2008*) that:***

> ***"……That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of discretion of the court which is judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assist litigants and legal Practioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."***

45. The question that must be answered is, whether, the applicant having filed his application of leave to institute Judicial Review proceedings within the 6 months stipulated in Section 9(3) of the Law Reform Act, but having obtained leave, but having defaulted to institute the substantive motion within the 21 days stipulated in Order 53 Rule 3 of the Civil Procedure Rules, he should be deprived of his cause of action on account of failure to file the motion within 21 days.

46. In my humble view, even going by precedents supplied by the respondents, compared to other authoritative precedents from the Court of Appeal, the spirit of the legislature in placing Order 53 of the Civil Procedure Rules within the rest of the Civil Procedure Rules was intended to flex the strict muscles of Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, so as to allow courts to exercise discretion where there is default occasioned by inadvertent mistake. If that were not to be the case, in my view, the legislature would have promulgated rules separate from the armbit of the Civil Procedure Rules, for operationalization of Sections 8 and 9 of the Law Reform Act.

47. By placing Order 53 within the Civil Procedure Rules, it was intended that the order would operate alongside other enabling rules under the statute. And if that were not the case, then the Court of Appeal would not have stated the following in the case of **Wilson Osolo v John Ojiambo Ochola & the Attorney General CA No. 6 Nairobi of 1995** while considering whether the court has power or jurisdiction to enlarge time stipulated under Order 53 of the Civil Procedure Rules:

> ***" A can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under***

the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, the procedure cannot be availed of the extension of time limited by statute, in this case, the Law Reform Act."

48. In the same judgment, the Court of Appeal stated:

" It was a mandatory requirement of 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 on 15th February 1985 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."

49. The above judgment was delivered by the Court of Appeal on 6th August 1996 when the provisions of Order 49 of the Civil Procedure Rules were in force and after amendments in 2010, it is now Order 50 Rule 6 of the Civil Procedure Rules, which permit the enlargement of time stipulated by the rules or set by the order of the court.

50. It is for the above reason that I concur with Professor Ojienda's acceptance of my holding in the **Republic vs Public Procurement Administrative Review Board Exparte Syner –chemie Ltd** case (supra) that 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 discretion 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.

51. In **Raval Vs The Mombasa Hardware Ltd[1968] EA 392**, the court considered inherent jurisdiction of the court and held that the reason usually given by the court for resorting to its inherent jurisdiction which is not conferred by any statute or constitutional provision is to prevent a miscarriage of justice, especially where the adverse party is not prejudiced in any way if the court extended time.

52. Article 159(2) of the Constitution is clear that in exercising judicial authority, the courts and tribunals shall be guided by principles including(a) justice shall be administered without undue regard to procedural technicalities. This is not to say that procedural rules shall be disregarded for they are handmaidens to substantive provisions of the law. However, as was stated in **Bremer Vulcan Schiffbar and Maschinen Fabrick vs South Indian Shipping Corporations Ltd [1981] AC 909** by Lord Diplock in relation to the inherent powers of the court, typifying such powers as enabling the court to take necessary actions to maintain its character as a court of justice;

" it would dampen the constitutional role of a court if as a court of justice it were not armed with power to prevent its process being abused, in such a way as to diminish its capability to arrive at a just decision of the dispute."

53. In my humble view, therefore, I find that Order 50 Rule 6 of the Civil Procedure Rules on enlargement of time under the rules is applicable to Judicial Review applications contemplated in Order 53 Rule 3 of the Civil Procedure Rules and even if it was not so, this court retains its inherent power to extend the 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.

54. Further, albeit the words used in Order 53 Rule 3 of the Civil Procedure Rules are *" shall be filed within 21 days….."*, the **Supreme Court** in **Deynes Mureithi & 4 Others s V Law Society of**

Kenya & Another[2016] e KLR applying a High Court decision in **Kisii High Court Peter Ochara Anam & 3 Others V CDF Board & 4 Others**, **Constitution Petition No. 3 of 2010 [2011] e KLR**, found that albeit the issues in the petition were neither civil nor criminal, were civil in nature and held:

