



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 113 OF 2018

BETWEEN

JOHN CHERUIYOT RONO.....APPLICANT

VERSUS

THE CABINET SECRETARY

FOR MINISTRY OF INTERNAL SECURITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The Application

1. The application before this Court for ruling is a Notice of Motion dated 21st August 2019 by John Cheruiyot Rono, the Applicant herein. The said application seeks orders for the review and/or setting aside of orders issued herein on the 11th April 2019 by Ogolla J., and that the Applicant's earlier application dated 12th April 2018 to be reinstated and proceed for hearing and determination on merit.
2. Ogolla J. in the ruling delivered on 11th April 2019 dismissed the Applicant's earlier application dated 5th July 2018, for being premature for merit of procedure, as there was no evidence of demand on the Respondents. The application of 5th July 2018 was seeking orders of mandamus to compel the Principal Secretary in the Ministry of Interior and Co-ordination Government who is the 2nd Respondent herein, to pay a decretal sum of Kshs 1,500,000/= awarded to the Applicant in Nairobi High Court Petition No. 536 of 2015.
3. The Applicant's grounds for the present application are in a supporting affidavit he swore on 21st August 2019, in which he stated that his earlier application was dismissed for want of service. However, that a perusal of the record for Nairobi High Court Petition No. 536 of 2015, which gave rise to the said application, showed that the Respondents were aware of the judgement therein, in which they participated. He also gave details of service upon them of the hearing of the said Petition and the judgment and decree therein. Therefore, that the finding by the Ogolla J. that his application was premature was erroneous.
4. The Applicant annexed copies of letters dated 4th October 2017 and 12th September 2018 written by his lawyers to the Attorney General, who is the 1st Respondent herein, forwarding the decree and Certificate of Order against Government issued in Nairobi High Court Petition No. 536 of 2015. He also annexed a copy of the said Order against the Government dated 27th September 2017.
5. Lastly, the Applicant averred that the dismissal order was punitive and will prejudice him from compelling the Respondents to pay him the fruits of his Judgement and decree which they are aware of. He requested that the said orders by Ogolla J. be set aside in the interests of justice and fairness.
6. The Respondents filed a replying affidavit sworn on 16th December 2019 by Dr. Ibrahim M. Mohamed, the Principal Secretary in the Ministry of Defence in opposition to the present application. The Respondents averred that the Applicant has never to date made any efforts to serve the Respondents and it would prejudice them if the Applicant's earlier application is entertained by the Court.
7. Further, that the issuance of the order of mandamus being pursued by the Applicant would only be issued if and when he has cured the defects crystalizing in dismissal of his earlier application. Therefore, that it is in the interest of justice and fairness that the instant application be dismissed as it has been brought in bad faith.

The Determination

8. This Court directed that the Applicant's application dated 21st August 2019 would be heard and determined by way of written submissions. The advocates on record for the Applicant, Osoro Juma & Company Advocates, filed submissions dated 17th January 2020, wherein they reiterated that there is no basis for the position that the judgement herein was not served, as the Respondents was represented and participated fully in the hearing of the case before the said judgement was delivered. In addition that they were served with the judgment, decree and Certificate of Order against Government after its delivery. Furthermore, that they were served with the application dated 12th April 2018 and were represented at the hearing of the application .

9. The Respondents' submissions are dated 31st December 2019 and were filed by A.K. Tuitoek, a State Counsel in the Office of the Attorney General. The Respondents contended that the Judge correctly found that the Respondents had not been served with the judgment, decree and demand of payment for them to be aware of their duty. Thus he rightfully dismissed the application for want of service. The decision in **Simon Wachira Nyaga vs Patricia Wamwira (2018) e KLR** was cited for the position that it would therefore amount to a waste of judicial time and prejudicial on the Respondents to hear the judicial review proceedings.

10. The Respondents also cited the decisions in **Shah vs Mbogo and Another (1967) EA 116** and **Mbogo and Another vs Shah (1968) EA 93** for the position that the exercise of a judge's discretion to set aside an *ex parte* judgment should not be interfered with unless erroneously exercised. Reliance was also placed on the decision in **Fredrick Otieno Outa vs Jared Odoyo Okello and 3 Others (2019) eKLR** that this court may invoke its inherent jurisdiction to review its decision in exceptional circumstances, but that this threshold has not been in the current application.

