REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 378 OF 2015

REPUBLIC ....APPLICANT

VERSUS

THE COMMISSION ON ADMINISTRATIVE JUSTICE………………………………………………………RESPONDENT

SALARIES AND REMUNERATION COMMISSION………………1ST INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION……………….2ND INTERESTED PARTY

EX PARTE: MICHAEL KAMAU MUBEA

RULING

Introduction

1. On 8th March, 2016, **Mr Ngatia**, learned counsel for the ex parte applicant herein submitted that while preparing for the hearing of this application, he found that the 1st interested party herein, **Salaries and Remuneration Commission**, through two letters signed by its chairperson had approved the salary structure involving the ex parte applicant's salary. By third letter, the contents of the said two letters were ignored and the 1st interested party through its secretary/Chief Executive Officer stated that the ex parte applicant's salary was not approved by the 1st interested party. According to **Mr Ngatia**, the repudiation of the earlier two letters and the adoption of the unusual position by the 1st interested party that it does not wish to participate in these proceedings, notwithstanding the fact that it is obliged to set the salaries that necessitated the need for the attendance of the deponent of the affidavit sworn on behalf of the 1st interested party in order for the Court to arrive at a fair determination.
2. **Mr Okello**, learned counsel for the respondent supported the application while **Mr Muraya** who appeared for the 2nd interested party similarly informed the Court that he was supporting the application as it was difficult for them to put in submissions in light of the gap created by the stand taken by the 1st interested party.
3. On the said date, there was no representation on behalf of the 1st interested party though that dated had been fixed in the presence of **Ms Wafula**, learned counsel for the 1st interested party.
4. After considering the submissions made by counsel who appeared before me, in the exercise of the Court's inherent jurisdiction, I directed that **Mrs Anne R. Gitau**, the deponent of the affidavit sworn on behalf of the 1st interested party attends the Court for cross-examination on the contents

of her affidavit sworn on 26th January, 2016 and filed the same day.

1st interested party's case

5. However, by an application dated 24th May, 2016, the 1st interested party sought to have the orders made on 8th March, 2016 directing the said cross-examination to be reviewed and set aside. It is this application that is the subject of this ruling.
6. According to the said interested party, there are no orders being sought against it and it has no identifiable stake or legal interest in these proceedings. According to **Ms Wafula** who swore the supporting affidavit, the said order was given in her absence. According to her, the contents of the affidavit the on which the cross-examination is sought are clear and do not need any clarification. It was her view that no legal basis had been laid to justify the cross-examination and that in the proceedings of this nature, cross-examination should be used sparingly. It was her view that the application for cross-examination will only delay the determination of these proceedings.
7. It was disclosed that the delay in bringing the instant application was due to the fact that the applicant and the 1st interested party were meeting with a view to having the applicant agree to the withdrawal of the 1st interested party from these proceedings.
8. In her oral submissions, **Ms Wafula** stated that they were challenging the legality of the order. She reiterated the contents of the supporting affidavit and submitted that there was no conflicting affidavit that would justify the cross-examination. It was submitted that on the day the order was made, the matter was coming up for the highlighting of submissions which the 1st interested party was yet to file. According to learned counsel, the 1st interested party was not given an opportunity to address the matter hence the rules of natural justice were breached.

Ex parte applicant's case

9. The application was opposed by the ex parte applicant vide the following grounds of opposition:

1. **The application is frivolous to the extreme and should be dismissed as an abuse of court process.**
2. **The order sought to be reviewed was served upon the 1st interested party on 9th March 2016 and no explanation has been tendered for the delay of almost 3 moths.**
3. **An application for review must be made without unreasonable delay. A period of almost 3 months is unreasonable.**
4. **No ground for review has been advanced.**
5. **The application is founded upon an erroneous supposition that no orders are sought against the 1st interested party oblivious of the fact that it is due to conflicting information given by the 1st interested party that made the Respondent issue the impugned report.**
6. **That at no time has the Applicant or his counsel held any meeting with the 1st interested party as erroneously stated.**

10. On behalf of the ex parte applicant, it was submitted by **Miss Nyagah** that no grounds had been advanced to warrant the orders sought. Whereas the 1st interested parte had maintained that there are no orders sought against it, the dispute touches on the applicant's salary and whether or not the same was approved by the 1st interested party since the Respondents contends that its report was based on the letter written by **Mrs Anne Gitau**, the deponent of the affidavit in issue. According to learned counsel, all that they were seeking is a clarification of the three letters emanating from the 1st interested party relating to the applicant's salary for the Court to determine whether the Respondent took into consideration factors which it ought to have taken into consideration considering the contention by the 1st interested party that it was not a party to the Respondent' report.
11. According to the *ex parte* applicant, in light of the foregoing the 1st interested party cannot claim to have been in the periphery. It was reiterated that the application was not timeously brought and

no explanation was given for the delay of 3 months. It was submitted that t allegation of a meeting between the applicant and the 1st interested party was untrue. To the ex parte applicant the grounds relied upon are not grounds for review but are rather grounds for appeal.

2nd interested party's case

12. The 2nd interested party similarly opposed the application based on the following grounds of opposition:

1. **The application is misconceived and has no grounding in law.**
2. **The application is an abuse of the court process intended to delay the hearing and conclusion of the main Notice of Motion.**
3. **There is nothing in Order 53 that precludes this honourable court from directing that a deponent of a filed affidavit be cross-examined during the hearing.**
4. **The conduct of Anne R. Gitau is central to the determination of this matter and directions for her cross-examination is well founded.**

13. On behalf of the 2nd interested party, **Mr Muraya** submitted while associating himself with the ex parte applicant's submissions that the 1st interested party were not barred from participating when the order sought to be reviewed was made. It was submitted that the Court joined the 1st interested party to these proceedings because its conduct was central to the proceedings and this is clear from the letters under consideration. It was submitted that the decision on cross-examination depends on case to case. In judicial review proceedings, it was submitted that since the proceedings are in respect of a public cause, the court is interested in a just determination of the issues before it.
14. In this case, it was submitted that the Court has already exercised its discretion and there is nothing to demonstrate that it did not exercise the same judiciously. It was contended that there was no dispute that the person to be cross-examined authored the letter in question whose contents are in conflict.

Respondent's Case

15. The application was similarly opposed by the Respondent who through its learned counsel, **Mr Okello** submitted while associating with the ex parte applicant's submissions that there was no illegality as the Court has the power to order cross-examination in appropriate case. To the learned counsel it was not shown how the cross-examination would prejudice the 1st interested party. With respect to non-appearance of the 1st interested party's counsel, it was submitted that that was a choice made by the counsel as the date was taken in her presence.

Determinations

16. The instant application is expressed to be brought under the provisions of Section 3, 3A of the ***Civil Procedure Act***, Order 45 rule 1 & 2 and Order 51 rule 1 of the ***Civil Procedure Rules*** and all other enabling provisions of the law.
17. The known provisions which deal with review are section 80 of the ***Civil Procedure Act*** and Order 45 of the ***Civil Procedure Rules***, both of which however do not apply to judicial review matters since judicial review proceedings are neither civil nor criminal. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the ***Civil Procedure Rules*** render the application wholly incompetent.
18. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the ***Civil Procedure Rules***, certain requirements must be met. The said provision provides 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

19. In the instant case the decision sought to be reviewed was made on 8th March, 2016 while the instant application was not filed until 25th May,2016, some two and half months later. The reason given for the delay was that there was a meeting between the applicant and the interested party with a view to removing the 1st interested party from the proceedings. This was however denied by counsel for the ex parte applicant. In light of the said denial, this Court finds that the delay was *prima facie* long hence the applicant has not satisfied the conditions necessary for the Court to exercise its discretion in his favour.
20. The decision whether or not to review a Court’s decision was well captured by the Court of Appeal in **Mumby’s Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002,** where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.
21. In this case, the 1st interested party contends that the order was given in the absence of its counsel. That the date was fixed in the presence of the 1st interested party’s counsel is not in doubt. Although the same counsel faults the Court for granting the said orders there is no attempt to explain the absence of the said counsel on the day whether matter was coming up for highlighting submissions, which submissions the same counsel had not even filed. Clearly therefore the 1st interested party cannot claim to have approached this Court with clean hands in order to deserve the favourable exercise of discretion in its favour.
22. The other ground relied upon by the 1st interested party is the alleged illegality of the order. In my view this ground as well as the contention that in the circumstances of this case, cross-examination ought not to have been ordered are grounds for an appeal rather than review. In **Ndungu Njau vs. National Bank of Kenya Limited Civil Appeal No. 257 of 2002,** the Court of Appeal expressed itself as follows:

“Neither in the application, its grounds or supporting affidavit nor in the instant appeal was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of exercise of due diligence which requires strict proof... Nor was there any submission before the Court about any mistake or error apparent on the face of the record to warrant an order of review which was sought. The error or omission on record must be self evident on the part of the court and should not require elaborate argument in order to be established... There was no reference to such mistake or error before the trial Court and the grounds of appeal in the instant appeal do not

point to any such omission or error."

23. Similarly in **National Bank of Kenya vs. Ndungu Njau Civil Appeal No. 211 of 1996 [1995-98] 2 EA 249,** the same Court expressed itself as follows:

"In an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought. Although this was, in the court's view, a fatal omission, yet the court in the broad interest of justice, asked counsel for the appellant on which ground under Order 44 he had argued the said notice of motion in the Superior Court and he replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the Superior Court... A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court and the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law... Misconstruing a statute or other provision of the law is not a ground for review... In the instant case the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it would be a good ground for appeal but not for review. Otherwise the learned Judge would be sitting in appeal on his own judgement which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

24. In this case, the Court was clear in its decision that the order for cross examination was made in the exercise of the Court's inherent powers. It has not been contended that the Court has no such powers. To the contrary, **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 Of 2005** expressed himself on the matter as follows:

"The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; *it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion*; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, *to do justice between the parties and to secure a fair trial between them*." [Emphasis mine].

25. From the foregoing it is clear that the Court, in invoking its inherent powers does not have to be moved by any party though it may also exercise the same on the prompting of a party as happened in this case. Accordingly, the mere fact that a party did not address the Court on the issue cannot *ipso facto* be a basis for setting aside such an order especial if the party complaining was, due to unexplained reasons, absent when the order was made as happened in this case.

26. The general rule relating to cross-examination on affidavits was laid down in **G G R vs. H-P S [2012] eKLR** where it was held that:

"The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on *fraud, mala fides, authenticity* of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination."

27. In this case, the Court was informed that there were conflicting letters emanating from the Chief Executive Officer/Secretary of the 1st interested party, which may have informed the decision sought to be challenged in these proceedings. All the parties herein apart from the 1st interested party agree that for the just and fair determination of the matters before this Court the said apparent conflict ought to be clarified and the only person in a position to do that is the deponent of the affidavit sworn on behalf of the 1st interested party, **Mrs Anne R. Gitau**.
28. Having considered the grounds relied upon by the applicant in this application it is my view that the issues raised such as the purported illegality of the order and the merits thereof ought to have been raised in an appeal rather than in a review application. Apart from the incompetency of the application resulting from the failure by the applicant to bring itself within Order 45 of the ***Civil Procedure Rules*** with respect to the long delay in filing the application, it is also my view that the application for review is unmerited as it is an appeal couched as an application for review.
29. I agree with the position adopted by the ex parte applicant that the application is frivolous to the extreme and contrary to the position adopted by the 1st interested party, it is in fact this application which was calculated to delay the expeditious disposal of these proceedings.

Order

30. In the premises the Notice of Motion dated 24th May, 2016 fails and is dismissed with costs to the ex parte applicant, the respondent and the 2nd interested party.
31. Orders accordingly.

Dated at Nairobi this 12th day of July, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nyagah for Mr Ngatia for the applicant

Mr Nzioka for Mr Okelo for the Respondent

Mr Muraya for the 2nd interested party

Cc Mwangi