Johana v Secretary Teachers Service Commission & another (Miscellaneous Application 162 of 2006) [2024] KEHC 3981 (KLR) (22 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3981 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION 162 OF 2006

FR OLEL, J

APRIL 22, 2024

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICAL REVIEW(PROHIBITION) & CERTIORARI OF SIMON KAMAU JOHANA

AND IN THE TEACHERS SERVICE COMMISSION AND THE BOARD OG GOVERNERS-MAIUNI SECONDARY SCHOOL

BETWEEN

SIMON KAMAU JOHANA ..... EXPARTE APPLICANT

AND

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

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

RULING

A. Introduction

1. The Application before this court is a notice of motion application dated 09.10.2023 brought pursuant to the provisions of section 1A, 3A and 95 of the *Civil Procedure Act*, Order 42 rule 6 of the *Civil procedure rules* and other enabling provision of law. The Applicant seeks the following prayers, that;

    a. That the honourable court be pleased to extend time and grant the applicant leave to file a substantive notice of motion for an order of judicial review in the nature of the superior orders of prohibition and certiorari to prohibit the respondents namely the board of Governors-Muiuni secondary school and the Teachers service commission from interdicting the Ex parte applicant and to bring before the high court for purposes of being quashed the decision by the said respondent dated the 12th day of July 2006 to interdict the Ex parte Applicant.

b. That the leave so granted to operate as stay of the said decision to interdict the Ex parte Applicant.

2. The Application is supported by a supporting affidavit of the Applicant dated 09.10.2023 in which it was deposed that he was granted leave to file the substantive notice of motion on 06.10.2006, but his advocate M/s R.M Matata & co Advocates failed to do so. He had followed up on this issue with the said advocates, seeking updates but they had become uncooperative and hence he had sought to photocopy the entire court file to confirm the obtaining position. Unfortunately he discovered that his advocate had not filed the said notice of motion and he eventually did file this application to rectify the situation.

3. The applicant averred that the mistake which occasioned was beyond his control and that he should not be punished for the negligence and lack of action of his advocate. He therefore prayed that his application be allowed as the respondent would not suffer any prejudice and/or loss. Finally the applicant posited that he was also ready and willing to abide by any condition this court would impose in granting the extension of time.

4. The application is opposed by the 2nd respondent, who filed their grounds of opposition dated 31st October 2023 and did aver that the said 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 notice of motion and therefore the court had no basis upon which the said prayers could be granted. There had also been an inordinate and inexcusable delay in filing this Application and no plausible reason had been disclosed to justify the same. The courts hands were tied and the 2nd respondent prayed that this Application be dismissed with costs.

B. ANALYSIS & DETERMINATION

5. I have carefully considered the Application, its supporting affidavit and the grounds of opposition filed in opposition thereto. The applicant did rely on Section 79G of the *civil procedure Act* and order 42 rule 6 of the *civil procedure rules*, but it should be noted that these provisions are irrelevant to this application, as the issue at hand is not about extension of time to file an appeal out of time and/or stay of execution pending Appeal.

6. Be that as it may, the Court of Appeal in the case of *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR discussed some of the factors that aid Courts in exercising the discretion whether to extend time. They include the following:

   i) The period of delay;

   ii) The reason for the delay;

   iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;

   v) The importance of compliance with time limits to the particular litigation or issue; and

   vi) The effect if any on the administration of justice or public interest if any is involved.

7. The importance of giving a sufficient reason for the extension of time was discussed in the Court of Appeal case of *Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo* (2019) eKLR where it was held:-

> "In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The

guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR Sup Ct Application No 16 oF 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted".

8. From the record, leave was granted to the applicant on 29.09.2006 and he was grated 21 days to file the substantive notice of motion then. The applicant slept on his rights for seventeen (17) good years before waking up to move the court on 17.10. 2023 seeking for extension of time on the basis that he's advocate was at fault and did not file the substantive notice of motion as instructed. Unfortunately for the applicant, the reason proffered for this delay is week, and escapist. The period of delay (17 years) is prolonged and unjustified and he also does not explain what prevented him from filing this application promptly, when he realized that his advocate had not moved. The applicant simply slept on his rights and has moved court as an afterthought with unclean hands and therefore is underserving of any equitable remedy.

9. Secondly as pointed out by the 2nd respondent, the *law reform Act*, which is the substantive law governing issuance of prerogative orders does not provide for enlargement of time, once the leave window has lapsed and the court cannot do so in a vacuum- without legal basis. Even on the converse, if the applicant were to rely on the "Oxygen rules" he would still knock his head against "shut gates" in the court of justice as the period of delay herein is inordinate and substantive justice dictates that this matter be left to rest. It would also be be unjust and unfair to subject the respondents to proceeding with issues, which occurred seventeen (17 years) ago, when most of their witnesses are no longer in service.

10. Finally, what the applicant had intended to stop (his interdiction) was effected on 12th July 2006, this is as per his own disposition in his affidavit. It is also noted that pursuant to provision of Order 53 rule 2 of the *civil procedure rules*, orders of certiorari cannot be granted unless leave is sought not later than 6 months from the date of the impugned proceedings, order that one intends to quash. Axiomatically no orders of certiorari can be granted seventeen (17) years later and the court cannot issue orders in vain.

DISPOSTION

11. The upshot is that the notice of motion application dated 9th October 2023 lacks merit and the same is dismissed with costs to the respondents.

12. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 22nd day of April, 2024.

In the presence of;

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant