



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 182 OF 2016

IN THE MATTER OF THE SOCIETIES ACT CAP 108 LAWS OF KENYA

AND

IN THE MATTER OF THE LAW REFORM AND, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF APPLICATION BY WAY OF JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI AGAINST THE REGISTRAR OF SOCIETIES APPOINTMENT UNDER CAP 108, LAWS OF KENYA

REPUBLIC.....APPLICANT

AND

THE REGISTRAR OF SOCIETIES.....RESPONDENT

AND

AN NJERI WAIHUMBU & OTHERS.....INTERSTED PARTIES

EX PARTE: JOSEPH NDEMI WANJIRI & OTHERS

RULING

1. On 21st April, 2016, **Hon. Mr Justice Korir** granted leave to the applicants herein to commence judicial review proceedings and seek orders of prohibition, mandamus and certiorari as set out in Chamber Summons dated 20th April, 2016. The substantive Motion was directed to be filed and served together with the skeleton submissions and list of authorities within 10 days from the date of the order granting leave. In effect the substantive application ought to have been filed and served by latest 3rd May, 2016 since the 10th day fell on a Sunday and being a public holiday as well the following day, 2nd May, 2016 was similarly a holiday and both days were excluded by virtue of section 57(b) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya. The said leave was also directed to operate as a stay as sought in the said Chamber Summons. In effect the grant of leave was to operate as a stay of elections of Kawangware Market Development Society (hereinafter referred to as “the Society”). The matter was then fixed for mention to confirm compliance on 5th May, 2016 on which day apparently the Court was not sitting and a

- fresh date was fixed in the registry for 27th June, 2016.
2. Before the said date, on 13th May, 2016, the interested parties herein filed an application bearing the same date in which they sought orders seeking that there be an interim committee elected by members to oversee the collection of revenue and market operations and that the ex parte applicants be restrained from collecting the revenue from the Society. That application was placed before me on 16th May, 2016 when I directed that the same be served for hearing on 27th May, 2016.
 3. On 27th May, 2016, the parties agreed that the said application be prosecuted by way of written submissions which were to be filed by the parties within 14 days and the matter was scheduled for mention on 16th June, 2016 to confirm compliance and for fixing a date for ruling. On the said date the ex parte applicant had not responded to the application dated 13th June, 2016 and the time for responding thereto and for filing a rejoinder was extended by a further 3 days each and the matter stood over to 27th June, 2016 for fixing a ruling date. However on 27th June, 2016 when the matter was called out, only the respondent and the interested parties were represented and they applied that since no Motion had been filed by the ex parte applicant, the orders issued herein on 21st April, 2016 ought to be vacated.
 4. Upon perusing the record, the Court confirmed that in fact no Motion had been filed as directed by **Korir, J** and proceeded to hold that these proceedings were thereby rendered incompetent and struck out the same with costs and vacated the stay issued on 21st April, 2016.
 5. It is this order that provoked the application dated 29th June, 2016 the subject of this ruling by which the ex parte applicant now seek the following orders:
 1. **That service of this application be dispensed with in the first instance.**
 2. **That this substantive notice of motion be certified as urgent and admitted for hearing**
 3. **That the Ruling/Order made by the Hon. Justice Odunga on 27/6/2016 be reviewed.**
 4. **That leave as granted by the court on 21st April 2016 be reinstated and the court directs that the notice of motion dated 20th April 2016 be heard on merit.**
 5. **That there be stay of the court order dated 27th June 2016 pending review.**
 6. **That the costs of this application be in the course**
 7. **That such further and other relief be granted as this court deems fit and expedient in the circumstances.**
 6. The application was expressed to be based on the following grounds:
 1. **That the said Ruling/Order did not take cognisance that the notice of motion dated 20th April 2016 was substantive in nature and there was no need to file any other motion.**
 2. **That the Respondent and the Interested Parties were served and entered appearance on time.**
 3. **That the Interested Parties have put in their substantive reply to the notice of motion dated 20th April 2016**
 4. **That when the advocate for the Ex parte Applicants and the advocate for the Interested Parties met in court on 5th May 2016, they agreed by consent to enlarge time**

and fixed the matter to be mentioned on 27th June 2016 for directions.

5. That the Interested Parties filed a notice of motion under certificate of urgency dated 13th May 2015 where directions had been taken that the same be heard and compromised first by way of written submissions. The same was coming up for directions on 27/6/2016 to establish that parties had complied.

6. That in their reply to the notice of motion dated 13/5/2016, the Ex parte Applicants had annexed new evidence to the effect that the purported elections of 13/4/2016, were fraudulent as fake records were manipulated to show that the requisite quorum was reached.

7. The Ex parte Applicants are official of a Welfare Society with 518 members and it would be very punitive to force illegitimate officials on them and order that they pay costs.

8. That it is in the interest of justice that the court review its ruling/order on 27/6/2016 and reinstate leave that was granted on 21/4/2016 as failure to do so would validate an illegal election of persons who have come to court with unclean hands.

9. That there has been no unreasonable delay in making this application.

7. According to the ex parte applicants, they were on 21st April 2016 granted leave to apply for the aforesaid judicial review orders on the terms that they were, according to them “to serve the Substantive Motion, Skeleton submissions and list of authorities within 10” (sic). Their advocate, **Peter Waititu Macharia**, who swore the supporting affidavit deposed that he instructed a court process server to serve the substantive motion on the respondent and the interested parties. However on 5th May, 2016 when the matter was scheduled to come up, **Korir, J** who was seized of the matter was engaged before a three judge matter and according to him, they agreed with learned counsel for the interested parties to mention the matter on 27th June, 2016 for directions. The rest of the averments are as reproduced herein above.
8. According to the deponent, after looking at Order 53 rule 3 of the **Civil Procedure Rules**, he was of the view that the Notice of Motion dated 21st April, 2016 was substantive enough and met the requirements envisaged thereunder.
9. It was the *ex parte* applicant’s case that where there is an inadvertent omission on the part of the Court or where new evidence emerges or for any other sufficient reason then this Court has powers to review its decision.
10. The said application was opposed by the interested parties by way of an affidavit sworn by their advocate, **Julius Nyakiangana**, on 30th June, 2016. According to him, since the proceedings were struck out, there is nothing to be reviewed.
11. It was contended that there has never been any extension of the orders issued by **Korir, J** on 21st April, 2016 and that no substantive application has been filed.

Determinations

12. I have considered the foregoing.
13. It is clear that the ex parte applicants did not comply with the directions given by **Korir, J** on 21st April, 2016 to file their Motion within 10 days of the order. However instead of owning up to this omission and explaining the circumstances that led to their failure to do so, the ex parte applicants through their learned counsel contend that the Motion dated 20th April, 2016 was the substantive Motion and that there was no need to file another Motion.
14. With due respect to the applicants and their legal advisers, this position is untenable and was informed by lack of appreciation of the relevant legal provisions. Order 53 rule (1) of the **Civil Procedure Rules** provides that:

“no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.”

15. The word “leave” is defined by *Black’s Law Dictionary*, 9th Edn. at page 974 as “Judicial permission to follow a non-routine procedure”. “Leave” is clearly therefore a permission to take a particular judicial procedure and in this case it is permission to commence judicial review proceedings.
16. It is therefore clear that an application for judicial review is not made until after leave is granted. If the grant of leave was to be construed as an application for judicial review, it would in my view constitute an absurdity. If the Rules Committee was of the view that an application for leave constitute the suit, the said Committee would in my view have used the phrase such as “***an application for an order of mandamus, prohibition or certiorari shall be commenced by leave***” or similar provision.
17. The Chamber Summons is simply an application for leave or permission to commence judicial review proceedings and whereas on the filing of the Notice of Motion the Chamber Summons is subsumed or submerged in the Motion, it is the Motion that originates the judicial review application proper. I can do no better than quote the Court of Appeal in **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it expressed itself *inter alia* as follows:

“The proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. It would be somewhat ridiculous to bring the application for leave by way of an originating summons and once the leave is granted, the originating summons is then swallowed up or submerged in the notice of motion.”

18. Similarly in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** it was held by a three Judge bench of this Court that it is consequent upon leave being granted that an application is brought. On the same note, **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996** held *inter alia* that the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.
19. Therefore both on the letter of the law and on authorities, judicial review proceedings are commenced after leave therefor is sought and granted.
20. The law is now that it is not every case that a mistake committed by an advocate would be a ground for setting aside orders of the Court. In **John Onger Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** it was held that:

“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 by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...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”.

21. In **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002** Kimaru, J expressed himself as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of

the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.

22. In this case, the order granting leave was clear. However, not only did the applicants fail to comply therewith but insisted even after this Court found that they did not comply with the Court's directions that they were right and that the Court was wrong in striking out the proceedings when in their view they had filed the Motion when in all honesty there was none. To make matters worse, in the affidavit sworn in support of the instant application, the applicants incorrectly cited the order given by the Court to create the impression that they were in fact directed to serve the Motion already filed as opposed to filing and serving the same when the Court was clear in its mind that no such Motion had been filed. In my view the applicants have committed comedy of errors before and after the striking out of these proceedings which errors do not augur well for the favourable exercise of this Court's discretion. A party seeking such orders ought not to create an impression that he ought not to be believed. As was held in **Re Ebuneiri Waisswa Kafuko (Deceased) Kampala HCMA No. 81 of 1993**, inconsistencies in an affidavit cannot be ignored however minor since a sworn affidavit is not a document to be treated lightly. If it contains obvious falsehood then it all naturally becomes suspect. Apart from that the applicants have tried to explain their failures to comply with the directions of the Court on clearly misconceived grounds. In **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000**, the Court held that where simple inaction is not bona fide and is sought to be explained away by contrived grounds, the application ought to be dismissed.
23. Although it was contended in the submissions, though not expressly so in the supporting affidavit, that the parties had agreed to extend the time for filing the Motion, this position was clearly diametrically parallel to the position adopted in the supporting affidavit. In any case the respondents disputed such contention and there is no material on the basis of which this Court can find otherwise.
24. Having considered the material placed before me I find no merit in the application dated 29th June, 2016. Mercifully for the applicants they are still within time to commence fresh proceedings. For now however, these proceedings cannot, in light of the material placed before me, be resuscitated even assuming that this Court can reinstate them without extending the time for filing the Motion which to all intents and purposes died a natural death when the time for filing the same lapsed.

Order

25. Consequently, the Motion fails and is dismissed with costs.
26. It is so ordered.

Dated at Nairobi this 19th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Macharia for the exp applicant

Miss Akwale for Mr Nyakiangana for the interested parties

Miss Ndegwa for the 6th interested party and the Respondent

Cc Patricia