IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 122 OF 2017

BETWEEN

JIMNAH MWANGI GICHANGA.....APPELLANT

AND

THE SECRETARY TSC.....RESPONDENT

(An appeal from the Ruling of the Employment and Labour Relations

Court of Kenya at Nairobi (Monica Mbaru, J) dated 30th March, 2017

in

Misc. Appl. No. 82 of 2016)

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JUDGMENT OF THE COURT

The appellant, **Jimnah Mwangi Gichanga,** is a gallant fighter. He has for the last 19 years single-handedly tackled the Government and the Teacher's Service Commission **(TSC)** in pursuit of enhanced retirement benefits on the basis of a scheme of service that came into effect six years after his retirement. He has been to the High Court twice ***(HCCC No. 107 of 1999)***, twice in the Court of Appeal ***(CA No. 8 of 2011*** and ***Civil Appl. No. 206 of 2013*****),** back to the High Court ***(HC Civil Appl. No. 43 of 2016),*** across to the Employment & Labour Relations Court (ELRC) where the application was re-registered as ***Misc. Application No. 82 of 2016***, and now before us in this appeal.

It is evident from the record of appeal that the history of the fight is rather convoluted and some documents necessary to piece it together are either missing or introduced in the record in an untidy fashion. We shall therefore confine ourselves to the substance of the appeal before us and only relate it to the history where there is clarity on the facts.

It is stated to be an appeal from the Ruling of the ELRC **(Mbaru, J.)** made on 30th March, 2017. The ruling was on an application dated 8th February, 2016 seeking to set aside another ruling made nine years earlier on 18th July, 2007 by ***Mugo, J.*** setting aside a judgment made in the appellant's favour on 1st October, 2003 in HCCC No. 1907 of 1999 ***(the Mugo ruling)***. The judgment had been entered by ***Hayanga, J***. after a formal proof by the appellant when the Attorney General, then appearing for TSC,

failed to enter appearance or file defence. The TSC was ordered to calculate and pay the appellant's pension benefits under employment Grade R and not K ***(the Hayanga judgment).*** After the *ex parte* judgment was set aside, TSC was allowed to file a defence to the suit which was heard to finality by Sitati, J. and dismissed on 29th October, 2009. It was held that the appellant's suit had no basis since he was never promoted from Grade K to R in accordance with the regulations of TSC ***(the Sitati judgment).*** The appellant applied for review of that finding before the same court but the application was dismissed on 30th September, 2010 ***(the Sitati ruling).***

Mbaru, J. found that the appellant filed an appeal against the Sitati judgment together with the Sitati ruling in CA No. 8 of 2011, which was heard and determined before ***Omolo, Onyango Otieno & Okwengu, JJA*** on 22nd June, 2012, dismissing it. Dissatisfied with the dismissal, the appellant returned to the same Court and applied for review in ***Civil Application No. 206 of 2013***, but on 23rd January, 2015 the application was dismissed by ***Ouko, M'Inoti & J. Mohammed, JJA***. For those reasons, Mbaru, J. held that the application before her was a non starter as it was asking the court to reopen a matter that was determined on merits by a court of equal status and subsequently finalised by the Court of Appeal. In her view, the court was both *funtus officio* and without jurisdiction to consider the application. She concluded that in a matter that the appellant had an option to apply for review of the High Court order when it was made or to appeal to the Court of Appeal and chose the latter, he cannot be allowed to revert to the review process. Litigation must come to an end, she ordered. That was on 30th March, 2017, but it did not come to an end.

The appellant is now before us challenging those findings in a memorandum of appeal which is a far cry from the one envisaged under ***Rule 86*** of the Court's Rules which requires that:

> ***"the memorandum shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make".***

What we have instead are several pages of a narration of events, which is not easy to understand, going back to the appellant's mistakes made in the Sitati judgment and the Court of Appeal decisions. Ordinarily, the memorandum of appeal ought to be struck out but the appellant has been appearing in person throughout and perhaps his lack of understanding of court procedure may be excused. But not the substance of the appeal which this Court is enjoined to consider under **Article 164 (3)** of the Constitution. He professes to be a Bachelor of Arts graduate who has been teaching since 1962 until he retired in 1999, and it is difficult to understand why he is unable to file and present intelligible documents before the court.

The submissions filed by the appellant are equally confounding. There are seven bound thin volumes of it! Apart from one of them containing an application to enjoin in the appeal another retired teacher who has a similar problem, the submissions carry on the same disjointed trajectory of relating the history of the matter by attacking various findings made in the Mugo ruling, the Sitati judgment, the Sitati ruling and the two Court of Appeal decisions, stressing that the Hayanga judgment was still a valid judgment since the Mugo ruling was wrong. He insists on being paid his pension under Grade R, the graduate scheme, which he submits he was automatically entitled to. According to him, the case 'lost justice' when it was transferred to the ELRC. Any clarity expected from oral highlighting by the appellant did not come since he went on a tangent about the validity of his original claim.

In response, TSC filed written submissions through ***Allan Sitima, Advocate*** which Mr. Sitima orally highlighted. His basic contention was that the application was *res judicata* since the suit was finally determined by the Court of Appeal. Citing the case of ***Karatina Municipal Council & Another vs Kanyi Karoki [2015] eKLR*** counsel further submitted that the appeal is not only frivolous but also vexatious and an abuse of court process. According to him, it was simply meant to harass and embarrass the respondent and is a waste of precious judicial time, he concluded.

We have patiently considered this rather difficult record of appeal, but in the end we have no hesitation in loudly repeating these words to the appellant: THERE MUST BE AN END TO LITIGATION! It is not a mere cliche, but a fundamental *principle of public policy. Relitigating the same issues which, as in this case, have been considered at the highest level of our court system, amounts to an abuse of court process and we shall not countenance it. We also agree with learned counsel for the respondent that the appeal before us is* frivolous and vexatious. As stated in the ***Karatina Municipal Council* case:**

> ***"frivolous or vexatious proceedings are understood to be synonymous with or aspects of what is deemed to be an abuse of the process of the court and therefore these concepts may not necessarily be distinct from each other; where one exists the other will certainly be lurking around."***

CJ's Dictionary of Legal Words and Phrases 1 ed (Buttherworths Durban) ***1977 Vol. 2 & 4*** also weighs in stating thus:-

> "***The concept of 'frivolous and vexatious' has one established legal meaning. It refers to a claim or legal proceeding which is pursued where there is plainly no prospect of success and the motive of the claimant or plaintiff is to harass the defendant."***

It is on record, and the appellant was aware, or ought to have been aware, that the Hayanga judgment was set aside and that the suit was subsequently heard on its merits. Indeed the parties on both sides gave sworn evidence before Sitati, J. which was tested in cross examination before the merit decision was delivered. This Court went over the same territory on first appeal by way of a retrial and came to the same conclusion. That should have been the end of the matter unless it was certified to raise a matter of general public importance for consideration by the Supreme Court. It was not. The only reason for returning to the ELRC to reagitate the same issues was purely to vex the respondent. We so find.

For those reasons, we find no merit in this appeal and order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 20th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR