Abdulahi v National Land Commission & 6 others (Civil Appeal 113 of 2018) [2024] KECA 183 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 183 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 113 OF 2018

MA WARSAME, K M'INOTI & JM MATIVO, JJA

FEBRUARY 23, 2024

BETWEEN

ABDIFAISAL AMIN ABDULAHI ..... APPELLANT

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF GARISSA ..... 2ND RESPONDENT

DIRECTOR OF PHYSICAL PLANNING ..... 3RD RESPONDENT

COUNTY COMMISSIONER GARISSA COUNTY ..... 4TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 5TH RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 6TH RESPONDENT

ALI BUNOW KORANE ..... 7TH RESPONDENT

(Being an appeal against the judgment of the Environment and Land Court at Garissa, the Honourable Justice E.C. Cherono delivered on 19th March 2018inGarissa ELC Judicial Review No.20 of 2017)

JUDGMENT

1. The appellant filed an ex parte Chamber summons application dated 25th September 2017 seeking leave to institute judicial review proceedings. In particular, he sought an order of certiorari quashing the decision of the 2nd, 4th, 5th and 6th respondents allowing the 7th respondent to use members of the National Police Service for his private matters and to forcefully take possession of the suit property known as GSA/2469 PDP No.326/2017/18. He also sought orders of mandamus and prohibition relating to the suit property with a prayer that the leave so granted operate as stay barring the respondents their agents, representatives or proxies from dealing with the suit property.

2. On 2nd October 2017 leave was granted to the appellant to file the substantive motion within 21 days and the leave so granted was ordered to operate as stay. The appellant filed his substantive motion on 1st November 2017 three days beyond the granted time. When the matter came up for hearing, counsel for the appellant indicates that he orally sought leave to file an application for enlargement of time while the 7th respondent filed a preliminary objection seeking the dismissal of the substantive motion for being filed out of time.

3. On 16th January 2018 the appellant filed a Notice of Motion application under Articles 22, 47 and 159 of *the Constitution*, section 9 of the *Fair Administrative Actions Act* 2015, section 59 of the *Interpretation and General Provisions Act* seeking leave to enlarge time and to deem the Notice of Motion filed on 1st November 2017 to be properly on record.

4. The application for enlargement of time was determined together with the preliminary objection. In a judgment rendered on 19th March 2018 the learned judge held that the substantive motion was not properly before him. He found that Order 53 rule 3(1) of the *Civil Procedure Rules* is couched in mandatory terms and the substantive motion pursuant to leave granted must be filed within 21 days. He added that neither order 50 rule 6 of the *Civil Procedure Rules* which allows the enlargement of time by the court for doing a particular act nor Article 159(2) of *the Constitution* comes to the aid of the appellant. As such the court lacked jurisdiction to consider the application filed out of the stipulated period.

5. Aggrieved, the appellant filed the present appeal. In its memorandum of appeal dated 9th April 2018, the appellant faults the learned Judge for failing to consider the circumstances of delay; for finding that he did not have jurisdiction to consider an application out of the stipulated period and for failing to take into account the appellant's submissions.

6. The appellant and the 2nd and 7th respondents all filed their respective submissions dated 27th May 2019. Mr. Nura, Advocate for the 2nd and 7th respondent, appeared at the highlighting and adopted his submissions. There was no appearance on behalf of the appellant.

7. The appellant submits in his written submissions that the substantive issue for determination before the superior court was whether the court could enlarge time for filing of the substantive motion and deem the motion filed out of time as properly on record. The applicant argues that the Honourable Judge misdirected himself in finding that there was no competent substantive motion before him, the 7th respondent having based his argument to strike out the motion on order 53(3) (1) of the Civil Procedure Rules. The appellant urges that the court should have exercised discretion based on Articles 47 and 159(2)(d) of *the Constitution* to favour substantive justice by hearing and determining the substantive motion. He buttresses this argument by submitting that section 10 of the *Fair Administrative Action Act* and section 59 of the *Interpretation and General Provisions Act* further obliges the court to disregard procedural technicalities. Further, that order 50 rule 6 of the *Civil Procedure Rules* permits enlargement of time without exemption of order 53.

8. The appellant relies on the case of *David Njenga Ngungi v Attorney General* [2016] eKLR, *Gateway Insurance Company Ltd v Aries Auto Sprays* [2011] eKLR and *Republic v Kenya Revenue Authority ex parte Stanley Mombo Amuti* [2018] eKLR. He concludes that the learned judge erred in failing to enlarge time and allowing the substantive motion filed by the ex parte applicant and prays for the setting aside of the learned judge's decision, a finding that the motion was properly on record and a directive that the substantive motion be heard and determined on merits.

9. On their part, the 2nd and 7th respondents frame the principal issue for determination to be whether the trial court erred in failing to extend time for the appellant to file leave to file the substantive motion.

They proceed that the literal construction of the provisions of order 53 rule 3(1) of the *Civil Procedure Rules* 2010 is that it is couched in mandatory terms by use of the operative word shall. Thus, it is for the court, in interpreting the provision to give life to the intention of the legislature. These respondents submit that the words used demonstrate that the timelines are mandatory rules of procedure to be strictly adhered to. Reliance is placed on the Court of Appeal decision in *Wilson Osolo v John Ojiambo Ochola & the Hon AG* CA No.6 of 1995 as quoted in *Republic v Attorney General & Another ex parte Macharia Waiguru* [2017]eKLR.

