Republic v Director of Public Prosecutions & 3 others; Njeru & another (Exparte Applicants); Multistage Investment Limited (Interested Party) (Judicial Review E084 of 2023) [2025] KEHC 332 (KLR) (Judicial Review) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 332 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E084 OF 2023

JM CHIGITI, J

JANUARY 24, 2025

BETWEEN

REPUBLIC .... APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS .... 1ST RESPONDENT

THE CHIEF MAGISTRATES COURT, NAIROBI .... 2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS .... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL .... 4TH RESPONDENT

AND

FRANCIS NYAGA NJERU .... EXPARTE APPLICANT

JUDY MUTHONI NGUGI .... EXPARTE APPLICANT

AND

MULTISTAGE INVESTMENT LIMITED .... INTERESTED PARTY

RULING

1. What is before this court for determination is the Interested Party's Notice of Preliminary Objection dated 20th May 2024 wherein it is urging this Court to strike out the Exparte Applicants' Motion dated 7th September 2022 with costs on the grounds that:
    1. This Court has no jurisdiction to entertain the Application given that it was filed out of time on 8th September 2023, contrary to the strict and mandatory requirements of Order 53 Rule

3(1) of the Civil Procedure Rules 2010 as held by the Court of Appeal in Longinus Oroni Murunga v David Masika Mafumbo [2017] eKLR.

2. The Notice of Motion dated 7th July, September 2022 is fatally defective given that the Republic has not been invoked as the Applicant, as held in David Kinyanjui Gatimu v Physical Planners Registration Board & Another [2007] eKLR.

3. The Notice of Motion dated 7th July, September 2022 is fatally defective given that it is dated more than a year before leave was sought for the grant of various judicial review orders.

Brief background;

2. This Honourable Court granted the Ex-parte Applicants leave to file their substantive Notice of Motion Application on 4th July 2023.

3. The Application was filed on 8th September 2023.

4. This triggered the filing of the Notice of Preliminary Objection dated 20th May 2024 by Interested Party filed seeking to have the Notice of Motion Application filed on 8th September 2023 struck out.

5. This was predicated on the reason that it was filed out of the statutorily mandated timeline.

6. Parties were directed to file submissions limited to the Notice of Preliminary objection.

Interested Party's Case

7. It is the Interested Party's case that the court granted the Exparte Applicants leave on the on 4th July 2023. The Ex-Parte Applicants filed their Notice of Motion Application on 8th September 2023.

8. It is also its case that the time limitation for the filing of the substantive application is found in Order 53 Rule 3(1) of the Civil Procedure Rules which reads as follows:

> " 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."

9. Reliance is placed in Republic v District Education Board Sub-County Health Officer, Nyeri South District Ex Parte Bridge International Academies Limited [2016] eKLR, and on The Court of Appeal in Wilson Osolo vs John Ojiambo Ochola & the Hon.AG *CA No.6 of 1995* expressed itself as follows regarding the mandatory nature of the time limits imposed for the filing of the substantive application:

> " It was a mandatory requirement of Order 53 rule 3(1) of 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."

10. Indeed, the time limits imposed by law for instituting Judicial Review applications speak to the competence of the application and to the jurisdiction of this Honourable Court to entertain the application.

11. Having been filed almost 2 months outside the required window of time, the Ex-parte Applicants application dated 8th September 2023 is incompetent and cannot be heard before this Honourable Court.

12. Further, the provisions on the limitation of time do not fall within the ambit of procedural law but are instead substantive law, hence filing outside the period granted by law is not a procedural technicality curable by the application of Article 159 (2) (d) of *the Constitution* of Kenya 2010. Reliance is also placed in the Court of Appeal in Longinus Oroni Murunga v David Masika Mafumbo [2017] eKLR held:

> "...it is true that Article 159 (2) (d) of *the Constitution*, provides that justice shall be administered without undue regard to technicalities of procedure. It is also true that the High court was required to apply the overriding objective principle which is to facilitate the just, expeditious, proportionate and affordable resolution disputes. The High court had also inherent jurisdiction. However, those principles do not apply to the time limited by law for instituting court proceedings. They apply to competent court proceedings which a court has jurisdiction to entertain. The time limited by the court which was in conformity with the law for instituting judicial review applications, goes to the competence of the application and to the jurisdiction of the High Court to entertain the application. Since the application was filed out of time and the time had not been extended by the court, the decision of the High Court to strike out the application was correct."

13. In an attempt to rectify this error, the Ex-parte Applicants filed a Notice of Motion Application dated 18th June 2024 seeking an enlargement of time and upon grant of this order, to consider the Application filed on 8th September 2023 duly filed.

14. Notably, the Ex-parte Applicants herein had the option to seek an extension of time when filing their substantive application but failed to do so, only seeking this extension after the Interested Party filed and served their Notice of Preliminary Objection on 20th May 2024.

