



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E079 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW

PROCEEDINGS FOR ORDERS OF MANDATORY INJUNCTION AND DECLARATION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF LABOUR,

SOCIAL PROTECTION AND SERVICES.....2ND RESPONDENT

THE NAIROBI COUNTY DIRECTOR OF SOCIAL SERVICES.....3RD RESPONDENT

ALEXANDER HOOPS SHIHEMI.....4TH RESPONDENT

EX PARTE:

PETER NJOROGE KANIKA &: PETER GITAU MUIRURI

TRUSTEES O/B OF SOWESAVA SELF HELP GROUP

RULING NO. 2

1. On 28th January 2021, this Court delivered a ruling in which this suit was dismissed for want of prosecution, after non-compliance with this Court’s directions and orders issued on 21st December 2020. The *ex parte* Applicants have now filed a Notice of Motion application dated 1st February 2021 seeking the following orders:

(a) THAT the application be certified as urgent and be heard ex parte in the first instance.

(b) THAT this Court be pleased to set aside its Order of Dismissal of this suit for want of prosecution given on 28th January 2021.

(c) THAT upon granting prayer (b) above the Court be pleased to reinstate the suit and the Applicants' Advocates be directed to serve all the Parties for the Hearing of the Chamber Summons on its own merit.

(d) THAT costs be in the cause.

2. The said application is supported by an affidavit sworn on 1st February 2021 by James Gitau Mwara, the *ex parte* Applicants’ Advocate. The main ground for the application is that the *ex parte* Applicants’ Advocate did not receive any electronic mail communication of the court’s directions through their email address on 21st December 2020 or at any other date before 28th January 2021.

The Determination

3. The applicable law for setting aside or review of a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

4. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

“ (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

5. I have perused the Court record herein and note that there is no evidence of transmission to the parties of the directions issued by this Court on 21st December 2020, which were issued electronically by email. There is therefore sufficient reason, and it is in the interests of justice that the ruling and orders granted herein on 28th January 2021 are set aside, as they were predicated on the service of the said directions on the *ex parte* Applicants.

6. In light of the foregoing observations and findings, the *ex parte* Applicants' Notice of Motion dated 1st February 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Notice of Motion application dated 1st February 2021 is certified urgent and admitted to hearing *ex parte*.

II. The ruling and orders issued herein on 28th January 2021 are hereby set aside, and the suit herein is hereby reinstated for hearing.

III. There shall be no order as to the costs of the *ex parte* Applicants' Notice of Motion application dated 27th January 2021.

IV. The *ex parte* Applicant shall serve the Respondents with (i) the Chamber Summons application dated 14th December 2020 and skeletal submissions thereon, (ii) a copy of these directions, and (iii) a hearing notice, within fourteen (14) days of today's date, for *inter partes* hearing.

V. Upon service, the Respondents shall file and serve their response to the Chamber Summons application dated 14th December 2020 and skeletal submissions thereon within fourteen (14) days of service.

VI. The hearing of the *ex parte* Applicant's Chamber Summons application dated 14th December 2020 shall be held by email on 21st April 2021.

VII. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's Chamber Summons application dated 14th December 2020 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VIII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

IX. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

X. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 21st April 2021.

XII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 4th February 2021.

XIII. Parties shall be at liberty to apply.

7. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2021

P. NYAMWEYA

JUDGE