11. The applicable law for setting aside 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.”

12. 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.”

13. In this respect, the findings by J.Ogolla in the ruling delivered on 11th April 2019 were as follows:

“6...But the Applicant is obliged to bring to the attention of the Respondent these documents by way of a demand to pay the sum due. There is a letter of demand addressed to the Respondent by the Applicant. The letter is dated 12th September, 2018. However, there is no evidence that the said letter was served upon the Respondent.

7. The certificate of order against the government is attached dated 27th September, 2018. It is drawn fifteen (15) days after alleged demand was made. There is no evidence that the said certificate of order was ever served on the Respondent. As it were, there is no evidence of demand. The Respondent could not be expected to satisfy a decree it has no knowledge of, and a mandamus cannot issue where the Applicant has not fulfilled an important element of demanding for payment and the same not being honoured. It is the finding of this court that the Respondent cannot be compelled to satisfy a decree which has not been brought to his notice by way of a demand. To that extent the application herein is premature for merit of procedure and is dismissed. Parties to bear own costs.”

14. I note that there is a minor error in the said ruling as regards the date of the letter of demand and Certificate of Order of Government on record, which were dated 12th September 2017 and 27th September 2017 respectively and not 12th September 2018 and 27th September 2018. However, this error is not material. What is material is that the Applicant provided evidence of a letter dated 4th October 2017 addressed to the Attorney General, which enclosed the Certificate of Order against Government.

15. It is notable that contrary to the argument made by the Respondent, Ogolla J. did not dismiss the *ex parte* Applicant's application on account that the procedure was *ex parte*, but for want of demand for payment on the Respondents. In addition, there were affidavits of service on record filed on 30th July 2018 and 9th November 2018 attesting to the service of the application and hearing notice of the application dated 5th July 2018 on the Respondents, including the annexures on service of the decree and Certificate of Order against the Government. The said Respondents did not file any response to the said application nor did they dispute service of the application.

16. I therefore find that there is sufficient reason and it is in the interests of justice to set aside the orders of dismissal of the said application in the ruling delivered on 11th April 2019, and reinstate the application dated 5th July 2018 for hearing on its merits.

17. Lastly, in light of the scaling down of the Court operations due to the COVID-19 pandemic, I hereby direct and order as follows to expedite the hearing of this matter:

I. The ruling delivered herein on 11th April 2011 and orders therein together with all consequential decrees are hereby set aside, and the Applicant's Notice of Motion dated 5th July 2018 is hereby reinstated for hearing and determination on the merits.

II. The Applicant shall serve the Respondents with the Amended Chamber Summons dated 12th April 2018, the Notice of Motion dated 5th July 2018 and the submissions thereon dated 9th August 2018, and a copy of this ruling within fourteen (14) days of the date of this ruling.

III. The Respondents are granted leave to file and serve their response to the Applicant's Notice of Motion dated 5th July 2018 within fourteen (14) days of service by the Applicant.

IV. The Applicant is also granted leave to file and serve a further affidavit if need be, and supplementary submissions on the Notice of Motion dated 5th July 2018 within fourteen (14) days of service of the Respondents' submissions or upon default thereof.

V. The Respondents shall thereafter file and serve their reply submissions within fourteen (14) days of service of the Applicant's submissions.

VI. The judgment date in this matter shall be reserved at a mention on 6th July 2020.

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 this matter on the basis of the electronic copies of the pleadings and written submissions filed by the parties. In this respect, the Applicant shall avail electronic copies of Chamber Summons dated 12th April 2018, the Notice of Motion dated 5th July 2018, and the submissions dated 9th August 2018 in word format, within fourteen (14) days of today's date.

VIII. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

IX. The parties shall avail and file their electronic pleadings, applications and written submissions in word format by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

X. 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.

XI. The parties shall also be required to 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.

XII. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions and the extracted orders to the *ex parte* Applicants by electronic mail by close of business on Thursday, 30th April 2020.

XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 6th July 2020 and bring it to the attention of a Judge in the Division on that date for reservation of a judgment date.

XIV. Parties shall be at liberty to apply.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE