REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 340 OF 2017 CONSOLIDATED WITH JR 351 OF 2011

REPUBLIC …….....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY …….....……RESPONDENT

1. INVESTIGATING OFFICER

(MR CHEGE MACHARIA)

2. MRS E. KHAGULI

3. MRS T. ATEMO

4. JOHN NJIRAINI

(COMMISSIONER GENERAL KRA)

5. MRS L. MALINDA

PAUL MAKOKHA OKOITI……....….....……EXPARTE PARTIES

RULING

1. This ruling is dual based. It determines similar applications filed in JR 351/2011 and JR 340/2013 namely, applications dated 12th June 2017; 4th April 2017 and 28th September 2017 between the same parties. It was agreed that this court hears all the applications together and the ruling in this matter do apply to JR 351/2011.

2. The applications dated 4th April 2017 and 12th June 2017 are filed by the applicant herein whereas the application dated 28th September 2017 was filed by the respondent seeking to strike out the two applications filed by the applicant and for this court to declare the applicant as a vexatious litigant for consistently allegedly abusing the court process by bringing the same applications which are dismissed by the court before the same court.

3. The application dated 4th April 2017 seeks from this court orders that judgment/ruling made by justice Weldon Korir on 11th December 2014 be set aside, that the judgment/ruling made by Justice Weldon Korir on 21st May 2015 be set aside; and that costs of the application. The application is predicated in the grounds that: the document required by the applicant to enable the prosecution of the case has now been partly fulfilled and was voluntarily given by the respondent which means that the counsel was not representing the respondent (sic); that the cases have to be reviewed, since the impending (sic) documents are now partly given and the others are also expected to be given on request; and that the law must be followed to the later(sic) and a public document that was used to sack the applicant. Cannot be denied to the applicant.

4. The application by way of chamber summons which is brought under sections 3 and 3A of the Civil Procedure Act, Order 45 of the Civil Procedure Rules and all other enabling provisions of the law is also supported by the affidavit sworn on 4th April 2017 by the exparte applicant Paul Makokha Okoiti wherein he deposes that he now has the copies of the documents given by the respondent and which were part of the demand that the other cases were mishandled because the judge failed to see the implication of missing documents which were fundamental to the issues in dispute; that he need to have the case restores so that he can proceed to prosecute it now that the

respondent is prepared to give the necessary documents; that he requested for further documents from the respondent and I believe they are going to supply the same; and that this court is urged to proceed expeditiously so that the applicant is freed, after being tied down for so long.

5. In the application dated 12th June 2017 the applicant seeks for orders that the Director of Criminal Investigations do file the result for investigation requested by the applicant over the destruction of Kenya Revenue Authority documents; and costs be in the cause. In the said application, the applicant claims that he had been accused of destruction of official documents which are in court hence he has to clear his name. That he had to write to the Director of Public Prosecutions over the issue and that the Director of Public Prosecutions directed the applicant to liaise with the Directorate of Criminal Investigations on the same but that despite liaising with the Directorate of Criminal Investigation to investigate his alleged destruction of documents and provide him with the result, he has been unable to get the same even after sending a reminder to the Directorate of Criminal Investigation as shown by annexed letters. That the applicant is still in need of the said documents to clear his name and that even if charges are necessary, it be done so that the law is respected.

6. The respondent filed a preliminary objection to the application dated 4th April 2017. The Directorate of Criminal Investigation despite being served with the application dated 12th June 2017 neither entered an appearance nor filed any response to the application.

7. The respondent filed a notice of motion dated 28th September, 2017 raising preliminary objection to the applicants application dated 4th April 2017 seeking that the same be dismissed in limine and that the applicant be barred from filing any further documents or open any new file between the same parties on the same issues, other than Employment and Labour Relations Court Miscellaneous 25 of 2013 unless with leave of court; that the applicant be held to be in contempt of court and that costs be awarded to the respondent.

8. The grounds upon which the application is based are that:

1) The applicant has abused the court process by instituting multiple suits on the same issue in several different court.

2) That in every instance the respondent has been forced to file responses, make submissions and court appearances to defend the same issues which have already been determined several times;

3) That the applicant indulges in forum shopping;

4) That the applicant is in contempt of the court orders issued by Justice Mbaru by way of a judgment delivered on 24th October 2016 which were reinforced by the ruling of Justice Nderi Nduma on 1st September 2017;

5) That despite being advised otherwise, the exparte applicant has been making personal attacks on the respondents officers and counsel on record and this has put all such officer on personal defence in the multiple suits instituted.

