REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 7 OF 2014

(FORMERLY HCCC JR 49 OF 2006)

LIEUTENANT COL. JOHN KIRIMANIA GATOBU…….....
……..APPLICANT

VERSUS

THE CHIEF OF GENERAL STAFF OF THE ARMED FORCES OF KENYA…..... 1ST RESPONDENT

THE COMMANDER OF THE KENYA ARMY…….....2ND RESPONDENT

THE DEFENCE COUNCIL…….....….....3RD RESPONDENT

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

RULING

1. What is before me is the Notice of Motion dated 27th October 2015 by the Claimant/Applicant. The appearances were Mr. Nyamu for the Applicant and Ms. Chesiyna for the Respondents. Through the application, the Claimant/Applicant seeks the reinstatement of the suit. The application is supported by the affidavit of Lt. Col. John Kirimania Gatobu sworn on 27th October 2015 and upon grounds expressed on the face of the motion as well as a supplementary affidavit sworn by the Claimant on 8th December 2015 and filed on the same day.

2. The Respondent opposed the application and filed a Replying Affidavit sworn by a state counsel Mr. Peter Ngumi and filed on 2nd December 2015. In it, a narration of the sequence of events was given and the Respondent strenuously opposed the Claimant's application for reinstatement of suit and urged that the dismissal of the suit should stand.

3. Mr. Nyamu argued the application on behalf of the Claimant/Applicant on 19th May 2016. He submitted that the order sought is in terms of prayers 3, 4 and 5 of that application. He stated that the application was hinged on the supporting affidavit sworn on 27th October 2015 and the supplementary affidavit sworn on 8th December 2015. He urged the Court to rely on grounds as set out in the face of the

motion and the supporting affidavits in respect of the suit which was dismissed for want of attendance on 8th October 2015. He submitted that the record is clear that when matter was called, an advocate stood to hold brief for him and set aside the case for hearing save that he had other matters before other courts and as demonstrated by the cause lists annexed to the supporting affidavit and the advocate's diary as per the documents marked JKG 2 demonstrating there was a matter before Sergon J. in Application 6 on the list being Civil Appeal no. 547 of 2011. He stated that he also had a matter before Justice Korir which was no.1 on the judge's cause list being JR no. 47 of 2015. He submitted that he also has a notice to show cause case in a Divorce Cause no. 47 of 2013. He submitted that he was optimistic that he would have the matters mentioned and taken out and come back by 10.30 a.m. He stated that he was only able to finish with Sergon J. at 10.45 a.m. and upon getting to this Court he found the matter had been dismissed for non-attendance. He stated that the Claimant/Applicant was in court save that the Claimant could not address the Court. He submitted that the Claimant was with a Mr. Dominic Kyalo a pupil in his chambers. He stated that the Claimant/Applicant has awaited his day in court for many years, his commission having been terminated from Kenya Army where he lost his service for 23 years. He stated that the Claimant had filed his suit at High Court and the file had disappeared and this was pointed out to Majanja J and that the said court transferred the matter to the Industrial Court. He submitted that he had gone through the replying affidavit and in it, the Respondent blames the Claimant/Applicant for not being keen to prosecute the matter, a fact that is not true. He submitted that the Respondent gives a chronology of events leading to where the matter is and that the chronology is marked with various directions before various courts the first being before Makhandia J. (as he was then), the JR 49 of 2006 before Wendoh J. and when the matter was listed for dismissal before Majanja J., it has been marked as "missing" for a long while and the Claimant/Applicant had been pursuing the cause. He submitted that the process server in the matter went to his former offices but he had moved to Mayfair. He stated that Majanja J. reinstated the suit and due to the High Court not having jurisdiction transferred it to this Court. He submitted that upon transfer, directions were issued and the claim was to be amended to suit procedures under this Court's jurisdiction and also because some of the prayers in the Judicial Review had been overtaken by events. This was as directed by Lady Justice Onyango. He stated that the Respondents filed and served Notice of Appeal together with a letter asking for supply copy of proceedings but never proceeded beyond the Notice of Appeal. He submitted that this Court cannot sit in appeal in respect of orders of Courts of concurrent jurisdiction and all it can consider is what happened before it. He stated that as it is, the Court would bear witness that on the same day the cause was dismissed, he appeared in Court and was advised to file a formal application. He submitted that it would be miscarriage of justice for the Court not to grant the orders sought in this application as the Claimant/Applicant was ready to proceed and the record will bear out that the Respondent is the one which has not been ready prior to that day. He submitted that the Court ought to allow the claim to be heard on merit and that what is before the Court are issues touching on law and can be ventilated within a short time. He stated that he will not be calling any witness save for the Claimant himself and it is then that the Court will find out if the Claimant was *ultra vires* the law. He urged the Court to consider and grant the orders sought as the Claimant is ready to proceed. He stated that the mistakes of counsel ought not be visited upon the Claimant and even if there are thrown away costs, those would be borne by counsel since the blame lies squarely on counsel and not on the Claimant himself. He urged the Court to disregard the averments made in the replying affidavit as they blame the Claimant/Applicant. He urged the Court to allow the application. He relied on the case of **David Livingstone Oyieko v. Simon Kiprono Siele** (2005) EKLR in a matter where the learned judge, Musinga J. (as he then was), in exercise of discretion relied on the famous case of **Shah v. Mbogo** and stated the discretion was to be exercised to avoid injustice for excusable mistake and error and that the application if not allowed would lead to injustice. He submitted that the Claimant will not have the opportunity to challenge the alleged unlawful decommission in the hands of the Respondent and that would result in injustice. He also relied on a Ruling by Onyango J. in **Benson Omwala Oduor v. Secretary BOG Equator and Special School (2015) EKLR)** where the learned judge, while granting orders stated the court has wide discretion in granting orders in order to meet ends of justice and that it is only when it is shown that the Applicant intends to delay the course of justice that a court would decline to grant the orders. He stated that failure in that case was delay by advocate due to mechanical problems and that although the court set aside the dismissal, the advocate had not even sent someone to hold brief. He submitted that these authorities of persuasive efficacy would assist the Court to come up with a guideline to permit the Court to allow the application.

