



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT NAIROBI

MISC. CASE NO. 164 OF 2017

(FORMELY MACHAKOS MISC. 8 OF 2004)

FRANCIS MUTHINI KAVOI.....CLAIMANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER OF POLICE.....2ND RESPONDENT

PROVINCIAL POLICE OFFICER, EMBU.....3RD RESPONDENT

RULING

1. The application before the court is the Chamber Summons dated 28.1.2004. It was brought under Order 53 Rule 1(2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and it sought the following orders:
 - a. An order of Certiorari to remove into the High Court and quash the decision of the Provincial Police Officer, Eastern Province dated 16th July, 2003, reprimanding and dismissing the applicant from the police force.
 - b. An order of mandamus directed to the Commissioner of police to reinstate the applicant into the police force.
 - c. That costs of the application be provided for.
2. The application was presented to Onyancha J on 30.11.2005 but leave was not granted because the judge was of the view that the application was time barred. He however, directed the applicant to file an explanation for the delay before the application was argued. He further directed the applicant to serve a notice within 60 days.
3. Despite several court appearance in the last 15 years, and reminders by the court to comply with the directions by Onyancha J, on 30.11.2005, the applicant failed to file the explanation for filing the application out of time until 20.5.2019 when he filed an Affidavit sworn on 17.5.2019.
4. In the said affidavit, the applicant deposed that the delay in filing the application within 6 months was due to freezing of time during the Christmas court vacation. In his view from 21.12.2003 to 13.1.2004, time did not run and as such by the time he filed the application on 29.1.2004, only 5 months 21 days had lapsed from the date of the impugned decision. He therefore, prayed for leave to issue as prayed in his application.
5. He relied on **Republic v Public Procurement Administrative Review Board and Another [20.8] eKLR** to support his submission on the excluded time when computing the time for filing the application or leave to apply for Judicial Review order of Certiorari.
6. The Respondents objected to the application on ground that it was filed out of time. They contended that Section 9 (3) of Law Reform Act and Order 53 rule 1(2) of the Civil Procedure Rules bars the court from granting leave to apply for order of certiorari unless the application for leave is made not later than six months after the impugned proceedings or decision or such shorter period as may be prescribed by a statute.
7. They submitted that the said provisions are couched in mandatory terms and leaves no room for extension of the limitation period within which application for leave may be made. They further contended that judicial review proceedings under Order 53 of the Civil Procedure

Rules are a special proceedings and not subject to any other provisions of the Civil Procedure Rules. For emphasis, reliance was made on Welamudi vs The Chairman Electoral Commission of Kenya KLR (2002) 285, R vs Kenya Bureau of Standards [2006] E.A. 345, AKO vs Special District Commissioner Kisumu & Another [1959] KLR 163 and R v Kahindi Nyafula & Others [2014]eKLR

ANALYSIS AND DETERMINATION

8. The issues for determination herein is whether the application for leave herein is time barred.

9. The respondent contended that the application was filed after the lapse of 6 months after the impugned proceedings and decision and as such it is incompetent. However according to the applicant the application was made before the lapse of six months because the period between 21.12.2003 and 13.1.2004 is excluded from the computation by dint of Order 50 Rule 4.

10. The substantive law governing application for judicial review when the cause of action herein arose was Section 9 of the Law Reform Action which provides that :

“(3) 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 proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings 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 time for appealing has expired”.

11. The said provision is repeated in Order 53 rule (2) of the Civil Procedure Rules. In this case the impugned decision was communicated by the letter dated 16.7.2003 and the six months lapsed on 16.1.2004. However, the application for leave herein was filed on 29.1.2004, about 13 days out of time. There is no shortage of judicial precedents in this country on the prohibition from granting leave to apply for certiorari after 6 months.

12. In Ako v Special District Commissioner Kisumu & Another [1959] KLR 163, the Court of Appeal held that:

“The prohibition is statutory and absolute and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically Order 49 Rule 5 (now order 50) which makes provision for the enlargement of time.”(emphasis is mine)

13. The foregoing precedent is binding on this case. Section 9(3) of the Law Reform Act is the substantive law on that subject and it cannot be amended or watered down by subsidiary legislation in the name of Order 49 Rule 5 (now Order 50 Rule 6) of the Civil Procedure Rules. It follows that the application is time barred and incompetent as was observed by Onyancha J on 30.11.2005 when he declined to grant the leave *ex parte* and directed that it be heard *inter partes*. Consequently I decline to grant the leave sought and dismiss the application dated 28.1.2004 with no orders as to costs.

Dated, signed and delivered in open court this 20th day of December, 2019.

ONESMUS MAKAU

JUDGE