6) That in total, the exparte applicant had filed seven(7) suits against the same respondent over the same subject matter namely:

i. ***HC Miscellaneous Application 351/2011***

ii. ***ELRC NO. 25/2013***

iii. ***JR 340/2013***

iv. ***JR 117/2015***

v. ***JR 300/2016***

vi. ***JR 13/2016***

vii. ***CMCC 4201/2017 where the respondents counsel Janet Lavuna is sued.***

9. It is claimed that unless the applicant is restrained by the court, he will continue to abuse the court process, waste judicial time and cause unnecessary damage to the reputation of every judicial officer who declines to grant him orders in his litigations application.

10. The application is further supported by the affidavit sworn by Janet Lavuna advocate reiterating the grounds above.

11. The respondent's counsel emphasized that in JR 351/2011, in a ruling delivered on 10th February 2012, Honourable Majanja J found that Kenya Revenue Authority had supplied the applicant with relevant documents and advised the applicant to proceed and prosecute his Employment and Labour Relations Court case but that he never heeded to the advise and filed two application seeking to set aside Honourable Majanja's determined on 9th May 2014 and 20th January 2017 and that in the latter ruling the court ruled that the applicant was in danger of being declared a vexatious litigant obsessed with the issue of documents and avoiding the merits of this case. That in Employment and Labour Relations Court 25/2013 he refused to set down the matter for hearing before Honourable Justice Maureen Onyango and instead proceeded to file other suits in other courts.

12. That in JR 340/2013 the applicant sued officials of the respondent personally and on 21st May 2014 Honourable Korir J dismissed the

suit upon which the applicant sought to set aside that decision but on 11th December 2014 the application was dismissed.

13. That in JR 117/2015 Honourable Odunga J dismissed his application on the ground that the applicant had the benefit of sound advise by the court but had chosen to ignore the same.

14. That in Employment and Labour Relations Court case No.13/2016 Honourable Mbaru J directed the applicant to cease writing, communicating and or addressing the respondent and its officers directly on matters relating to his former employment that he ceased on 3rd February 2009 but that he has disobeyed that order and continued writing to the said employees.

15. That the applicant has then proceeded to file CM CC4201/2017 against the respondent's counsel MS Janet Lavuna for reasons that she had extracted orders in the suits.

16. It was therefore averred that the court had over indulged the applicant at the expense of the respondent and their counsel in person hence he ought to be declared as a vexatious litigant because he has abused court process to the prejudice of the respondent and has filed frivolous applications which are geared towards anyone who holds a contrary view to his and that despite being admonished by the court, he has continued to write accusations against judges, lawyers and various officers in his vendetta against Kenya Revenue Authority. Further , that he had written to the Ombudsman and Anticorruption Commission to investigate judges and Kenya Revenue Authority counsel, and that the officers have been found innocent hence the applicant should be banished from prejudicing the respondent.

17. The several decisions complained of were annexed to the affidavit filed by Miss Lavuna. The parties argued the respective applications orally on 30th October 2017 with Mr Okoiti representing himself whereas the respondent was represented by Mr Nyaga holding brief for Miss Lavuna.

18. Mr Okoiti submitted that the respondent has never supplied him with documents that were alleged that he posted in the Simba System and therefore he wants to have the judgments made against him set aside because he wants to proceed with ELR 25/2013. He submitted that in the judgment of 21st May 2014 delivered by Honourable Korir, the applicant had requested that it be stayed to enable him obtain documents to prosecute his case before the Employment and Labour Relations Court but that Honourable Korir J did not consider his case.

19. He also complained that the respondent's counsel was denying him a chance to prosecute his case by claiming that it is resjudicata and that the court denied him a chance to cross examine the deponents of affidavits.

20. Concerning the judgment of 11th December 2014,Mr Okoiti submitted that he wants it set aside because he applied to review it by availing all documents that were relevant but that the court had dismissed his application for review. He submitted that he had not considered appealing because he wants the respondent to supply him with his documents to enable him prosecute the Employment and Labour Relations Court case. He listed the documents in issue as being 2008/MSA T810/115756; MSA T810 1157428 as per letter of 29th May 2008 and 2008 MSA T810 1152471. He also claimed that he had never been supplied with documents in JR 351 of 2011.

21. In opposition, Mr Nyaga submitted relying on their grounds of opposition filed on 27th July 2017 and contended that the applications seek to set aside judgments of Honourable Korir J yet there is no law where a court can set aside a judgment of another judge of the same jurisdiction. Further that the applicant should have lodged an appeal to challenge the said decisions of the learned judge. It was also submitted that the ruling of 11th December 2014 was a ruling declining to review the judgment of 21st May 2014 and that instead of the applicant appealing against the refusal to review the earlier judgment, he was before court seeking to review a refusal to review a judgment.

22. It was further submitted that the applicant had refused to take wise counsel from Honourable Korir J that the Employment and Labour Relations Court has jurisdiction to order for recovery of the documents which the respondents posses and which the applicant seeks to rely on in the Employment and Labour Relations Court matter .

23. The respondent's counsel submitted that there are no sufficient grounds for setting aside the judgment and ruling by Honourable Korir J and maintained that partial delivery of documents does not invalidate the decisions by Honourable Korir J since the orders concerning production of documents can be issued by the Employment and Labour Relations Court. Counsel urged this court to dismiss the applications by the applicant.

24. In a rejoinder, Mr Okoiti submitted that he had been accused by Miss Lavuna for allegedly concealing and destroying documents which he was seeking. Further, that there was an admission that the documents were concealed and destroyed hence this court has power to compel the respondent to produce the documents by way of Judicial Review.

25. With regard to the application dated 28th September 2017 and filed in court on 2nd October 2017, Mr Nyaga submitted that the court should bar the applicant from filing documents or opening any new file between the same parties save for ELRC 25/2013 except with leave of court. Secondly, that the applicant should be declared a vexatious litigant and that he be found in contempt of court. It was submitted that the 7 suits filed by the applicant against the respondent are a waste of courts time and are an abuse of court process.

26. Further, that in JR 131/2016 he sought Hon Justice Nduma's recusal which the learned judge found to be scandalous, vexatious and an abuse of court process. That earlier on he had sought for recusal of Honourable Monica Mbaru and in her ruling the learned judge barred the applicant from writing, communicating and or addressing the respondent directly on matters relating to his former employment. That the Honourable Majanja J in JR 351/2011 advised the applicant to file a suit at the Employment and Labour Relations Court which he did but has never prosecuted it whereas in JR 340/2013 Honourable Korir J also advised the applicant to stop filing numerous suits and focus on his Employment and Labour Relations Court but the applicant is not willing to heed to advise and has gone ahead to sue the respondent's

counsel Janet Lavuna vide Milimani CMCC 4201/2017 for acting for the respondent counsel urged the court to protect the respondent by declaring the applicant a vexatious litigant and barring him from filing any other suit or prosecuting it as that would also protect the court from wastage of time and resources and scandalous accusations by the respondent who attacked Majanja J for ruling against him and that he has also questioned Honourable Korir and Lady Justice Monicah Mbaru's ability to handle matters and the swipe at Ms Janet Lavuna advocate which are all tales of who the applicant is.

27. It was submitted that the applicant deserves to be held to be in contempt of court for disobeying the orders of Honourable Mbaru J barring him from writing to the respondent but that he has insisted on writing to them hence he should not be allowed to seek refuge in court.

28. In response and opposition to the respondent's application Mr Okoiti, submitted that the motion by the respondent was filed late out of time without leave of court which had given it 7 days from 18th September 2017 and lapsed on 26th September 2017 hence this court was urged not to entertain the motion. He conceded to have filed several applications seeking for documents but that in JR 13/2016 the case was not about documents and that the application was not opposed by the respondent.

29. He submitted that Ms Lavuna misled the court and when the applicant raised issues, the learned judge (Mbaru J.) recused herself from the case and that when the matter was placed before Nduma Nderi J, Ms Lavuna advocate refused to appear in court and instead raised a preliminary objection.

30. He maintained that albeit he had been gagged by Mbaru J in JR 13/2016, he wrote to the respondent and they paid him his money in March 2017, which money he had been wrongly deducted.

31. He submitted that JR 300/2016 was before Honourable Odunga J who directed him to go before the Employment and Labour Relations Court which matter became JR 13/2016. He denied that CMCC 4201/2017 was against Ms Lavuna personally and submitted that in any event Ms Lavuna had not defended that suit and that he already had judgment in default of appearance and that an application to set aside that judgment had been dismissed for want of prosecution.

32. Mr Okoiti submitted that he had come to court to seek justice and not to disrespect judges. He complained that he had issues with the manner in which JR 351/2011 was handled whereat he was called last after staying in court until all other matters were called out and that when he was served with a preliminary objection a ruling was delivered on the preliminary objection on the spot without canvassing it hence he was only complaining of not being accorded an opportunity to be head which he considers a denial of justice.

33. As against Honourable Justice Lenaola (as he then was), it was submitted that he granted the applicant leave to apply for documents but that he denied the applicant an opportunity to cross examine the deponents. He submitted that Mbaru J had never complained that the applicant used bad language against her.

34. The applicant maintained that his main cause is to get documents from Kenya Revenue Authority who sacked him from employment unfairly and that the documents being sought are crucial. He submitted that his case in Employment and Labour Relations Court was only for leave to file suit out of time and not a substantive claim.

35. He maintained that Kenya Revenue Authority was taking him in circles and that if the documents he is seeking are not available then he should be given back his job. He accused counsels for the respondent of being fraudulent.

36. In a rejoinder, Mr Nyaga counsel for respondent submitted that the applicant was blowing hot and cold by claiming that he was supplied with some documents while some are said to be destroyed. It was submitted that the applicant should not have many suits which will not resolve his problem and contended that there is no genuine issue which the applicant has raised and the respondent failed to address.

37. Counsel for the respondent conceded that their application was filed out of time but submitted that this court has jurisdiction under Article 159(2)(d) of the Constitution to deem it filed within time as there is no prejudice occasioned to the applicant since he has been heard and so judicial time should be saved with a specific determinations being made to cure all the applicant's problems and address the issues to save judicial time.

38. That is the long and short of all the applications on record filed not only by the applicant, but also by the respondent seeking to bring these two cases JR 351/2011 and JR 340/2013 to an end and also seeking to bar the applicant from prosecuting or filing any other suit other than the Employment and Labour Relation Court matter.

DETERMINATION

39. I have carefully considered all the applications on record and in my humble view, to resolve the issues flowing from the said applications, I shall resolve them in the following manner.

1) Whether the application seeking that the Directorate of Criminal Investigations do investigate the respondent's allegations against the applicant on account of his alleged destruction of documents at the respondent's is merited.

2) Whether the applicant should be declared a vexatious litigant and therefore whether he should be barred from filing or prosecuting any other suit against the respondent other than the Employment and Labour Relations Court matter, except with leave of court.

3) Whether the applicant should be held to be in contempt of Honourable Mbaru's orders.

4) Whether the applicant's application seeking to review the judgment and ruling by Honourable Korir J as disclosed is merited.

5) What orders should this court make; and

6) Who should bear costs of those proceedings.

40. Commencing with the issue of the Directorate of Criminal Investigations investigating the alleged destruction of the documents by the applicant, the court notes that what the applicant is seeking is an order that the Directorate of Criminal Investigations investigates into an allegation that he destroyed the documents which he has persistently sought from the respondents so as to clear his name.

41. In other words, t applicant is claiming that the respondent has levelled accusations against him which are false and which should be probed to establish the truth. In my humble view, if the respondent alleges that the documents being sought after persistently by the applicant were infact destroyed by the applicant, then the burden of proof lies on the respondents to establish that indeed the applicant was in possession of the said documents and that he destroyed them. This is the letter and spirit of Section 107,108 and 109 of the Evidence Act that he who alleged must proof. It is not for the applicant to seek out the Directorate of Criminal Investigations to investigate him to determine his guilt or innocence on the allegations by the respondent.

42. On the other hand, if the applicant is highly aggrieved by the allegations levelled against him by the respondent which hinge on character assassination, he should have filed a suit against the respondent for defamation of character for vindication. He cannot be allowed to use the court process to compel the Directorate of Criminal Investigations to investigate allegations against him to clear his name.

43. One cannot be a complainant and seek to be investigated at the same time. If the applicant believes that the respondent has wronged him by making those false allegations against him, he can only sue in civil defamation.

44. In addition, the Directorate of Criminal Investigations cannot be compelled to investigate a complainant who believes that he has done no wrong and that he is being wrongly accused by the respondent. In my view, the application is frivolous and an abuse of court process. It discloses no cause of action against the Directorate of Criminal Investigations and in as much as the Directorate of Criminal Investigations did not defend the application, no serious court of law can grant such an application in the name of clearing the applicant's name from being tarnished.

45. The applicant had avenues through which he could ventilate his grievances but it appears he has lost discretion possibly due to lack of proper legal advise and legal representation. That application in my view, is contrary to the ethics of litigation and borders on abuse of court process.

46. The same is hereby dismissed with no orders as to costs as it was not defended and perhaps, deliberately as it would have been a waste of public resources for the Directorate of Criminal Investigations to come to court to defend such a frivolous application that was prima facie not arguable or at all.

47. The second issue for determination flows from the respondent's application filed on 2nd October 2017 seeking to bar the applicant from prosecuting or filing any other suit other than the Employment and Labour Relations Court case, save with leave of court and further, to have the applicant to be declared a vexatious litigant.

48. However, before determining that issue, I must determine issue No. 3 of whether the applicant should be declared to be in contempt of court for disobeying orders of Mbaru J which barred him from writing to the respondent in relation to the dispute herein on documents.

49. In my humble view only the court which issued the impugned order, can be called upon to make a determination On whether the order in issue was disobeyed. In this case, as the court that made the impugned decision is Employment and Labour Relations Court, this court has no jurisdiction superintend or over orders of an Employment and Labour Relations Court, or to enforce that court's orders. The Employment and Labour Relations Court is an independent court established under Section 4 of the Employment and Labour Relations Court Act as contemplated in Article 162(2) (a) of the Constitution. This court does not supervise the Employment and Labour Relations Court. It cannot, therefore be called upon to hold the applicant to be in contempt of the orders issued by a judge of the Employment and Labour Relations Court.

50. Accordingly, the prayer for contempt fails. The same is hereby dismissed with no orders as to costs.

51. Back on the second issue of whether this court should bar the applicant from filing and or prosecuting any other suit other than the Employment and Labour Relations Court case save with leave of court and whether he should be declared a vexatious litigant, the issue raises questions and the first question is whether the court can bar a party from continuing to prosecute their cases already filed in court without leave of court.

52. Section 2 of the Vexatious Proceedings Act Cap 41 Laws of Kenya provides that *"**No suit shall, except with leave of the High Court or of a judge thereof, be instituted by or on behalf of a vexatious litigant in any court, and such leave shall not be given unless the court or the judge is satisfied that the suit is not an abuse of the process of the court and that there is prima facie ground for the suit"***

53. The above provision precludes a person, having been declared a vexatious litigant under Section 2(1) of the Act from instituting any further suits without leave of the court. There is no other provision under the Act which empowers the court to impose a ban upon a party or person in regard to prosecution of existing suits.

54. This court, in my humble view, has no inherent power to make an order restraining a person from continuing, to without leave of court, the prosecution of any of the suits which he or she may have already instituted. There is no such express power given to the court and which vests in the court to be exercised against the person and therefore in my view, to do otherwise would be to violate a person's right to access justice as stipulated in Article 48 of the Constitution and Article 50(1) of the Constitution which latter provision stipulates that ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body."***

55. A similar situation arose in **Attorney General vs Racheal Wacera Kareithi [1979] e KLR** where L.G.E. Harris J (as he then was) held inter alia:

> ***" A difficulty arises, however, in regard to the relief claimed in the second portion of the motion, which is that the court in the exercise of its inherent jurisdiction should make an order restraining the respondent from continuing without the leave of the court the prosecution of any of the suits which she may have already instituted.***
>
> ***The Act gives the court no such express power and it is necessary to consider whether such power can be said to vest in the court by virtue of its inherent jurisdiction"***

56. I agree with the above holding that this court would not invoke its inherent jurisdiction to bar the applicant from prosecuting any of the cases that he may already have instituted in court except with the leave of court.

57. Accordingly, the prayer No. 2 by the respondent cannot hold as barring a party from` filing any further documents in the matters which are pending generally would infringe on his right to be heard and to a fair hearing.

58. In addition, this court cannot limit the applicant who is before the Employment and Labour Relations Court especially where it is clear that the Employment and Labour Relations Court matter is in its nascent stage. It is upon the respondent to identity what issues, in a particular or specific file that render the proceedings frivolous and vexatious or abuse of court process and make an appropriate application in those proceedings.

59. This court cannot be called upon to generally determine the fate of other proceedings which are not before it for determination. To do so would be a traversity of justice.

60. It is in the same vein that I have declined to find and hold that the applicant is in contempt of court since the impugned court order which barred him from filing or writing to the respondent is not an order which this court is under a duty to implement.

61. The other question that is key to be answered in the respondent's application and touching on issue No 2 is the prayer that the applicant should be declared a frivolous a vexatious litigant and that he should therefore be barred from filing any further documents or open any new file between him and the respondent on the same issues other than in Employment and Labour Relations Court Miscellaneous 25/2013, unless with the leave of court. The reasons given are that the applicant has filed suit after suit and has continued to file documents and applications which, despite being dismissed and advisory by the courts that he sticks to the Employment and Labour Relations Court matter, he has not heeded, which actions are vexatious and waste the time and resources of the respondent and this court.

62. The court notes that the respondent's motion is brought under Order 2 Rule 15 of the Civil Procedure Rules which relate to striking out of pleadings on grounds that:

> ***a) It discloses no reasonable cause of action or defence in law; or***
>
> ***b) It is scandalous, frivolous or vexation; or***
>
> ***c) It may prejudice, embarrass or delay the fair trial of the action or;***
>
> ***d) It is otherwise an abuse of the process of the court;***

63. The rule also makes provision that pleadings which meet the above conditions may either be amended or be struck out and under Subrule (2). No evidence shall be admissible on an application under Subrule 1(1) (a) .

64. However, in the serious submissions made by the respondent's counsel, he concentrated on the reason why the applicant should be declared a vexatious litigant. This is notwithstanding the fact that the respondent is entitled to defend the applicant's applications and that is a matter which I will deliberate on shortly.

65. Institution and prosecution of proceedings to declare one a vexatious litigant is governed by provisions of Cap 41 Laws of Kenya which is the Vexatious Proceedings Act, and not Order 2 Rule 15 of the Civil Procedure Rules which sets out instances where a court may strike out pleadings or order for their amendment.

66. The Vexatious Proceedings Act is an old but very brief piece of legislation enacted in 1958 and commenced on 20th March 1958. The long title states that ***'An Act of Parliament to prevent abuse of the process of the High Court and other courts by the institution of vexatious legal proceedings.***

67. Under Section 2 of the Act, it is stipulated that:

> ***1) If , on an application made by the Attorney General under this Section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious proceedings, whether civil or criminal, and whether in the High Court or in any subordinate court, and whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, make an order declaring such person to be a vexatious litigant***
>
> ***2) If the person to whom an order is sought under this Section is unable on account of poverty to retain an advocate, the High Court shall assign an advocate to him in respect of such application.***
>
> ***3) A copy of any order made under this Section shall be published in the gazette.***

68. Under Section 3 of the Act; with regard to restraint of civil proceedings the Act provides that:

> ***4. " No suit shall, except with leave of the High Court or of a judge thereof, be instituted by or on behalf of a vexatious litigant in any court, and any suit instituted by him in any court before the making of an order under Section 2(1) of this Act shall not be continued by him without such leave; and such leave shall not be given unless the court or the judge is satisfied that the suit is not an abuse of the process of the court and that there is a prima facie ground for the suit.***

69. Thus, no criminal proceedings shall, except with the written consent of the Attorney General, be instituted by a vexatious litigant in any court.

70. The Act comprises the above 4 sections only but is speaks volumes and from the above reproduced sections, it is clear that there is a distinction between Order 2 Rule 15 proceeding intended to strike out or amend pleadings which meet the conditions under the Sub rule; and seeking to declare a person as a vexatious litigant under Cap 41.

71. In this case, albeit the respondent did not cite the provisions of the vexatious Proceedings Act, no doubt, the application and arguments point to and call for the applicant to be declared a frivolous and vexatious litigant under prayer No. 1.

72. For one to be declared a vexatious litigant, an application must be filed by the Attorney General under Section 2 of the vexatious Proceeding Act, and not under any other provisions of the law. Thus, it is only the Attorney General who is empowered by the Act to apply to have the person declared as a vexatious litigant, not any other person or party to proceedings as was in this case.

73. In other words, there is a whole difference between proceedings or pleadings being vexatious and frivolous and amounting to abuse of the process of the court, in which case, a party to those proceedings can apply for striking out under order 2 Rule 15 of the Civil Procedure Rules; and a person being vexatious and thereby the Attorney General initiating or being requested to initiate proceedings that would lead to the person being declared a vexatious litigant. And once such an order declaring a litigant vexatious is issued by the High Court, then the person (vexatious litigant) is thereby barred from initiating any future proceedings in any court of law without leave of the court.

74. Proceedings under Section 2(1) of the vexatious Proceedings Act are therefore distinct and independent proceedings not to be lodged in an existing suit unlike in the case of proceedings under Order 2 Rule 15 of the Civil Procedure Rules. It therefore follows that an application under Order 2 Rule 15 can only be made in a particular or specific suit and not generally to affect other existing or impending or intended proceedings.

75. Further, in proceedings under order 2 Rule 15 of the Civil Procedure Rules, the court has no power to make such order striking out one suit to affect/stay or dismiss proceedings in another separate suit.

76. Accordingly, I have no hesitation in finding and holding that the application by the respondent is misconceived and the same must be dismissed. What the respondent can do is perhaps refer the applicant to the Attorney General under Section 2 of the Vexatious Proceedings Act for institution of proceedings that would lead to his being declared a vexatious litigant, if the respondent is aggrieved by the conduct of the applicants habitually and persistently and without any reasonable ground instituting vexatious proceedings, and after the court has given the applicant an opportunity to be heard on the application seeking to declare him a such vexatious litigant. The party sought to be declared a vexatious litigant will also be entitled to free legal representation where he cannot afford one. This is so in recognition of a party's right to access justice and be accorded a fair hearing. Therefore, as these proceedings commenced by the respondent to have the applicant herein Paul Makokha Okoiti declared a frivolous and vexatious litigant do not meet the legal threshold laid out in the Vexatious Proceedings Act, Cap 41 Laws of Kenya, they must be and are hereby declined and dismissed.

77. I then move onto the question of whether the applicant's own applications seeking to set aside or review of the judgments and rulings of Honourable Korir J in the twin files as consolidated herein for purposes of this ruling, thus JR 351/2011 and 340/2013 are merited, to which the respondent raised a preliminary objection contending that the applications are resjudicata; that the matter had been determined several times, over the same issue between the same parties as listed in the 7 cases; that Justice Korir had delivered a judgment dated 21st May 2014 in the matter; the applicant applied to set aside that judgment vide an application dated 8th August 2014; that Justice Korir rendered a decision on the latter application on 11th December 2014; that the present application is a second application to set aside and that the applicant is a vexatious litigant and is abusing the court process to the prejudice of the respondent; and that the present application is frivolous.

78. All the previous rulings and judgments delivered related to these proceedings were all annexed to prove the preliminary objection. The

court also notes that in JR, ELRC 13/2016, a decree was drawn on 24th October 2016 dismissing the application and proceedings filed by the applicant.

79. In the ELRC matter, Honourable Mbaru J also barred the applicant from writing, communicating and or addressing the respondent and its officers directly on matters relating to his former employment that ceased on 3rd February 2009 unless the same relates to motions of the court out of ELRC Miscellaneous 25/2013.

80. The court further notes that indeed, the applications dated 12th June 2017 and 4th April 2017 are related in the sense that whereas the former seeks to set aside the judgment of Korir J made on 11th December 2014, the latter seeks to set aside or review the ruling made on 25th May 2015 arising out of refusal by the court to set aside the judgment of 11th December, 2014.

81. Whether the court is exercising inherent jurisdiction in Judicial Review to review its own decisions or it is exercising jurisdiction under Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act on review, it must exercise such jurisdiction judiciously and not whimsically. There are established principles of law that govern applications for review, generally, and specifically. In Judicial Review, for example as governed by Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules, there is consensus that Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act do not apply. However, the court in the exercise of its Judicial Review jurisdiction may in the interest of justice or to prevent abuse of its process, review its own decision.

82. The two decisions which are sought to be reviewed were delivered by Honourable Korir J.Albeit Mr Nyaga counsel for the respondent contended that this court cannot review its own decision where such decision is made by another judge of concurrent jurisdiction, in the **Nakumatt Holdings Limited V Commissioner of Value added Tax[2011] e KLR(** Nakumatt Holdings case) the Court of Appeal made it clear that whether or not Order 44 of the old Civil Procedure Rules applied in matters of Judicial Review, what is important is that the Superior Court in the matter before the court had the residual power to correct its own mistake and that it may be that the appellant cited wrong provisions of the law in its application for review, which, perse, would not deprive the court of the power of correcting its own mistake which that court itself acknowledged it made.

83. The court stated inter alia:

> ***"" Mr Ontweka for the respondents in his submissions to us, seemed to suggest that where a law is silent on whether review is permissible, the courts must decline jurisdiction where a review is sought. While we agree with him that Judicial Review is a special jurisdiction, we do not agree that in clear cases, courts should nonetheless fold their hands and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is otherwise not to blame for the circumstances he finds himself in. This court in the earlier case we cited of Aga Khan Education Services Kenya V Republic (supra) expressed the view that review jurisdiction in cases as the present one, should be exercised sparingly and in very clear cut cases."***

84. The question therefore is whether there is any apparent error on the face of the record in the two decisions which are sought to be reviewed and or set aside.

85. I have carefully perused the impugned judgment and ruling and considered the applicant's application and submissions and I find nothing like an apparent error capable of being corrected by this court in order to do justice to the parties. In the earlier ruling, the court had declined to set aside its own judgment. The applicant on being dissatisfied with that refusal to set aside the court's own judgment, filed another application challenging refusal by the learned judge to set aside its own judgment.

86. The latter application was also dismissed and it is upon that dismissal that the applicant filed these proceedings seeking to challenge the refusal to set aside the earlier judgment and ruling dismissing the application to set aside the earlier judgment. In my humble view, the moment the applicant's application to set aside judgment was declined, he had the opportunity to file an appeal and having squandered that opportunity, he could not in the absence of proof of an apparent error on the face of the record, seek to have a second bite at the cherry by seeking to set aside the refusal to set aside orders as he had exhausted his prospects in the matter. What the applicant is seeking, in my humble view, is the reopening of proceedings and not to correct a mistake where the court could be said to have inadvertently made a mistake of fact, not of law.

87. Once a court of law makes a decision on merit, it becomes functus officio and its decision can only be appealed to a higher superior Court not to the same court. This court, therefore, is unable to find any grounds for review of the decisions made by Honourable Korir J. To do otherwise would be tantamount to sitting on appeal of the decision of the court of concurrent and competent jurisdiction. No residual power vests in a court of law to sit on its own judgment where there is no claim of a mistake apparent for correction.

88. It is for that reason that I would not belabour delving into whether or not the application is resjudicata other applications already dismissed as there is sufficient material to demonstrate that the applicant is urging this court to sit on the judgment of its own decision made by a different judge which is unacceptable in law. The application for review is accordingly declined.

89. I however must mention that the applicant is a *prose* litigant and a non lawyer. he has for a considerably long time remained in the court corridors seeking justice to reclaim his long lost employment. He is a lay person in legal matters. He is however knowledgeable and expresses himself quite well. He is an impressive person who can persuade a court of law to make orders in his favour where there are merits. All along he had represented himself in matters which even some qualified and seasoned lawyers may find it challenging. For the applicant, however, justice is only served when he wins the case in court, not when he loses the battle. That is why he believes that the court must rewrite the judgment of Korir J and find in his favour in order for it to be a true and fair decision.

90. But that is not the nature of litigation, not forgetting that the law is a double edged sword such that sometimes, in the course of legal

processes, the hunter can turn out to be the hunted. Tables turn even for seasoned lawyers.

91. The applicant herein no doubt harbors a deep sense of grievance on the loss of his job and he must be forgiven for seeking his rights through thick and thin. He is seeking for justice from the courts, which are the only assurance for him getting back his job. But the applicant must learn to go to the right forum with the right claim. He must not jump in any forum irrespective of jurisdiction.

92. The honourable judges who have handled the applicant's claims in the past have done their best. They have guided him on where and how he could ventilate his grievances. I reiterate that the applicant must accept and know which court has jurisdiction to do what. He must know that a judgment once pronounced cannot be rewritten by the same or other judge of concurrent jurisdiction to change the outcome. Once a court of law writes and delivers its judgment, it brings to finality that particular litigation or issue between parties, save for an appeal to the Court of Appeal or the limited application of review window to correct the court's own mistakes which are apparent .

93. The applicant must accept this very fundamental principle of law. And it is the duty of this court to tell him so now, now that he has come this far. He must now look back and ask himself why every judge who hears his matter has had to tell him the same thing. He must, in my view, not cast aspersions against judges who do not render decisions in his favour. There is no vendetta against the applicant because judges own no case. They are not parties to his litigation. However much he is aggrieved and even traumatized by his alleged unfair loss of his employment, he must learn to accept verdicts of the courts or file appeals to a Superior Court and not to circuit the same court [s].

94. It is for this reason that this court must caution the applicant herein that he must desist from filing application after application or suits in connection with the present dispute with his employer otherwise since the respondent's application only fell short of the legal requirements for declaring one a vexatious litigant, it will not be long before the applicant is referred to the Attorney General under Section 2 of the Vexatious Proceedings Act Cap 41 Laws of Kenya, for seeking orders of the High Court that he be declared a vexatious litigant. The applicant must take heed of this humble counsel. He need not, indeed, waste courts time and resources and prejudice and vex the respondent who must also expend resources to defend quite frivolous and vexatious proceedings at the tax payers' expense.

95. In the end, the applicant's applications as considered in both files No JR 340 of 2013 and JR 351 of 2011 are all dismissed. The respondent's application seeking to have the applicant herein Paul Makokha Okoiti declared a vexatious litigant too is dismissed.

96. As none of the parties have succeeded in their quests, I hereby order that each party shall bear their own costs of these prolonged proceedings.

97. As agreed by the parties, this ruling shall apply with necessary modifications to JR 340 of 2013.

Dated, signed and delivered in open court at Nairobi this 7th day of February, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Paul Makokha Okoiti the exparte applicant in person

Mr Kama Rodgers h/b for Ms Janet Lavuna for the Respondent

CA: Kombo