**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPEAL NO. 10 OF 2014**

**BETWEEN**

**MWANGI MUTAHI RUGA …….……. APPELLANT**

**AND**

**MUNICIPAL COUNCIL OF NYERI …….……. 1ST RESPONDENT**

**THE ATTORNEY GENERAL ……..……..….. 2ND RESPONDENT**

*(An appeal from the Judgment of the Industrial Court of Kenya at Nyeri (Aboudha, J.)*

*dated 26th November, 2013 & Ruling dated 17th December, 2013*

**in**

**H.C.C.A No. 206 of 2010)**

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**JUDGMENT OF THE COURT**

1. The appellant herein was employed on 23rd January, 1984 as an Accountant by the 1st respondent. By a letter dated 15th December, 1999, the appellant was asked to show cause why he should not be retired from his services on account of alleged misconduct and poor performance. The appellant vide a letter dated 29th December, 1999 denied the allegations of misconduct. After considering the appellant's response, the 1st respondent forwarded the appellant's case and its recommendation to the Public Service Commission of Kenya. Subsequently, the 1st respondent vide a letter dated 17th July, 2000 which was received by the appellant on 19th July, 2000, communicated to the appellant the commission's decision to retire him from service. The appellant maintained that his retirement was contrary to the law and hence null and void.
2. Subsequently, the appellant filed suit in the Chief Magistrate's Court at Nyeri against the respondents. The 2nd respondent was sued on behalf of the Public Service Commission. The appellant in the said suit sought *inter alia:-*

- ***A declaration that the alleged retirement was not in public interest and was contrary to the law hence null and void.***

- ***General damages for wrongful retirement and breach of agreement together with salary due from 17/9/2000 at the rates revised from time to time by the 1st respondent until retirement age of 60 years.***

- ***Costs of the suit.***

3. The 1st respondent filed its statement of defence denying the allegations made by the appellant save that the appellant was its employee. The 1st respondent averred that the appellant was retired due to poor performance. The 2nd respondent also filed a statement of defence denying averments made by the appellant.
4. The appellant testified that during his 12 years of service to the 1st respondent he performed his duties diligently and had not received any warning about his performance. He stated that at the time he was retired from service he was earning a monthly salary of Kshs. 20,625/=. The appellant maintained that the 1st respondent never gave him the opportunity to defend himself before making the aforementioned decision. He testified that the whole issue was instigated by the then Town Clerk who had a grudge against him. According to the appellant, the two of them had a disagreement over money the Town Clerk owed him. It was the appellant's contention that the 1st respondent's actions deprived him of salary, promotion and benefits which he would have otherwise earned save for the forced retirement. The appellant admitted that he was paid his terminal dues.
5. DW1, Stephen Ndii Gitahi, the 1st respondent's legal officer, testified that the appellant's services were not terminated on malicious grounds but due to poor performance. He produced a series of warning letters from the 1st respondent to the appellant. DW2, Mary Nafula Wanyama, the Human Resource Management Officer attached to the Public Service Commission, testified that the commission deliberated on the appellant's case and resolved that it would be in public interest to retire him from service. She testified that as per Legal Notice No. 32 of 1998, the commission was not required to call the appellant to defend himself in person. The said Notice provided for the appellant to defend himself through a written explanation. She stated that the appellant never appealed against the commission's decision.
6. After considering the evidence on record, the trial court found that the appellant had not proved his case against the respondents and dismissed the suit with costs to the respondents. Aggrieved by that decision, the appellant preferred an appeal in the Industrial court which was dismissed by a judgment dated 26th November, 2013. Thereafter, the appellant filed an application seeking *inter alia* an order reviewing the judgment dated 26th November, 2013. The Industrial court (Abuodha, J.) vide a ruling dated 17th December, 2013 summarily rejected the said application. It is the judgment dated 26th November, 2013 and the ruling dated 17th December, 2012 that is subject of this appeal which is based on nine grounds which can be aptly summarized as follows:-

