



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 254 OF 2015

ANASTASIA GITIRI MUNYI & OTHERS.....APPLICANT

VERSUS

COUNTY COMMISSIONER,

KIAMBU COUNTY.....1ST RESPONDENT

HON. KIMANI ICHUNGWA (MP KIKUU).....2ND RESPONDENT

HON. JOHN KIRAGU (MP LARI).....3RD RESPONDENT

RULING

1. On 29th July, 2015, I granted the ex parte applicant leave to apply for judicial review orders and directed the applicant to file and serve the substantive Motion within 21 days.
2. That substantive Motion therefore ought to have been filed and served by latest 18th August, 2015. That Motion was however not filed till 29th September, 2015, more than one month after the due date.
3. By his preliminary objection dated 12th October, 2015, and filed herein the same day, the 3rd Respondent herein seeks the striking out of the said Motion on the ground that the Motion was filed out of time and that the 3rd respondent being a private person no relief can be issued against him in these proceedings.
4. In his submissions, **Mr Kinyanjui**, learned counsel for the 3rd respondent contended that leave having lapsed there is nothing to reply to. He further contended that the 3rd Respondent is a private person hence the substance of the Motion in so far as it seeks public law remedies can only be directed to public bodies save where the complaint is about violation of human rights.
5. On the part of the 2nd respondent it was submitted by **Miss Nabuye**, learned counsel while associating herself with **Mr Kinyanjui's** submissions that since the period for filing of the Motion is governed by the provisions of the **Civil Procedure Rules** as read with the **Law Reform Act**, and there being no provision for enlargement of time, the Motion was incurably defective.
6. In opposing the preliminary objection, **Mr Kiragu** learned counsel for the Applicant while admitting that leave was granted on 29th July, 2015 and that the applicant was given 21 days to file the Motion, explained that the delay in filing the Motion was occasioned by lack of filing fees by the applicant. In his view, since the applicant was seeking leave to apply for three judicial reliefs of certiorari, mandamus and prohibition, the fees required of Kshs 18,000/- being Kshs 6,000/ - for each head was unavailable to the applicant.

7. Learned counsel relied on Article 48 of the Constitution and submitted that the said Article is meant to ensure access to justice hence the Applicant ought not to be denied justice simply because of her inability to get the filing fees. In his view no prejudice would be occasioned to the 2nd and 3rd Respondents if the Motion is allowed to proceed.
8. According to **Mr Kiragu** the 2nd and 3rd Respondents being Members of Parliament are bound by Article 10 of the Constitution and are sued in their capacities as such MPs for failure to properly interpret the Constitution. Since they are public officers, it was contended they ought to be accountable.
9. I have considered the preliminary objection. The facts herein are not in dispute. It is conceded that the substantive Motion was not filed within the time directed by this Court. Therefore the preliminary objection was well taken.
10. Whereas **Miss Nabuye** contended that there is no provision for enlargement of time based on the provisions of the **Civil Procedure Rules** and the **Law Reform Act**, it must be appreciated that the provisions of the **Law Reform Act** do not prescribe the time within which substantive application is to be made. That power is donated to the Court by rule 3(1) of Order 53 of the **Civil Procedure Rules** which provides:

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.

11. It is therefore clear that the time for the filing of the Motion is prescribed by the **Civil Procedure Rules**. Order 50 rule 6 of the **Civil Procedure Rules** provides:

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 mine].

12. It is therefore clear that where the time is limited by the **Civil Procedure Rules**, or by summary notice or by an order of the Court, the Court has the power to enlarge the said period. In this case the 21 days period was both prescribed by the Rules and the order of the Court hence this Court must of necessity have jurisdiction to enlarge the said time.
13. In **Wilson Osolo vs. John Ojiambo Ochola & Another Civil Appeal No. 6 of 1995** 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.”

14. It is therefore clear that this Court has the jurisdiction to extend time within which a substantive Motion may be filed where leave has been granted. However, 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 **John Onger Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163:**

“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”.

15. It is therefore clear that an applicant for extension of time must place before the Court material on the basis of which the Court can exercise its discretion in his favour. In other words it is upon the applicant to supply the Court with the peg with which the Court can pitch its tent.

16. In this case far from relying on inadmissible factual averments, the applicant has not even applied for enlargement of time. Instead her advocate has contented himself by attempting to adduce evidence from the bar why the Motion was not filed within time. With due respect that is not the manner in which extension of time is sought. The applicant expects this Court to ignore express directions of the Court and treat her failure to comply with the Court's directions as inconsequential. That position with due respect is untenable. I associate myself with the decision of the Court of Appeal in **United Housing Estate Limited vs. Nyals (Kenya) Limited Civil Appl. No. Nai. 84 of 1996** where the Court expressed itself as follows:

“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.”

17. In my view 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 applicant had the option of moving the Court to extend time or seeking to be permitted to proceed as a pauper if she was not in a position to secure filing fees. By failing to exercise any of the available options the applicant has disentitled herself to the favourable exercise of discretion.

18. In the result I find that the preliminary objection raised herein with respect to the filing of the Motion out of time is unassailable. In the premises there is no reason for me to determine the second ground.

19. It follows that these proceedings are misconceived and are hereby struck out with costs to the 2nd and 3rd Respondents.

Dated at Nairobi this 10th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wamalwa for Mr Kiragu for the Applicant

Miss Nabuye for 2nd Respondent

Cc Patricia