10. The respondents point out that the application for extension of time was not only filed after filing the substantive application outside the 21 day leave window but also it was supported by the affidavit of the applicant's advocate on record, Charles Liewa Madowo in breach of professional practice prohibiting advocates appearing in a matter from swearing affidavits on contested matters of facts. They cite *Nicholas Kipchirchir Kimaiyo v Wilson Kibet Kimutai & Another* [2014] eKLR and *Regina Waithira Mwangi Gitau v Boniface Nthenge* [2015] eKLR.

11. Moreover, they agree with the learned Judge's finding that article 159(2) of *the Constitution* and order 50 rule 6 of the *Civil Procedure Rules* do not come to the aid of the appellant. The respondents make recourse to the Court of Appeal decision in *Nicholas Kiptoo Salat v IEBC & 6 Others* [2013] eKLR and *John Ongeri Mariaria & 2 Others v Paul Matundura* Civil Application No. Nai.301 of 2003 [2004] 2EA 163 as relied upon in *Republic v Inspector General National Police Service & 2 Others ex parte Linda Okello & 2 Others* [2016] eKLR to the effect that courts should never provide comfort and cover for parties who exhibit scant respect for rules and timelines at the expense of an innocent party who strives to abide by the rules. Thus, they add that the Notice of Motion application would not have succeeded as the Advocate deponed on contentious matters, which would only be deponed by the appellant.

12. They pray for costs, stating that they have spent considerable time effort and expense in defending these proceedings before the High Court and now before the Court of Appeal. The 2nd and 7th respondents conclude that the orders sought in the memorandum of appeal are incapable of being granted and the trial judge was correct in his findings. They ask for a dismissal of the appeal.

13. Having set out the background, and arguments by the parties, it is our considered view that the appeal firmly hinges on the determination of the question as to whether the learned judge erred in disallowing the application for extension of time within which to file the substantive application for judicial review proceedings.

14. In doing so, we are mindful of our appellate jurisdiction that calls upon us to reconsider the evidence on record and determine whether the learned judge made the correct conclusion under the circumstances. This is the import of rule 31 of the *Court of Appeal Rules* 2022.

15. It is undisputed that the decision by the learned judge involved exercise of judicial discretion. This stems from the interpretation of the provisions of order 53 rule 3(1) of the *Civil Procedure Rules*. The corollary question is whether the provision of Article 159(2)(d) of *the Constitution* and/or order 50 Rule 6 was available to assuage the appellant's non-compliance with the said provision.

16. In perusing the judgment of the High Court, it emerges that the trial court framed three main issues for determination. The first issue is, whether the court has jurisdiction to enlarge time within which the substantive notice of motion ought to have been filed. The second issue is, if the answer to the first question is in the affirmative, whether there was inordinate delay which is prejudicial to the respondents. The third issue was on what orders should the court make.

17. On jurisdiction, the learned judge expressed himself as follows:

> " What emerged from the two rival positions advanced by counsel is that there is no settled position currently as regards the 21 days period stipulated in order 53 rule 3 of the *Civil Procedure Rules*.
>
> In that regard, it is my view that order 53 rule 3(1) CPR is couched in mandatory terms to the effect that the substantive motion pursuant to leave must be filed within 21 days.
>
> Although Article 159(2) of *the Constitution* requires the court to administer justice without undue regard to procedural technicalities, that provision does not imply in my respective understanding that all procedural requirements of moving the court are thrown out of the window."

18. From the above, it is clear that the learned judge appreciated the existence of two schools of thought. Each of the said schools of thought is backed by authorities. The judge opted to be persuaded by the strict interpretation of the rules in finding that he lacked jurisdiction. The trial court having made this decision, it did not consider the other two issues, whose determination was in any event dependent on the determination of the first issue in the affirmative.

19. It is trite that we can only interfere with such discretion if it is demonstrated that the discretion was not exercised judiciously stemming from the decision in *Shah v Mbogo* [1968] EA 93. Can we fault the judge merely for adopting one position over the other? We do not think so. This is because we are mindful of the fact that it is not upon us to substitute the trial court's decision just because we would have arrived at a different decision. Exercise of judicial discretion remains one of the key pillars of judicial independence to be exercised from time to time.

20. We note that even under the new constitutional dispensation, the Supreme Court underscored the importance of adherence to procedural rules, affirming that Article 159 did not intend to act as a panacea in all and sundry situations. In *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR the Supreme Court stated:

21. The Court of Appeal in *Charles Karanja Kuru v Charles Githinji Muigwa* (CA 71/2016), was faced with a similar situation as submitted by the applicant and posed the following question:

> " Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on 24th October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted."
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> The Court of Appeal in the above stated case cited with approval Aburili, J. in Martha Wambui v Irene Wanjiru Mwangi & Another where the learned judge stated:

> " In my view, the use of the term "admitted" connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time....." see also APA Insurance Ltd v Michael Kinyanjui Muturi (supra).
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> The Court of Appeal went on to state;
>
> "This is the position this court has taken when dealing with applications for extension of time. We have always, and we believe lawfully so, deemed as fully filed applications without leave where leave is sought and subsequently granted. Learned counsel for the appellant

submitted that this position was found to be untenable by the Supreme Court which pronounced itself as follows in the Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR (Salat case):"

22. Looking at the circumstances of the case, we note that first, the application was filed way after lapse of time, when the applicant had already filed the substantive notice of motion. Secondly, the court was not persuaded to extend time that had already lapsed and lastly it appeared that the application to enlarge time was merely an afterthought, the appellant having made a reactionary move against the respondents' intention to object to the late filing.

23. From the foregoing, we are not persuaded that the appeal has merit and we order the same be and is hereby dismissed. As for costs, they follow the event. Since only the 2nd and 7th respondents participated, the costs of the appeal are awarded to them.

Dated and delivered at Nairobi this 23rd day of February, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

K. M'INOTI

.....

. JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR