



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 140 OF 2017

GIDEON KATUMO NTHIWA.....APPLICANT

VERSUS

PS MINISTRY OF DEFENCE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

R U L I N G

1. In the notice of motion application dated 28th November, 2018 the Petitioner, Gideon Katumo Nthiwa, is the Applicant. The 1st Respondent is the Principal Secretary, Ministry of Finance and the 2nd Respondent is the Attorney General. The respondents in the petition are also the respondents in the application.
2. Through the application, the Petitioner seeks the setting aside of the order dated 26th November, 2018 which dismissed his petition and a reinstatement of his petition for hearing on merit.
3. The respondents opposed the application through a replying affidavit sworn on 10th May, 2019 by Major Emmanuel W. Wandera. It is the respondents' position that prior to the dismissal of the petition, it was apparent to the respondents and the court that the Petitioner had not exhausted the available remedies as he had not petitioned the Defence Forces Pensions Appeals Tribunal (the Tribunal) for a review of his disability allowance. They state that the matter was indeed referred to the Tribunal. Further, that the Court had directed counsel for the Petitioner to show cause why the petition should not be withdrawn and the issue placed before the Tribunal.
4. It is the respondents' case that the Court struck out the petition with no order as to costs after the Petitioner's counsel failed to attend court on 26th November, 2018. They state that the Petitioner's counsel has not explained his absence on the date the petition was struck out and that this petition is indeed a waste of judicial time as the Tribunal is the proper forum for determining the Petitioner's claim.
5. In his application and the affidavit sworn by his counsel, Eric Mutua, in support of the application, the Petitioner avers that the failure of his counsel to attend Court on 26th November, 2018 was caused by the failure of an associate in his lawyer's firm to diarize the mention date. Further, that the said associate by the name Ms Patricia Benbella had left the law firm prior to 26th November, 2018. The Petitioner pointed out that prior to the dismissal of his petition his advocate had religiously attended all the mentions of the matter.
6. The advocates for the parties filed submissions, which simply reiterate their pleadings. None of them cited any authority in support of their submissions.
7. In **CMC Holdings Limited v Nzioki [2004] 1 KLR 173** it was held that:-

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle...We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here...In doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

8. It is important to note that the Petitioner has established satisfactory cause for his absence and that of his counsel on the day the petition was struck out. Counsel for the Petitioner in an affidavit sworn in support of the application averred that the matter was not diarized by the counsel who attended court on 25th September, 2018 when the matter was listed for mention on 26th November, 2018. Further, that the counsel had left their law firm on 31st October, 2018. The respondents have not controverted this averment.

9. Another important piece of evidence that tilts the application in favour of the Petitioner is the fact that the record shows that the Petitioner's counsel had faithfully attended court from the time the petition was instituted on 5th April, 2017. Contrary to the respondents' assertion that the Petitioner was averse to having his dispute resolved by the Tribunal, the record shows a willingness on the part of the Petitioner to file his claim before the Tribunal. Indeed on 5th March, 2018 counsel for the Petitioner asked for more time to regularize the Petitioner's claim before the Board, which I presume is the Tribunal.

10. On 25th September, 2018 counsel for the respondents indicated that the term of the members of the Board had expired in April 2018. Even on the date the Petitioner's claim was struck out the respondents' counsel had indicated to the court that the Pension Board was yet to be constituted.

11. In the circumstances of this case, the Petitioner has shown good cause why the petition should be reinstated. The record is also clear about the Petitioner's willingness to pursue the alternative dispute resolution mechanism. However, at the time the petition was struck out the alternative dispute resolution mechanism was not in place.

12. In light of what I have stated above, it follows that the Petitioner's application dated 28th November, 2018 has merit. The same is therefore allowed so that the order dated 26th November, 2018 striking out the petition is set aside and the petition is reinstated for hearing on merit. The costs for the application shall be in the cause.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

W. Korir,

Judge of the High Court