15. It is evident that the motion for extension of time was a mere afterthought and for the sole objective of defeating the motion to strike out the judicial review proceedings.

16. Further reliance is placed in the case of Republic v Chief Land Registrar and the Attorney General ex-parte Juma Seva & 446 others [2024] held:

> "To my mind, it was incumbent upon the Applicants herein to seek for and obtain leave of the court, prior to and before filing the impugned amended Notice of Motion Application. However, it is worthy to underscore that no leave was ever sought for and/or obtained before the impugned application was filed; and in this regard, the question that does arise is whether the impugned amended Application is properly before the court or otherwise. Be that as it may, my humble view is that the Applicants herein could not proceed to and amend the Application and thereafter seek to validate the amended Application ex-post-facto."

17. Reliance is also placed in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR which expressed itself as follows:

> "To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently,

this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out."

18. Similarly, the Supreme Court in Nairobi Bottlers Limited v Ndung'u & another (Application E030, E034 & E038 of 2023 (Consolidated)) [2023] KESC 96 (KLR) held:

> " Furthermore, even assuming that the applicant had offered satisfactory explanation for the entire period of delay, which it hasn't, its motion for extension of time would still be subject to the same fate. This is because the applicant has urged this court that upon extending time to deem the appeal as being properly filed. Time and time again, we have reiterated that filing an appeal out of time without leave and then seeking this court's discretion to extend time is presumptive and inappropriate. As we stated in Nicholas Salat-
>
> 'No appeal can be filed out of time without leave of the court. Such a filling renders the 'document' so filed a nullity and of no legal consequence.'
>
> We therefore decline to accede to the request to deem the appeal, which was filed out of time, as properly before us. To do so would be tantamount to sanctioning an illegality."

19. Accordingly, it was incumbent upon the Ex-parte Applicants to obtain leave beforehand, and insofar as no such leave was procured beforehand, the impugned Notice of Motion Application dated 8th September 2023 ought to be vitiated and rendered a nullity.

20. The Ex-parte Applicants have not offered any explanation for the delay between 8th September 2023 when they filed their substantive Notice of Motion Application and 18th June 2024 when they filed their Motion for extension of time.

21. In the Supreme Court in Marvin Opiyo Ambala & another v Oduor Hawi Ambala & another [2021] eKLR, where it was held that it is trite law that, in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court.

22. They pray that their Notice of Preliminary Objection be allowed, and the Ex-parte Applicants' Applications dated 8th September 2023 and 18th June 2024 be dismissed forthwith, with costs to the Interested Party.

The Exparte Applicants' Case;

23. It is their case that on the 4th July,2023, the Honourable Court granted leave for the Ex parte Applicants to file a Notice of Motion seeking for substantive orders of judicial review.

24. It is further their submission that, their counsel was unwell during the period of 20th July 2023 and the entire August 2023 after contracting severe food poisoning and a bacterial infection rendering him completely indisposed.

25. They eventually filed the Notice of Motion the 8th September,2023 about two months after the leave was granted after which the honorable court proceeded to list the matter for judgment on 30th January 2024, however, the said judgment was arrested by the Interested Party's application dated 1st December 2023 which sought for their enjoinment in the suit.

26. The said application was allowed pursuant to a ruling delivered on the 5th March 2024. It is their case that the delay in filing the Notice of Motion was not deliberate but a purely excusable mistake occasioned by the indisposition of the counsel who is the sole advocate in his law firm.

27. It is their case that Judicial Review is a constitutional right espoused under Article 47 and therefore no longer within the narrow limits of the traditional common law principles and hence Court has the power to grant the orders sought in order to achieve substantive justice for the parties.

28. It is also their case that Article 47 of *the Constitution* is supreme to provisions of Order 53 of the *Civil Procedure Act* and Sections 10 & 11 of the Fair Administration Act, 2015 overrides the *Civil Procedure Act* on the issue of enlargement of time as the latter was enacted after the former.

29. They argue that no prejudice would be occasioned to the Interested Party since they have an opportunity to ventilate their case during the substantive hearing. This can be confirmed from the responses by the interested party where they have not listed and or pointed out any prejudice that they will suffer if the Substantive Motion is allowed to proceed.

30. It is submitted that the Honorable Court is clothed with the requisite discretion to enlarge the time required to file the substantive judicial review notice of Motion.

31. Sections 95 of the *Civil Procedure Act*, Section 63 (e) of the *Civil Procedure Act* and Section 59 of the Interpretation of the General Provisions Act (Cap 2) and more importantly Article 159 (2) (d) of *the Constitution* in order to prevent an injustice being occasioned to an innocent party. The following authorities affirm that extension of time in judicial review matter is done in the best interest of justice.

    a. Reliance is placed in the case of Remco Ltd Vs Mistry PRBAT Jadva & Company Ltd (2002) IEA 227, where it was held that the court has powers to extend the period of filing of judicial review application where leave was already granted;

    b. In Kenya Bureau of Standards Vs Kenya Maritime Authority (2014) e KLR, Mureithi J. held that the Court has jurisdiction to enlarge the 21 days after grant of leave.

    c. In Republic vs District Land Registrar Thika (2014) Eklr, Honorable Korir J held that the extension of time is in the interest of justice.

    d. In David Njenga Ngugi Vs. Attorney General (2016) eKLR the Court of Appeal defined the word "shall" as merely directory, the Court of Appeal held that a suit that has been filed without full compliance with section 13A cannot be said to be incompetent nor can it be rightly struck out.

32. Order 50 rule 6 of the Civil Procedure Rules gives the court powers to enlarge time upon such terms as the justice of the case may require; it states;

> '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'

33. In the case of Republic v Kenya Revenue Authority ex parte Tom Odhiambo Ojienda Sc t/a Prof. Tom Ojienda & Associates [2016] eKLR where the court stated thus;

> 'There is no doubt that judicial review proceedings are special proceedings guided by sections 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules. However, the framers of the said Rules deemed fit to provide for enlargement of time in instances where the said framers had themselves prescribed the timelines without making a distinction between judicial review and other proceedings prescribed by the said Rules. Emphasis ours. In Sukwinder Singh Jutley vs. Prudential Association Co. of Kenya Ltd & Another Civil Appeal (Application) No. 62 of 2004, the that in procedural rules that lack clarity, the Court is at liberty Court of Appeal held to lean on constructions which aid the course of justice. Since there is no express rule barring the enlargement of time to file the substantive motion as opposed to enlargement of time to apply for leave, in my view the Court ought to adopt an interpretation of Order 53 rule 3(1) as read with Order 50 rule 6 of the Civil Procedure Rules which aid the course of justice"

34. They also rely on the case of Republic v Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] eKLR where the court emphasized that the court should ensure that justice is served through invocation of its inherent powers. The court stated thus;

> "that even if there was no specific provision for enlargement of time in a procedural rule like Order 53 Rule 3 of the Civil Procedure Rules, what this court needs to satisfy itself is that there is no demonstrable prejudice caused to the adverse party because of delay and whether refusal to enlarge time would occasion hardship and result in an injustice to the applicant. In so doing, this court's inherent discretion is not fettered to ensure that justice is done to the parties since there is no prohibition for enlargement of time and in the absence of a specific prohibition by the Rules Committee, the court infers that the Civil Procedure Rules were not meant or intended to preclude meritorious claims"

35. It is their case that the Interested party seems to have relied on Supreme Court and Court of Appeal decisions whose facts and circumstances are clearly distinguishable and not the same with the facts in the instant suit. In the case of H Wholesalers Limited v Kenya Revenue Authority [2021] eKLR, the court, Justice John M. Mativo (as then he was), stated as follows: -

> " The Applicant attributes the delay to alleged discussions with the Respondent. It claims that owing to the negotiations, it withheld court action. In support of this view, reliance was placed on Gatune v The Headmaster, Nairobi Technical High School Another in which the court allowed extension of time on grounds that the parties were negotiating. I have in several decisions stated that cases are context sensitive. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage: -
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> "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides...." (Emphasis added).

36. It is their case that the decisions relied upon by the Interested Party flow from decisions of election petitions which are cast in stone as the timelines are set out clearly in *the constitution*.

37. It is also their case that the timelines for filing of Judicial Review are not cast in stone and the Court still has unfettered jurisdiction to extend time in order to serve justice to the parties. The issues raised by the Ex parte Applicants in the suit herein are weighty issues which craves for the hearing and determination by the honorable court and it will therefore be just and equitable for the Honorable court to grant the orders as sought.

38. Reliance is placed in the Supreme Court in the case of Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] where the apex court observed as follows;

> '… As urged by counsel for the 1st respondent, we recognize that there are instances in general litigation, when jurisdiction is not affected by a party's failure to meet the set filing requirements. For example, a Court may in certain instances exercise its discretion to admit a matter for hearing when an argument regarding proper form is pending before it. The Court's authority under Article 159 of *the Constitution* remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice'

39. They submit that the Honourable Court should refer to Article 159 of *the Constitution* and make a finding that it is in the interests of justice that the substantive motion is heard to finality than striking it out. In Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009 the Court of Appeal appreciated that:

> " …the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out."

40. They submit that contrary to the averments raised by Interested Party in its Replying Affidavit, the Motion was filed within two months from the date the leave lapsed. The period was therefore not inordinate. As already explained, the pleadings were admitted that no party raised any qualms as to its regularity and submissions were exchanged and the matter reserved for judgment.

41. The reason for the two-month delay has been supplied by counsel for the Ex parte Applicants who has stated that he was unwell and therefore unable to report to the office for the said period in question. The delay was therefore properly explained and it is a mistake attributable to the sickness of the counsel and therefore the same should be excused and not be used to drive the Ex parte Applicants from the seat of justice. On this they rely on the court of Appeal Loci classicus of Philip Chemwolo &Another… Vs…Augustine Kubende (1986) eKLR, where the Court of Appeal held that: -

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud-or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as it often said exists for the purpose of deciding rights of parties and not the purpose of imposing discipline."

42. In the case of Gideon Mose Onchwati Vs Kenya Oil Co. Ltd & Another (2017) eKLR cited the case of Shah Vs Mbogo and Ongwom Vs Owota, where the Court of Appel held that;

> " Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate, is bound by the acts and omissions of the advocates in the course of representation, in applying that principle, Courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions."

43. According to them, the Interested Party has not countered the evidence of the indisposition of the counsel for the Ex parte Applicants in its entire written submissions. They believe that this is a concession that it is a valid reason for the delay and that the application before court validly seeks the leave of the honorable Court to deem the substantive Motion already filed in Court as properly filed in court pursuant the leave which the honorable Court has inherent power to so grant.

44. They urge the honorable court to disregard the submissions by the Interested Party that leave had to be sought first before filing the notice of motion and submit that the Honorable court still has inherent powers and, in a bid, to deliver substantive justice in an expeditious manner deem the filed motion as properly filed as no prejudice will be suffered to the interested party.

45. Reliance is placed in the case of Republic v Kenya Revenue Authority ex parte Tom Odhiambo Ojienda Sc t/a Prof. Tom Ojienda & Associates(Supra) and Republic v Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] eKLR(Supra).

Analysis and determination;

46. From The Notice of Preliminary Objection and rival submissions of parties as read alongside the authorities cited by the parties, the issue that commends itself for determination is whether the Interested Party's Notice of Preliminary Objection dated 20th May 2024 should be upheld or dismissed.

47. The Law on preliminary objections is now well settled in the case of Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited [1969] EA696, Newbold, V.P, observed as follows;

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and, on occasion, confuse issues. This improper practice should stop."

48. The court is satisfied that the grounds raised in the Notice of preliminary Objection flow from the provisions of Order 53 of The Civil Procedure Rules and this court has no doubt that the grounds amount to points of Law which go to the jurisdiction of this court.

49. What is before the court is a Notice of Preliminary objection and not the application for the enlargement of time. In the premises this court reminds itself that it will not get into the evidence analysis as invited by the Exparte Applicants.

50. In the case of Republic v Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] eKLR it was held;

> "that even if there was no specific provision for enlargement of time in a procedural rule like Order 53 Rule 3 of the Civil Procedure Rules, what this court needs to satisfy itself is that there is no demonstrable prejudice caused to the adverse party because of delay and whether refusal to enlarge time would occasion hardship and result in an injustice to the applicant. In so doing, this court's inherent discretion is not fettered to ensure that justice is done to the parties since there is no prohibition for enlargement of time and in the absence of a specific prohibition by the Rules Committee, the court infers that the Civil Procedure Rules were not meant or intended to preclude meritorious claims"

51. In Remco Ltd Vs Mistry PRBAT Jadva & Company Ltd (2002) IEA 227, it was held that the court has powers to extend the period of filing of judicial review application where leave was already granted.

52. In the case of Jaber Mohsen Ali & Another vs Priscillah Boit & Another E & C No. 200/2012 (2014) eKLR the court stated that for delay to be declared unreasonable it will depend on circumstances of each case and that even one day's delay can be unreasonable.

53. In Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR, the court similarly declined to exercise its discretion simply because the Applicant claimed a mistake of counsel. The Court stated:

> " It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by cost .... However, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court".

54. Upon assessing the conduct of the Exparte Applicants, this court notes that they acknowledged that they filed the Notice of Motion late and that the Exparte Applicants have already taken remedial steps in that they have already filed an application for the enlargement of time.

55. It is this court's finding that a process that would best accord with the interest of justice in this matter would be best achieved if the court upheld, promoted and fulfilled Article 159 (2) of *the Constitution* which provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles—

    (a) justice shall be administered without undue regard to procedural technicalities; and

    (b) the purpose and principles of this Constitution shall be protected and promoted.

56. From the foregoing, I am satisfied that this court has the requisite jurisdiction to hear this suit and that the interest of justice will be best served if the matter proceeds to hearing on merit.

57. The Interested Party will not suffer any prejudice if the preliminary objection is dismissed which I hereby do.

    Order:

    The Notice of Preliminary Objection dated 20th May 2024 is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

J. CHIGITI (SC)

JUDGE