Johana v Secretary Teachers Service Commission & another (Civil Appeal E315 of 2024) [2025] KECA 732 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KECA 732 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E315 OF 2024

W KARANJA, WK KORIR & GV ODUNGA, JJA

MAY 2, 2025

BETWEEN

SIMON KAMAU JOHANA .... APPELLANT

AND

THE SECRETARY TEACHERS SERVICE COMMISSION .... 1ST RESPONDENT

THE BOARD OF GOVERNORS MAIUNI SECONDARY SCHOOL .... 2ND RESPONDENT

(Being an appeal from the Ruling of the High Court at Machakos (F. R. Olel, J.) delivered on 22nd April 2024 in High Court Misc. Application No. 162 of 2006)

JUDGMENT

1. This appeal has, as its genesis, the ruling by the High Court Machakos in Miscellaneous Application No. 162 of 2006 delivered by Olel, J on 22nd April 2024 in which the learned Judge dismissed the Notice of Motion dated 9th October 2023. In that Motion, the appellant, as the applicant, sought extension of time to file a substantive Motion for an order of judicial review in the nature of prohibition and certiorari, prohibiting the respondents (the Teachers Service Commission and the Board of Governors, Muimuni Secondary School) from interdicting him Nai Civil Appeal No E315 of 2024 Page 1 of 15 and to quash the decision by the respondents dated 12th July 2006. He also sought to have the leave operate as a stay.

2. The gravamen of the application was that the appellant was granted leave to file the substantive motion on 6th October 2006 but his advocate, M/s R. M. Matata & Co Advocates failed to do so; that he followed up on the issue with the said advocates seeking updates but none was forthcoming as the said advocates became uncooperative; that upon obtaining the proceedings, he realised that his said advocates had not filed the said motion; that the mistake was beyond his control and he should not be punished for the negligence and inaction on the part of his advocate; that the grant of the orders

would not prejudice the respondents; and that he was ready and willing to abide by any condition that the Court would impose in grating the extension sought.

3. That application was opposed by the 2nd respondent which, in its grounds of opposition, contended: that the application was misconceived, incompetent and bad in law as the *Law Reform Act*, which was the substantive law governing prerogative orders, did not provide for enlargement of time to enable a party file the substantive motion; that there was no basis upon which the said prayers could be granted; that there was inordinate and inexcusable delay in filing the application and no plausible reason was disclosed to justify the same; and that the court's hands were tied.

4. After hearing the application, the learned Judge held: that the provisions under which the motion was brought were not relevant to the application as what was before him was not an application for extension of time to file an appeal or stay of execution pending an appeal; that the appellant slept on his rights for seventeen (17) years before moving the court to seek extension of time; that the reason proffered by the appellant for the delay was weak and escapist; that the unexplained delay was prolonged and unjustified; that the *Law Reform Act* does not provide for enlargement of time once the leave window has lapsed hence there was no legal basis to grant the application; that it would be unjust and unfair to subject the respondents to proceed with issues that occurred seventeen (17) ago when most of the witnesses were no longer in service; that the interdiction that the appellant intended to stop was, according to the appellant's own deposition, effected on 12th July 2006; and that since no order of certiorari can be granted seventeen (17) years later, the Court cannot grant orders in vain.

5. Dissatisfied with that decision the appellant filed this appeal seeking to upset the decision on the grounds: that the learned Judge erred in law and in fact by failing to consider the appellant's submissions thereby occasioning a miscarriage of justice; that the learned Judge failed to grant to the appellant an opportunity to file written submissions in support of his application; that the learned Judge erred in law by failing to fully appreciate the law as it relates to extension of time and thereby misdirecting himself on the same; that the learned Judge erred in law by disregarding the reasons advanced by the appellant in support of his application for extension of time for leave to file the substantive motion; that the learned Judge erred in law and in fact by failing to appreciate that the respondent had not rebutted the evidence/reasons presented to the trial Judge; and that the learned Judge erred in law and in fact by casually dismissing the appellant's application.

6. The appellant sought orders for setting aside the said decision and substituting therefor an order allowing the dismissed application.

7. When the appeal was called out for plenary hearing on 9th December 2024, the appellant appeared in person, the 1st respondent was represented by learned counsel, Ms Manyasa, while learned counsel, Ms Momanyi, represented the 2nd respondent. All the parties relied on their written submissions with minimal highlighting.

8. According to the appellant: the failure to file the substantive motion after leave had been granted was due to the negligence of his erstwhile advocates, leading to the dismissal of the application for want of prosecution in 2004; that the appellant was unaware of these lapses and only discovered them later; that the dismissal of the application was purely procedural and was not based on the merits of the case; that he should not be punished for the negligence of his previous advocates; that rule 4 of this Court's Rules as well as section 75G of the *Civil Procedure Act* donates to the Court the power to extend time; and that the Court should be guided by the liberal approach set by the Supreme Court.

