REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 45 OF 2007

CONSOLIDATED WITH NO. 46 OF 2007

KENYA ANTI-CORRUPTION COMMISSION.....…
PLAINTIFF

VERSUS

MICHAEL K. GITUTO.....……...….
…….....DEFENDANT

RULING

This case has a chequered history. It is one of the old cases still lingering in this court. It was filed on 26th June 2007. Hearing commenced before Justice Sergon on 18.11.2009. The plaintiff called a total of six witnesses who completed testifying on 21.7.2011 and the case was scheduled for defence hearing on 22.11.2011 but on the said date it was adjourned at the request of both parties to enable the defence council to secure a document from the plaintiffs council. Thereafter there were several other adjournments at the request of both parties and when the matter came up for further hearing on 18.02.2013, the trial Judge was no longer in the station and the file was placed before Hon Justice Wakiaga. There was no appearance for the defendant on the said date a mention date was fixed fro 18.3.2013 for directions on the way forward.

On 18. 3.2013, there was no appearance for both parties and a further mention date was listed for 29.5.2013. On the said date only counsel for the plaintiff appeared. The next mention date as per the record was on 24.02.2014 and on the said date there was no appearance for both parties.

Both parties appeared before Justice Wakiaga on 24.02.2014 when at the request of both counsels it was directed that files for Chief Magistrates Criminal Case nos. 655 of 2007 and 657 of 2007 be produced in court and on 28.3.2014 Miss Ngethe appearing for the plaintiff confirmed to the court that the two files had been produced in court. On 28.05.2015 Mr. Munene for the defendant confirmed to the court the availability of the files and further informed the court *"we would like to proceed with the matter from where it had reached. The plaintiff had closed the case"* The learned judge gave the following directions:-

> *"Now that the lower court files are available, this matter is fixed for defence hearing on 7th October 2014 from where it had reached before Judge Sergon. The lower court files being number Nyeri Criminal Case No. 655 and 656 to be produced in court on the said date"*

The case was listed before Wakiaga J on 7.10.2014 but was taken out because the learned judge was going on transfer. On 21. 11. 2014 this case came up before Ngaah J and even though directions had

already been taken before Judge Wakiaga as stated above, Miss Ngethe for the plaintiff is recorded stating as follows:-

> *" I prefer that we proceed from where the judge left"*

And Mr. Macharia for the defendant is recorded stating as follows:-

> *" We can proceed from where the last judge left"*

The learned judge gave the following directions:-

> *"The matter shall proceed from where Justice Sergon left....."*

On 16.7.2015 the case came up before Hon Njoki Mwangi and counsel for the defendant sought an adjournment on grounds that they had requested the plaintiffs to avail some exhibits which they had not by then availed and sought for time to engage the plaintiffs' counsel. A mention date was given for 30.9.2015 but on the said date only counsel for the plaintiff attended court and informed the court that they were not able to get the required documents and the court directed that the case shall proceed for hearing on 27.10.2015.

On 27.10.2015 the matter was listed before me and the defendant informed the court that his advocate was appearing in Kerugoya High court. Counsel for the plaintiff was present. I directed that the proceedings be typed and since no one brought to my attention the fact that directions had been given, I made an order that the matter be mentioned on 1.12.2015 to confirm whether proceedings had been typed and for directions on the manner of proceeding.

On 1.12.2015 the matter came up before me and notwithstanding the fact that directions had been given twice before as earlier mentioned, both counsels sought directions again. Miss Ngethe suggested that the matter proceeds from where it had reached while counsel for the defendant insisted on the case starting afresh stating that he had not been supplied with key documents crucial to the defence case.

None of the counsels drew the courts attention to the fact that directions had already been given. In my view, the said directions are now part of the record and have the force of court orders and no application has been made to set aside the said orders/directions, or to review or vary the said orders and I see no basis why the same orders are being sought for the third time on the same issue. So long as the said directions were granted, it is improper for the parties to seek similar orders again. I am afraid should I grant different orders or directions, then my orders or directrions will have the effect of contradicting existing court orders which is improper.

It will suffice for me to recall the provisions of order **18** Rule **8 (1)** of the Civil Procedure Rules, 2010 which provides for the power of the court to deal with evidence taken before another judge. The said Rule provides as follows:-

> *8 (1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it"*

Section **1A** of the Civil Procedure Act[1]provides that:-

> *1A (I) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*
>
> *(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

> *(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court.*

As pointed above, directions were given twice in this suit at the request and suggestion of the parties, the court directed that the case proceeds from where it had reached. As provided under section **1A (3),** the parties herein have a duty to assist the court to further the overriding objective of the Civil Procedure Act and are bound to comply with the directions of this court and on this ground alone, I find the request that this suit starts afresh to be unmerited and an affront to the overriding objective. The orders/directions in question are still in force and no application has been filed to set aside, review or vary the said orders. Further, a retrial will result to an unnecessary delay in this case whose history I have enumerated above.

Such delay will be an affront to Article **159 (2) (b)** of the Constitution which provides that justice shall not be delayed. If I were to grant such an order this will be against the tenor, context and spirit of the Constitution and also against Section **1A** cited above and Order **18** Rule **18 (1)**. It will also fly on the face of the provisions that justice shall not be delayed.

Starting the case *de-novo* entails re-calling all the witnesses. "The Latin Maxim "*De Novo*" connotes a *'New', Fresh", a 'beginning', a 'start' etc.* In the words of the authors of *Black's Law Dictionary,*[2] *De Novo* trial or hearing means trying a matter a new, the same as if it had not been heard before and as if no decision had been previously rendered ..... new hearing or a hearing for the second time, contemplating an entire trial in same manner in which the matter was originally heard and a review of previous hearing. On hearing *'de novo'* court hears matter as court of original and not appellate jurisdiction . That a trial *de novo* could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter, or rather, in a more general sense, the parties are at liberty, once more to reframe their case and restructure it as each may deem it appropriate.

The consequence of a retrial order or a *de novo* (a *Venire De Novo*), is an order that the whole case should be retried or tried a new as if no trial whatsoever has been had in the first instance.[3]

The overriding objective of Section **1A** referred to above is to *inter alia* facilitate a just and expeditious resolution of civil disputes and not to unnecessarily delay the same. There must be harmonious and constructive interpretation of provisions of procedural laws and it is necessary for the Court to adopt an approach that would satisfy the overriding objective and avoid any construction that would tend to create an impediment to the overriding said objective. A retrial would in my view not be in the interests of justice to both parties.

In **Kamani vs Kenya Anti-Corruption Commission**[4] the court citing the English case of **Bigizivs Bank Leisure**[5] talked about the concept of overriding principle objective as follows: "*a new procedural code with the overriding objective of enabling the court to deal with cases justly."*

In **Stephen BoroGithiavs Family Finance Building Society & 3 others**[6]**Nyamu J** had this to say:-

> *".....A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all cobwebs hitherto experienced in the civil process and to wed out as far as practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution disputes in a just, fair and expeditious manner……"*

In the circumstances I decline the request to have this case re-heard afresh and direct that the case proceeds from where it had reached. I also direct that this case be fixed for hearing on a priority basis.

Right of appeal 30 days

Dated at Nyeri this **14th** day of **December** 2015

John M. Mativo

Judge

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[1]Cap 21, Laws of Kenya

[2][2] Eight Edition

[3] See: *Kajubo v. The State*

[4] Ibid

[5] PLC {1999} 1 WLR 1926

[6]Civil Application No.Nai 263 of 2009