> ***"In as much as the constitutional petition is a special jurisdiction, it is in the nature of civil proceedings. In the absence of rules made thereunder, the procedure of handling such a petition must be akin to civil proceedings. It cannot be that merely because it is a special jurisdiction, the rules of evidence, for instance should not apply, be ignored nor witnesses should not be sworn, pleadings should not be signed and questions in cross examination should not be asked. That will be a direct invitation to judicial chaos and legal absurdity. I do not therefore wholly agreed or subrule to the subscribe to the submissions of the petitioners that the petition being neither a criminal nor civil proceedings, it must be conducted in a vacuum. (emphasis by the Supreme Court)."***

55. In **Equity Bank Limited v West Link MBO Ltd Civil** Application **(Appeal) no 78 of 2011**, it was held that:

> ***" Courts of law exist to administer justice and in doing so, they must of necessity balance between the competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute."***

56. For the foregoing reasons, I find that this court has jurisdiction to enlarge time within which an application under Order 53 Rule 3 of the Civil Procedure Rule is to be filed, upon leave of court being granted.

57. On the **second issue** of whether there was inordinate and inexcusable delay in filing this application, the respondents contended that the applicant was guilty of delay of 46 days and that therefore he should not benefit from the court's discretion, assuming that the court had the power to enlarge the time for the filing of the substantive motion, which delay was said to be inordinate and prejudicial to the respondents and all the Nairobi City County Electorate who have been anxiously waiting for the disposal of this case. Further, that there is no good reason given for the delay.

58. On the part of the applicant, it is averred that the substantive motion was filed 5 days after the 21 days period and that delay was occasioned by an inadvertent error on the part of the applicant's advocates who got heavily engaged in preparing documents and affidavits in response to the respondent's motion seeking to set aside the orders given by this court on 10th October 2016. Further, that counsel was under a mistaken belief that Saturdays and Sundays are not included in the computation of time.

59. The respondents contend that it is the applicant's counsel who should therefore bear the blame of being professionally negligent to his client and not to seek to abuse court process by delaying the proceedings.

60. The court's rendition on this issue is that the applicant was on 10th October 2016 granted leave to institute Judicial Review proceedings within 21 days from that date. It was therefore expected that the substantive motion would be filed on or before 31st October 2016. However, the motion was filed on 7th November 2016 it is dated the same day. The application is supported by the affidavit sworn by Dr Evans Kidero sworn on 31st October 2016.

61. The record also shows that on 12th October 2016 2 days after grant of leave, the respondents filed a notice of motion under certificate of urgency seeking to suspend orders issued on 10th October 2016 operating as stay of the notice of the respondents to the applicant inviting him to appear before a sitting of the County Assembly to respond to allegations brought against him; stay of orders staying

implementation of the contemplated impeachment of the applicant and set aside or discharge order of 10th October 2016 granting leave to the applicant to apply for Judicial Review orders of certiorari and prohibition and that the court do strike out the entire Judicial Review proceedings.

62. That application, upon being served upon the applicant, elicited a response from the applicant, filed on 7th November 2016 by way of a replying affidavit sworn on 5th November 2016 comprising 57 paragraphs, 18 pages and several annextures including legal authorities.

63. However, it was not until 13th December 2016 that an application for enlargement of time was filed seeking to validate the notice of motion dated 7th November 2016 filed 6 days out of the 21 days stipulated in the order of 10th October 2016 and as per Order 53 Rule 3 of the Civil Procedure Rules.

64. The application for enlargement of time came about 43 days after 31st October 2016 when the motion ought to have been filed. The question is whether there was inordinate delay and if so, whether despite the delay, the court can grant the orders sought in the interest of justice.

65. In **Ivita v Kyumba [1984] KLR 441**, the court held, in considering an application for dismissal of suit for want of prosecution that:

> ***" The test applied by the courts…….is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied d with the plaintiff's excuse or the delay and that justice can still be served to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of discretion of the court."***

64. On extension of time, the principles applicable were laid down in **Aviation and Allied Workers Union vs KQ Ltd** (supra) where the Supreme Court stated that the following principles should be considered by the court in the exercise of such discretion:

> *1. Extension of time is not a right of a party, it is an equitable remedy that is only available to a deserving party at the discretion of the court;*
>
> *2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court.*
>
> *3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
>
> *4. Where there is (good) reason for the delay, the delay should be explained to the satisfaction of the court;*
>
> *5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
>
> *6. Whether the application has been brought without undue delay; and*
>
> *7. Whether in certain cases, like election, petitions, the public interest should be a consideration for extending time."*

66. The above principles were enunciated by the same Supreme Court in **Nicholas Arap Korir Salat v IEBC & 7 Others Sc Application No. 16 of 2014.**

67. Applying the above principles to this case, the court notes that indeed there was delay in filing of the substantive motion by 7 days which in my humble view is not inordinate delay. Secondly, albeit there was delay in filing of the application for validation of the filed motion, that delay of 43 days

has been satisfactorily explained to the court. The court accepts the explanation that the applicant's counsel however senior he is, was caught up in the mix of responding to the application by the respondents seeking to vacate the orders of 10th October 2016 issued by this court and therefore concentrated on that response instead of filing the substantive motion and only came to when, from the record, the application for contempt was being mentioned.

68. Although the respondents contend that Senior Counsel should not have been such careless, and that he should compensate his client for professional negligence instead of seeking to validate an application which is invalidly on record, the court notes that Order 50 Rule 6 of the Civil Procedure Rules permits the filing of an application for enlargement of time even if such time has elapsed.

69. Further, in **Belinda Murai & others vs Amos Wainaina (1978) KLR 278 per Madan JA** cited **with approval by Nyeri CA 18/2013 Richard Ncharpi Leiyagu vs IEBC & 2 Others** – Visram, Koome & Odek JJA it was stated that a party ought not to be denied an opportunity to ventilate his grievances as that would oust them from the judgment seat. Madan JA (as he then was) stated quite clearly that:

> "***A mistake is a mistake. It is no less a mistake because it is committed by Senior Counsel. Though in the case of junior counsel the court might feel compassionate more readily. If a blunder on a point of law can be a mistake, the door to justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interest of justice so dictate."***

70. The learned Madan JA further stated:

> ***" It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule….."***

71. Further, in **Phillip Chemwolo & Another Vs Augustine Kubende [1982-1988] KAR at 1040**, Apalloo J (as he then was), citing with approval **Nyeri CA 18/2013 Richard Ncharpi vs IEBC, t**he Court of Appeal in the latter case stated:

> ***" Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud-or intention to overreach, there is no error or default that cannot be put right by payment of costs.***
>
> ***The court as it often said exists for the purpose of deciding rights of parties and not the purpose of imposing discipline."***

72. In the instant case, it is my finding that the mistake which has been admitted by Senior Counsel is inadvertent and genuine, not intentional and despite that delay, this court finds that justice can still be done to the parties by enlarging time and allowing the issues which are raised in the motion ventilated or canvassed at an appropriate hearing. The respondents, in my humble view, have not demonstrated any prejudice that has been or is likely to be occasioned to them of the enlargement of time is granted.

73. There is no evidence that the delay was intended to cause the respondents any hardships and no hardship or injustice has been demonstrated. In my humble view, to deny the applicant the orders sought would be depriving him of the right to apply and therefore would work definite injustice. It is the applicant who claims that his constitutional rights are being infringed and or threatened to be violated. It therefore follows that if the applicant is not accorded an enlargement of time, he will suffer more injustice than the respondents who are by law expected to perform their constitutional mandate in accordance with the stipulated legal framework.

74. Furthermore, the inconvenience caused to the respondents can be adequately compensated by an award of costs.

75. It is for those reasons that this court proceeds to exercise its discretion in favour of the applicant and grants the prayers sought in the notice of motion dated 13th December, 2016.

76. As the mistake and error was occasioned by the advocate for the applicant and who has acknowledged that mistake, I order that the advocate, Senior Counsel Professor Tom Ojienda do personally pay to the respondents thrown away costs of kshs 100,000/- one hundred thousand Shillings only within 14 days from the date hereof, being compensation for the inconvenience caused to the respondents . In default, execution to issue for recovery.

Dated, signed and delivered in open court at Nairobi this 13th day of February 2017.

R.E. ABURILI

JUDGE

In the presence of Miss Awour h/b for SC Prof Tom Ojienda for applicant

Mr Karanja for respondents

CA: George