4. Ms. Chesiyna urged the reply to the application for the Respondents. She submitted that she relied on the affidavit by Mr. Peter Ngumi filed 7th December 2015 in its entirety. She pointed out that this matter begun in 1998, when the Claimant filed Judicial Review 968 of 1998 and the Claimant sought orders of *certiorari* and prohibition to remove and quash decision of the Armed Forces to convene and constitute a court martial to try him. The Claimant was given orders that leave would operate as stay of the court martial proceedings and that thereafter the Claimant did not make any substantive application within the 21 days given for filing of the application. She submitted that the Claimant did not extend the orders which lapsed and his commission terminated in 2001. She stated that thereafter, the Claimant filed Miscellaneous Application No. 1103 of 2001 seeking judicial review orders and this application was withdrawn on 30th November 2005. She submitted that yet again, the Claimant filed the instant Judicial Review Application in Misc. No. 49 of 2006 which was dismissed by the High Court on 5th August 2013. She submitted that it is important to note the High Court issued a notice to show cause on 26th July 2013. She stated that after dismissal of the case, the Claimant by application of 16th December 2013 sought orders to reinstate JR 49 of 2006 and the matter be transferred to Industrial Court. She submitted that the instant memo of claim dated 5th August 2014 is materially different from JR 49 of 2006 which was transferred to this Honourable Court and that the effect of it is that this case before Court is an entirely new suit couched under JR 49 of 2006. She stated that the same is contrary to the limitation of time and the suit is an abuse of Court process and should not be reinstated. She stated that equity aids the vigilant and not the indolent. She submitted that it cannot be said the Claimant is vigilant because if he had been keen, the matters would never have been either withdrawn by Claimant or dismissed by the Court. She submitted that Counsel for the Claimant had narrated what happened and had taken the Court to cause lists which shows that he was elsewhere. She stated that how he organizes the affairs of his law firm is a private affair and it does not direct the affairs of this Court. She submitted that in the supplementary affidavit, the Claimant/Applicant had sworn that he has attended court every time the matter had been called. She stated that if the matter has been mentioned for the last 17 years, as a Claimant, he would have been spirited enough to stand up or as the pupil from the Claimant's Counsel's firm could have motioned her. She stated that litigation must come to an end. She submitted that the multiplicity of suits by the Claimant is an abuse of court process. She submitted that this court has same status as the High Court and in exercising the powers of the court, it exercises the rights of fundamental freedoms. She stated that the employer has a right to these protections and that the Labour Relations Act was enacted to among other things, to promote orderly and expeditious dispute settlement, conducive justice and economic development. She stated that these are fundamental functions of this Court and that a matter cannot go on for 17 years and justice is said to have been done to the employer. She submitted that the employer too has a right and that it is through the instrumentality of the Industrial Court that such rights are actualized. She stated that the Claimant is guilty of prolonged, inordinate and inexcusable delay in prosecuting this matter. She relied on the case of **David Livingstone Oyieko** Supreme and **Shah v. Mbogo** Supreme where the Court's discretion is intended to be exercised to avoid hardship but not to assist a person who has deliberately sought to obstruct or delay the course of justice. She submitted that in 1998, after the Claimant got his orders with leave operating as stay, the employer's hands were tied. She stated that the multiplicity of suits was deliberate and non-attendance cannot be said to be excusable if constantly done for 17 years. Once is an excuse but twice, thrice or 17 times is not excusable but is a delay and obstruction of the course of justice. She submitted that for an employer justice delayed, is justice denied and one cannot put an employer in abeyance and urged this Court to declare the application incompetent and dismiss the same. She submitted that the issue of *res judicata* applied and cited Section 7 of the Civil Procedure Act. She submitted that the matters were heard by a court of competent jurisdiction and stated that if a court of competent jurisdiction makes findings, litigation must end. She urged the Court to dismiss the application with costs.

5. In a brief reply, Mr. Nyamu wondered how *res judicata* comes into this matter and stated that this is matter for reinstatement of the claim following the dismissal for non-attendance and is not a case of filing a fresh claim. He submitted that the claim was never heard on merit and that the submission on *res judicata* is hopelessly misplaced. He submitted that all the submissions made by his learned friend do question the manner all the other courts issued directions allowing the Claimant to move forward and stated that this Court cannot be asked to review those directions. He submitted that this matter reached the Court for the first time as a claim on the day the case came before Justice Maureen Onyango who directed

the Claimant to rearrange pleadings hence the memo of claim dated 5th August 2014. All the other submissions made on whether or not there was merit, these are proceedings where the Respondent participated and they should have raised it in those proceedings. He submitted that the current application is on the issues surrounding the happenings on 8th October 2015. He stated that it would be wastage of judicial time to consider what happened between 1998 and now and that if the Respondents did not participate it was failure on their part. He stated that this is not a Court of Appeal. He stated that the case of **Shah v. Mbogo** cited, the court's discretion is said to be exercised to avoid injustice, mistake or error but not to assist a party who has sought to obstruct justice and that the Respondent's counsel had submitted that the Claimant has obstructed justice. He stated, that this is not true and that the arguments advanced seem to be tailored like there was an application for dismissal of suit. He stated that this was an Applicant who, as per court record, as shown by the hearing notice of 20th July 2015 on record, took steps. He stated that it was the Applicant who took the hearing date and even served Respondents. He submitted that the date was taken by the Claimant and he cannot be said to be indolent or inclined to delay. He submitted that the fact the case has taken 17 years is not an issue that can be held against the Claimant and he urged the Court to see how the Claimant has conducted himself since this Court was established under Article 162(2) of Constitution of Kenya 2010. He submitted that it had been stated that if Claimant was vigilant he ought to have risen when matter was called and stated that a person represented by counsel cannot represent himself. He submitted that it is not in dispute that there was counsel instructed to hold brief and that it would have been an affront to procedure to have the Claimant address court and that the Claimant was a Lieutenant Colonel in the Army and was disciplined to know when to rise or not. He submitted that it is misplaced for counsel to submit on the rights of the employer and that no provision is cited. He stated that at no other time has the Claimant/Applicant failed to appear in court. He urged the Court to find the opposition by Respondent not tenable and to exercise its discretion in the interest of justice fairly and with sensitivity to the person of the Applicant. He stated that the application was made immediately upon dismissal and if appropriate give directions on how case is to be heard and disposed of.

6. The Court deferred the Ruling to today. In matters involving setting aside, there are a series of considerations. *In **Patel v EA Cargo Handling Services Ltd [1974] EA 75** at page 76 letters C and E, Duffus P stated thus:*

> *"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."*

*7. In **Shah v Mbogo [1967] EA 116** at page 123 letter B, Harris J said:*

> *"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."*

*8. The East Africa Court of Appeal approved the decision of Harris J. in the resulting appeal in **Mbogo v Shah [1968] EA 93** where Newbold P held at page 96 letter G as follows:-*

> *" … a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."*

9. The Court of Appeal of Kenya also had occasion to pronounce itself on the factors to consider in setting aside. In the oft cited case of **CMC Holdings v Nzioki [2004] 1 KLR 173**, the learned judges of appeal (Tunoi, O'kubasu JJA, Onyango Otieno Ag. JA (as they then all were)) held as follows:

1. In an application before a court to set aside an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously.

2. On appeal from the decision, the appellate court would not interfere with the exercise of the discretion unless such discretion was exercised wrongly in principle or the Court acted perversely on the facts.

3. In law, the discretion on whether or not to set aside an 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.

4. It would not be proper use of such 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 be wrong in principle.

5. In the instant case, the trial magistrate did not exercise her discretion properly when she failed to address herself to a matter which might have very well amounted to an excusable mistake visited upon the appellant by its advocate.

6. In an application for setting aside ex parte judgment, the Court must consider not only the reason why the defence was not filed or why the appellant failed to turn up for the hearing, but also whether the applicant has r easonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed raised triable issues.

10. The Court has been urged to exercise its discretion in favour of the Claimant/Applicant. It is asserted that he was in Court and to boot, a pupil from the Claimant's counsel's law firm was present. It is note worthy that the pupil has not deponed to his presence in Court on the material day. The Claimant has been litigating for some time now and the case was set for hearing. It was called out at 10.45 am and the Court record shows that the advocate and the Claimant were absent and the suit was dismissed with costs. Mr. Nyamu is indicated as having come to Court at 12.25 pm almost 2 hours after the dismissal and sought the recanting of the orders of the Court. After some delays the matter was finally heard by this Court hence the Ruling today.

11. Ms. Chesiyna for the Respondent raised the issue of *res judicata*. *Res Judicata* means a thing adjudicated. In a sense, it means that it was litigated and cannot be re-litigated. The submission is misplaced as the Claimant's case has not been determined yet. It is not *res judicata*. That being said, the Claimant has been far from being an exemplary or diligent litigant. His dispute with the Respondent has dragged in Court for 17 years and is not within sight of resolution even as of now. It is not lost on the Court that he held the rank of a lieutenant colonel in the Army at the time he lost his commission. He had been in service for 23 years and must be familiar with his name. The Claimant was called and he did not respond and the only inference is that he was not in Court when the case was called at 10.45 am. There was no one in Court representing him either and it would be a travesty of justice to have the sword of litigation hang over the head of the Respondents for all these years without respite. My *discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice*. The Claimant does not demonstrate an excusable mistake, inadvertence, accident or error in the conduct of the suit. From all accounts, the Claimant has been indolent in the conduct of his case and the only fair disposal of the matter is upholding the dismissal of the suit. I decline to exercise discretion as no grounds exist for the said exercise and dismiss the Claimant's application with costs to the Respondents.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of June 2016

Nzioki wa Makau

JUDGE