9. On behalf of the 1st respondent, it was submitted: that the High Court cannot be faulted for declining to extend time, 17 years after leave was granted; that based on the case of Aviation & Allied

Workers Union (K) v Kenya Airways Authority & 3 Others [2015] eKLR, extension of time is an exercise of discretion and not a matter of right and ought to be exercised where there are extenuating circumstances based on laid out reasons or basis by a party with cogent reasons for the delay in filing the application and public interest must be considered; that in this case, 17 years delay is inordinate and the reasons advanced are frivolous and undeserving of favourable exercise of discretion; that the *Law Reform Act* does not provide for extension of time once the leave window has lapsed; and the trial court did not err in the manner it exercised its discretion.

10. The 2nd respondent, on its part, similarly relied on the Aviation & Allied Workers Union (K) v Kenya Airways Authority & 3 Others (supra) and submitted: that there was inordinate delay in seeking extension of time within which to file the substantive motion; that the Court would be acting in vain since the 6 months period prescribed for seeking an order of certiorari had lapsed; that the reasons advanced for seeking extension of time were flimsy and an afterthought; and that the learned Judge did not err in dismissing the application.

11. We have considered the appeal and the submissions made before us. The only issues for determination before us are whether the learned Judge had jurisdiction to extend time and if he did, then whether in dismissing the application, he exercised his discretion properly.

12. Since the issue of jurisdiction, if answered in the negative, is capable of disposing of the appeal, we shall deal with it first. The respondents contend, a contention which seemed to have swayed the learned Judge, that since the primary legislation under which judicial review was anchored was the *Law Reform Act*, the learned Judge could not extend time as that Act does not provide for enlargement of time to file the substantive motion once the leave window has lapsed. In our view, a distinction must be made between an application for extension of time to apply for leave to commence judicial review and an application to extend time to file the substantive motion where leave has been granted. In matters of certiorari, section 9(3) of the *Law Reform Act* provides that:

> In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. [Emphasis ours].

13. Sub rule (2) of rule 9 of the said Act provides that:

> Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

14. We are not aware of any provision made by the Rules Committee that prescribes that leave in respect of certain matters be made within six months or shorter periods. From section 9(3) of the *Law Reform Act*, it is clear that the time within which leave to apply for orders of certiorari may be sought is prescribed by the Act. The Act does not provide for extension of time in that regard. This Court in Thomas Achuch Ako v Special District Commission & Ministry of Lands & Settlement [1989] KLR 163 held that under the *Law Reform Act*, leave to apply for prerogative orders ought not to be granted

unless the application is made within 6 months of the decision sought to be quashed. Similarly, in Wilson Osolo v John Ojiambo Ochola & Another [1996] KLR it was held by this Court that:

> "There was quite clearly a fundamental error on the part of the Superior Court in granting such an extension of time as 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. It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from s. 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 that procedure cannot be availed for the extension of time limited by statute, in this case, the *Law Reform Act*. There is no provision for extension of time to apply for such leave in the *Limitation of Actions Act* (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here."

15. However, whereas the *Law Reform Act* prescribes the period within which leave in cases of certiorari is to be sought, it does not prescribe the time within which substantive application is to be made subsequent to the grant of leave. That power is donated to the Court by rule 3(1) of Order 53 of the Civil Procedure Rules which provides that:

> 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.

16. Since the time for the filing of the Motion is prescribed by the Civil Procedure Rules, Order 50 rule 6 of the said Rules applies to the prescribed timelines. That rule provides that:

> 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].

17. In this case since the time for filing and service of the motion was limited by an order of the court, the High Court had the power to enlarge the time for filing the substantive motion. Even where the period is not by an order of the Court but pursuant to Order 53 rule 3(1) of the Civil Procedure Rules, the Court is empowered to enlarge the time. This position was appreciated in Wilson Osolo v John Ojiambo Ochola & Another (supra) in which the Court was 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." [Emphasis added].

18. It is clear that the trial court had the jurisdiction to extend time within which the substantive motion could be made, consequent upon leave being granted. The learned Judge's holding to the contrary was, therefore, not supported by the law. However, the decision extending time being an exercise of discretion, the same must be exercised on sound judicial principles. The learned Judge having exercised his discretion, the principles upon which this Court can interfere with that decision were reiterated by Madan, JA (as he then was) in United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] E.A where he held that:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

19. It is now trite that litigants have a duty to follow up on their cases even after they hand them over to their advocates. A litigant who fails to do so cannot be heard to seek the court's indulgence on the ground that an advocate's mistake should not be visited on the client. While in certain cases, it may be unjust to visit the sins of the advocate on the client, the client also bears the responsibility of showing the steps he took in pursuing his case. Waki, J.A. had this to say in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR:

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

20. In John Ongeri Mariaria & 2 Others v Paul Matundura [2004] 2 EA 163, this Court cautioned 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... 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.

21. The need to comply with conditional orders was emphasised by this Court in United Housing Estate Limited v 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."

22. In our view, 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 it can pitch its tent. In this case, apart from blaming his advocate, the appellant did not satisfactorily explain what steps he took in following up his case for seventeen years. In Wilson Osolo v John Ojiambo Ochola & Another (supra) the Court was of the view that the application:

> " 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."

23. We find no reason to fault the learned Judge in declining to extend time. In any case, as the appellant has since been dismissed from employment, no useful purpose would have been served by allowing the application.

24. In the premises, this appeal fails and is dismissed with costs.

25. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY 2025.

W. KARANJA

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

G.V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR