



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CONSTITUTIONAL PETITION NO 1 OF 2018**

**NAROK LINE SERVICES LIMITED.....PETITIONER/APPLICANT**

**VERSUS**

**NAROK COUNTY GOVERNMENT.....RESPONDENT**

**NAROK STAR SHUTTLE SACCO LTD.....INTERESTED PARTY**

**RULING**

**Introduction**

1. By its notice of motion dated 17<sup>th</sup> December 2018 the applicant has applied to this court to review and/or set aside its order and/or ruling dated 30<sup>th</sup> October 2018, which dismissed the applicant's application dated 12<sup>th</sup> June 2018. Additionally, the applicant seeks an order that the costs of this application be costs in cause. The applicant has in addition filed written submissions.
2. The said application is supported by eight grounds that are set out on the face of the notice of motion. The application is supported by a 13 paragraphs supporting affidavit.
3. The applicant has also filed written submissions in support of its application.
4. The respondent has filed a replying affidavit in opposition to the application; in addition to its written submissions.
5. The interested party has filed written submissions in opposition to the application.

**The case for the applicant**

6. The applicant's notice of motion is filed pursuant to the provisions of section 1A, 3A, 80 of the Civil Procedure Act, Order 45 (1) (b), 51 Rule 1 of the 2010 Civil Procedure Rules and all other enabling provisions of the law. The applicant has set out the background leading to the dismissal of its petition dated 12<sup>th</sup> October 2018. The applicant has in particular pointed out that there is a mistake or error apparent on the face of the record in that the court made reference to the petition and not to the application. The applicant has further stated that unless the orders sought are granted it would have been condemned unheard. It has therefore urged the court to grant the application in the interests of justice.
7. In its counsel's supporting affidavit the applicant has deponed to the following major matters. Counsel has set out the historical background leading to the dismissal of the petition instead of considering the application. After the parties had filed their written submissions, the court directed that the ruling be delivered on 30<sup>th</sup> October 2018. In its ruling the court dismissed the petition, whereas what was before the court for determination was the application dated 12<sup>th</sup> June 2018. Counsel has also deponed that unless the orders sought are granted the applicant would have been condemned unheard. Counsel has finally deponed that no prejudice will be suffered by the respondent if the application is allowed as the court will have an opportunity of hearing all the parties before making its decision.
8. In its submissions, the applicant has cited **Order 45 (1) of the 2010 Civil Procedure Rules**, which it submits enables the court to review its order or decree; upon an application by an aggrieved party, who has not appealed. Counsel has therefore submitted that the reference to the petition instead of the application is error or mistake apparent on the face of the record that warrants review and/ or be set aside.

**The case for the respondent**

9. The respondent through its county secretary (Elizabeth Sanangoi Lolchoki) has deponed to a 21 paragraphs replying affidavit in opposition to the application. She has deponed to the following major matters. She has averred that the instant application is a clever attempt to resurrect

a claim that was futile from its inception. She has further averred that the application is an abuse of the process of the court; since the court has already pronounced itself on the issues raised by the parties. She has further averred that both the application and the petition of the applicant raise the same issues. The county secretary has averred that the applicant has filed yet another claim against the respondent and the interested party in the Transport and Licensing Board Appeal No. 013 of 2018, in which the applicant has sued both the interested party and the National Transport and Safety Authority (NTSA), in which substantially the same issues are raised. The other matters deponed to relate to issues of law; following advice of its counsel.

10. Counsel for the respondent has filed written submissions citing authorities amongst them, *Nyamogo and Nyamogo Advocates v Kogo (2000) E A 170 and Sadar Mohamed v Charan Singh and Another (1959) E A 793*, in support of the submission that there is no error on the face of the record to warrant review and /or setting aside.

#### **The case for the interested party**

11. The interested party has only filed written submissions in opposition to the application. It has cited a number of authorities; among them, Order 2 Rule 15 and Order 45 of the 2010 Civil Procedure Rules and *James Irungu Mwangi and 2 others v Laban Macharia Muiruri and Another ELC Case No. 170 of 2015*. The latter authority is in relation to the issue of res judicata. Order 2 of the 2010 Civil Procedure Rules is in relation to whether the pleadings disclose a reasonable cause of action.

#### **Issues for determination**

12. I have considered the affidavit evidence of all the parties, their submissions and the authorities cited in the light of the applicable law. As a result, I find the following to be the issues for determination.

1. whether or not the order and ruling complained of amounts to an error on the face of the record within the meaning of Order 45 of the 2010 Civil Procedure Rules.

2. who bears the costs of this application?

#### **Issue 1**

13. The parties had filed written submissions in support of their positions in relation to the application and not the petition of the applicant. By error this court proceeded to rule and issued an order dismissing the petition and not the application. No submissions had been made by the parties in relation to the substantive petition. The petition is still pending in this court for hearing and determination. Furthermore, this court has not directed and addressed its mind in relation to the petition. In the circumstances, I agree with counsel for the petitioner that the order dismissing the petition amounts to being condemned unheard. I find that the authorities cited by the respondent are distinguishable from the instant application. The authorities cited by the interested party are not applicable in the instant application.

14. The upshot of the foregoing is that I find the ruling and/or order dismissing the applicant's petition is an error on the face of the record in terms of Order 45 of the 2010 Civil procedure Rules. I therefore set aside the order dismissing the petition; and I now order the application dismissed. Parties are now at liberty to address the court in respect of the petition.

#### **Issue 2**

15. I have considered the issue of costs and I find that it is only fair that the costs of this application should be costs in cause.

16. The application is hereby allowed with cost to be costs in cause.

Ruling dated, signed and delivered at Narok in open court this 6<sup>th</sup> day of June, 2019 in the absence of petitioner and in the presence of Mr. Keke holding brief for Mr. Kemboy for the respondent and Mr. Meingati for the interested party.

**J M Bwonwonga**

**Judge**

**6/6/2019**