



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 97 OF 2016

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 21(1), 23(1)
23(3) (f), 25(c), 27(1), 47(1), 49(1) (d) & 50(2) OF THE 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 SECTION 7 OF THE STATE CORPORATIONS ACT

AND

IN THE MATTER OF THE POLICE ACT SECTION 5(1) CAP 84 LAWS IF KENYA

AND

**IN THE MATTER OF THE POLICE REGULATIONS ACT CAP 20 FORCES STANDING
ORDERS**

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE INSPECTOR GENERAL

NATIONAL POLICE SERVICE.....1ST RESPONDENT

ASSISTANT INSPECTOR GENERAL,

JACINTA KINYUA2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

SENIOR SUPERINTENDENT OF POLICE TRAFFIC

HEADQUARTERS,JULIUS WANJOHI.....1ST INTERESTED PARTY

PRESIDING OFFICER STAFFING OFFICER PERSONNEL,

JULIUS NDUNG’U.....2ND INTERESTED PARTY

AND

LINDA OKELLO.....EX-PARTE APPLICANT

JUDGMENT

1. Vide a chamber summons dated 12th February 2016 filed under certificate of urgency and supported by statutory statement, verifying affidavit of the exparte applicant Linda Okello and annexed exhibits, the exparte applicant herein Linda Okello who is a serving Police Officer in the National Police Service sought for orders that the court do grant her leave to apply for Judicial Review orders of :

a. **Certiorari** to remove into the court and quash the decision of the 1st respondent, the National Police Service conveyed by the 2nd Respondent, Assistant Inspector General, Jacinta Kinyua vide a letter Reference No. PF/83811/53 dated 19th January 2016 and served upon the exparte applicant purporting to reduce the exparte applicant’s rank from that of Corporal to a Constable with effect from 19th January 2016;

b. that leave be granted to apply for Judicial Review orders of **Prohibition** to remove into this court and prohibit the first respondent from issuing such orders, new and/or further orders purporting to reduce the exparte applicant in rank from that of a Corporal to a Constable allegedly envisaged in the Police Regulations Act, Chapter 20 of the Force Standing Orders and or the Police Act, Chapter 84 of the Laws of Kenya and to further prohibit the 1st respondent from delegating his aforementioned powers to any of his authorized subordinate officers to reduce the applicant in rank from that of a Corporal to a Constable in the Police Service;

c. That the applicant be granted leave to apply for Judicial Review order of **Mandamus** to compel the 1st respondent and or the 2nd respondent to revert back the applicant to the rank of a Corporal in the police force with immediate effect;

d. That the leave so granted to operate as a stay of the reduction in rank order issued by the 1st respondent conveyed by the 2nd respondent vide a letter Reference number PF/83811/53 dated 19th January 2016, pending the hearing and determination of his(sic) application;

e. That costs of and incidental to the application be provided for;

f. That such further and other reliefs that this Honourable court may deem just and expedient to

grant.

2. That application for leave was filed on 25th February 2016 and placed before Honourable Odunga J the same day. Present to urge the application under urgency and *ex parte* was Mr Makokha advocate for the *ex parte* applicant.

3. Upon the learned judge hearing Mr Makokha counsel for the applicant, he made the following specific order:

“Court: Leave is hereby granted to the applicant to apply for Judicial Review orders to be sought. The substantive motion to be filed and served by 26th February 2016. Directions on 3rd May 2016.

Signed

Odunga J

25/2/2016” (emphasis added).

4. From the record, on 29th February, 2016 an application dated 29th February 2016 was filed by the *ex parte* applicant’s counsel, the firm of Senior Counsel Professor Tom Ojienda & Associates, and court fees paid vide receipt No. 3491890 dated 29th February 2016 for shs 12,500/-. The said application by way of Notice of Motion was on 29th February 2016 served upon the National Police Service, the Honourable Attorney General and on 1st March 2016, it was served upon the Commandant Traffic Department at Nairobi.

5. The parties then appeared before the Honourable Odunga J for directions and the court directed that the respondents do file and serve replying affidavit within 14 days. The applicant was also granted 7 days from 3rd March 2016 to file a supplementary affidavit as well as submissions.

6. The matter was then slated for submissions on 31st May 2016 and on the latter date the learned judge enlarged the time for the respondent to file submissions for a further 7 days and directed that the matter be heard by myself.

7. The parties appeared before me on 6th July 2016 and highlighted their filed written submissions. The applicant’s submissions were filed on 25th May 2016 whereas the respondent’s counsel filed their submissions on 6th July 2016.

8. This court after hearing the parties reserved judgment for delivery on 29th September 2016 but owing to pressure of work, I set the judgment date to 24th October 2016.

9. Regrettably, I got engaged in other administrative duties as assigned by the Principal Judge on 24th October 2016 and so the matter was taken out for judgment to be delivered on notice to be issued to the parties advocates, which notice was served and hence this date.

10. As I embarked on writing this judgment, quite eagerly, having heard the parties advocates’ oral rival submissions, I was indeed disappointed to find that the Notice of Motion dated 29th February 2016 was filed out of the time line set by Honourable Odunga J on 25th February 2016, and no such leave was ever sought or granted enlarging the time initially granted or validating the substantive motion..

11. On 25th February, 2016 the learned judge having granted leave to the *ex parte* applicant to file the substantive motion by 26th February 2016, which was the following day, and the application having

been filed on 29th February 2016 which was four days later without any order of enlargement of such timeline, no doubt, the notice of motion as filed is incompetently filed.

12. This court would only have jurisdiction to hear and determine the substantive notice of motion which is filed within the timelines given by the court.

13. This is so because Order 53 of the Civil Procedure Rules which is the procedure governing the filing of Judicial Review proceedings provides that the leave once granted, the substantive motion shall be filed within 21 days from such date of leave. However, the court having granted a shorter period than the 21 days, it was upon the applicant to file the substantive motion within the timeframe granted by the court. Failure to comply with the timeframe renders the substantive motion as filed out of timelines given by the court inept.

14. I am fortified on this point by the Court of Appeal decision in **United Housing Estate Limited vs. Nyals (Kenya) Limited Civil Appl. No. Nai. 84 of 1996** where the Court expressed itself thus

“A party who obtains 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 condition, the Court has inherent power to recall or vacate such an order.”

15. It follows that a party cannot unilaterally decide not to comply with the conditions attached to the exercise of discretion in his or her favour on the ground that he or she ought to have access to justice. In this case the ex parte applicant had the option of moving the Court to extend time or seeking to regularize the record where the Motion had been filed. By failing to exercise any of the available options, the applicant has disintitiled herself of the favourable exercise of this court’s discretion.

16. In addition, Whereas this Court has the jurisdiction to extend time within which a substantive Motion may be filed where leave has been granted, it is upon the applicant to apply for the extension of the time for doing so and being an exercise of discretion, the same must be exercised on sound judicial principles. As was held in **Wilson Osolo vs. John Ojiambo Ochola & Another Civil Appeal No. 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 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 prescribed thereunder, was nevertheless of the view that:

“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 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.” (Emphasis added).

17. The court does appreciate that the provisions of the *Law Reform Act* do not prescribe the time within which a substantive motion application is to be made. That power is donated to the Court by Order 53 rule 3(1) of the *Civil Procedure Rules* which provides:

“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, 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.

18. It is therefore patent that the time for the filing of the substantive Motion is prescribed by *the Civil Procedure Rules* under Order 50 rule 6 of the *Civil Procedure Rules* which provides:

“50(6) 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.
(Emphasis added).

19. In **John Onger Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 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”.

20. In my humble view, the court cannot ignore its order stipulating the period within which the exparte applicant was supposed to file the substantive motion. Where there was no compliance with the court order, that failure cannot be a technicality curable under Article 159 of the Constitution.

21. Odunga J in **Republic v Cabinet Secretary, Information Communication & Technology & another Ex parte Celestine Okuta & others [2016] eKLR** faced with a similar situation where the applicant failed to file the substantive motion within the time stipulated in the order for leave expressed himself thus, 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.”

22. Accordingly, without jurisdiction to determine the notice of motion filed out of time, to delve into the merits of the notice of motion would no doubt be engaging on a wild goose chase and a waste of valuable judicial time.

23. Accordingly, I find that there is no competent Notice of Motion filed before this court, capable of adjudication on its merits.

24. In the end, I hold that the notice of motion dated 29th February 2016 and filed on the same day by the exparte applicant is incompetent and I proceed to strike it out.

25. As the respondents and interested parties were all oblivious of this very fundamental state of affairs in law and therefore they never raised the issue, but nonetheless the court being deemed to know **the law and hence my findings, I make no order as to costs.**

Dated, signed and delivered in open court at Nairobi this 8th day of December 2016.

HON. R.E. ABURILI

JUDGE

In the presence of:

Miss Awour h/b for Prof Ojienda for the exparte applicant

Mr Munene for all the Respondents and the interested parties.

CA: Lorna