



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**JUDICIAL REVIEW APPLICATION NO. 16 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL**

**REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE MEDICAL LABORATORY TECHNICIANS**

**AND TECHNOLOGISTS ACT – CAP 253A (ACT NO.10 OF 1999)**

**AND**

**IN THE MATTER OF ARTICLES 22, 23 & 47 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT- CAP 26**

**IN THE MATTER OF SECTION 8 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**REPUBLIC.....APPLICANT**

**AND**

**THE MEDICAL LABORATORY**

**TECHNICIANS AND TECHNOLOGISTS BOARD....RESPONDENT**

**EX-PARTE APPLICANT:**

**ANASTACIA NGITHI WAHU AND 177 OTHERS**

**RULING**

1. The applicants filed an application under a certificate of urgency under the provisions of Order 53 rules 1(2) and 4 of the Civil Procedure Rules seeking leave to apply for judicial review orders of certiorari,

prohibition and mandamus; this court granted them the leave sought on the 17<sup>th</sup> October, 2016; they were ordered to file the substantive motion within 21 days;

2. A Preliminary Objection was raised by the respondent and is dated the 19<sup>th</sup> September, 2017; it seeks to have the two substantive applications struck out as both were not properly before the court; as both motions had been filed outside the prescribed time;

3. At the hearing hereof learned counsel Mr.Githinji appeared for the respondent and learned counsel Mr. Peter Muthoni appeared for the ex-parte applicants; hereunder are the rival submissions made by the respective parties;

### **RESPONDENTS SUBMISSIONS**

4. The application is premised on one pure point of law; that the application ex parte applicants is bad in law, incompetent and is an abuse of the court process as it was filed out of time and without leave;

5. The order for leave was granted on the 17/10/2016 and the directions were that the substantive motion be filed and served within 21 days in accordance with Order 53 which prescribes a mandatory period;

6. In breach of the court orders and Order 53 the applicants filed the motions out of time; the period lapsed on 8/11/2016; in JR.No.16/2016 the motion was filed on the 9/11/2016 and the motion in JR.No.17/2016 was filed on the 10/11/2016; both applications were filed well outside the 21 day window granted; when filed the leave had been spent.

7. The respondent relied on the following authorities which were served upon the applicants counsel in court; and were received under protest by counsel for the ex parte applicants; this court nevertheless admitted the same; the authorities relied on are;

(i) **JR.No.130/2016-** the court pointed out '*suo moto*' that the application had been filed out of time; it was found to be incompetent and was struck out '*suo moto*'.

(ii) **JR.No. 270/2016-** the notice of motion struck out by Odunga J for having been filed out of time without leave of court;

(iii) **JR.No.109/2015-**the notice of motion was found to be incompetent as it had been filed out of time without leave;

(iv) **JR.No.3/2014-** the notice of motion struck out for being incompetent for having been filed out of time without leave of court;

(v) **JR.No.3/2013-** the preliminary objection was up held and the motion was struck out for the same reasons

8. Counsel urged the court to uphold the law.

### **EX-PARTE APPLICANTS SUBMISSIONS**

9. Counsel in response opposed the preliminary objection; that under the provisions of Order 50 Rule 5 this court had the discretion on timelines if the delay was not inordinate;

10. On the 17/10/2016 leave was granted together with interim orders; the substantive motion was filed outside the 21 day window by just a day; the provisions of Article 159 be invoked which enjoins this court to do justice without being too strict because the students careers are at stake; the delay was not intentional and is excusable; and the respondent has suffered no prejudice;

11. In essence a preliminary objection disposes of the case absolutely on a pure point of law; Counsel

relied on the renowned case of Mukisa Biscuit and that the court should look beyond the preliminary objection; that this court has unfettered discretion on timelines; and that the notice of motion be deemed to have been filed within time so as to accommodate the applicants;

### **REJOINER**

12. Counsel for the respondent's in his rejoinder submitted that timelines are not simple issues; Order 53 is substantive and the issues are not curable under Article 159;

13. The authorities cited deal with the issues at length; the rules and the order issued cannot be dismissed by mathematics; that judicial review is a special jurisdiction and that parties who seek judicial review are bound by timelines and stand to be penalized for the lapses;

14. In the absence of the ex-applicants moving the court for extension of time counsel prayed that the applications be expunged.

### **ISSUES FOR DETERMINATION;**

15. After taking into consideration the oral presentations only one issue was framed for determination;

(i) Whether the application herein was filed outside the time limit of twenty-one (21) days;

### **ANALYSIS**

16. Both Counsel agreed that the preliminary objection application herein be consolidated with the preliminary objection application in JR.No.17/2016; that the orders made pursuant thereto to apply to both files.

### **Whether the application herein was filed outside the time limit of twenty-one days;**

17. The instant application was brought under the provisions of Order 53 Rule 3(1) of the Civil Procedure Code and also under Sections 8 & 9 of the Law Reform Act; and leave was sought and was granted by this honorable court on the 17<sup>th</sup> October, 2016;

18. **Order 53 Rule 3(1) provides as follows;**

**Order 53(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.....”**

19. **The operative words in Order 53 Rule 3(1) are;**

**“.....shall be made.....”**

20. The words demonstrate that the timelines are mandatory rules of procedure that ought to be strictly adhered to; in the Court of Appeal case of Wilson Osolo vs John Ojiambo Ochola & the Hon.AG CA No.6 of 1995 the court held that;

**“It is a mandatory requirement of Order 53 Rule 3(1) of the Civil Procedure Rules then that 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 15 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 the Civil Procedure Rules.”**

21. The court record indicates that the substantive application was filed on the 9<sup>th</sup> November, 2016 which was one day after and outside the time limit as had been directed by the court; the last day for filing

the substantive motion herein ought to have been the 8<sup>th</sup> November, 2016; and as for JR No. 17 of 2016 the substantive motion was filed on the 10<sup>th</sup> November, 2016 whereas it ought to have also been filed on or before the 8<sup>th</sup> November, 2016.

22. The applications in this instance and in JR No 17of 2016 are both found to have been filed out of time; that parties who seek judicial review under Order 53 of the Civil Procedure Code are bound by timelines and stand to be penalized for the lapses; it is noted the applicants gave no reasons for the delay and further did not make any application for the enlargement of time; therefore in the absence of such an application the applications are found not to be properly before this court and both are found to be incompetent.

### **FINDINGS AND DETERMINATION**

23. The applications are found to have been filed outside the mandatory time lines and are found to be incompetent;

24. The applications are hereby struck out.

25. There shall be no order as to costs in both cases as the matters are of public interest.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 8<sup>th</sup> day of June, 2017.**

**HON. A. MSHILA**

**JUDGE**