- ***The learned Judge erred in failing to note that the retirement process was not only unprocedural but also illegal.***

- ***The learned Judge erred in failing to appreciate that the appellant was denied the right to fair hearing and to call witnesses at the trial court.***

- ***The learned Judge erred in summarily dismissing the application for review.***

- ***The learned Judge erred in failing to take into consideration the relevant laws and submissions made by the appellant.***

The 1st respondent also filed a cross-appeal against the aforementioned decisions on the issue of costs. The 1st respondent's contention was that the learned Judge erred by failing to award costs

both in the appeal and the application for review.

7. The appellant filed written submission and also made oral submissions. The appellant submitted that the whole retirement process was contrary to the law and the 1st respondent's procedures. He argued that the 1st respondent failed to follow the laid down disciplinary process. He submitted that the 1st respondent's council ought to have first approved by resolution the forwarding of the appellant's case to the Public Service Commission. The decision to forward the appellant's case was done by the Town Clerk contrary to the law. He stated that the Public Service Commission ought to have made the final decision and communicated the same to him. According to him, there was no evidence that the commission made the decision because no minutes of the alleged meeting which resolved his retirement were produced. He maintained that the decision to retire him from service was made by the Town Clerk contrary to the law. The appellant submitted that he was denied the right to a fair hearing before he was retired from service. Consequently, the whole process was a nullity.
8. The appellant faulted the learned Judge for not finding that his retirement was actuated by malice on the part of the Town Clerk. He submitted that the malice was proved by uncontroverted evidence. As per the 1st respondent's terms and conditions of employment and disciplinary procedure it was only the treasurer who was in a position to gauge the appellant's performance and not the Town Clerk. This is because the treasurer was his supervisor. He had never received a warning from the treasurer. The appellant submitted that he was denied the right to call witnesses by the trial court. The appellant also faulted the learned Judge for summarily rejecting his application for review.
9. Mr. Wahome, learned counsel for the 1st respondent, submitted that this was a second appeal and therefore this Court was restricted to consider only issues of law. He went on to further state that the decision of the learned Judge could not be faulted because he considered all the grounds raised by the appellant. Mr. Wahome submitted that the appellant's Memorandum of Appeal raised issues of fact. He argued that the proper procedure was followed in retiring the appellant from service. He urged us to dismiss the appeal. On the cross appeal, Mr. Wahome argued that the learned Judge erred in not awarding the respondents costs; costs ought to follow the event. The learned Judge gave no reasons for declining to award costs of the appeal.
10. Mr. Muthuri, learned counsel for the 2nd respondent, urged this Court to uphold the decision of the Industrial court. According him, the proper procedure was followed in retiring the appellant from service.
11. This being a second appeal, only issues of law fall for consideration. ***Section 72(1)*** of the ***Civil Procedure Act***, Chapter 21, Laws of Kenya provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court. A careful reading of the Section shows that such appeals are, as a general rule, confined to issues of law only. We are of the considered view that the following issues arise for determination from the appeal and cross appeal:-

- ***Was the retirement of the appellant from service legal?***
- ***Was the appellant denied an opportunity to call witnesses at the trial court?***
- ***Did the learned Judge err in summarily rejecting the application for review?***
- ***Did the learned Judge err in not awarding costs in the appeal and in the application for review?***

12. It was the appellant's case that his retirement was illegal because firstly, he was denied a fair hearing and secondly, the proper procedure was not followed. On the issue of a fair hearing, the appellant argued that he was not given an opportunity to defend himself before the decision to retire him from service was made. In ***Kiai Mbaki & 2 others -vs- Gichuhi Macharia & Another- Civil Appeal No. 178 of 2002*** this Court held,

***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without a party being afforded an opportunity to be***

***heard. This Court has indeed reiterated that principle on many occasions and we need only cite one for emphasis: - Matiba –vs- Attorney General (1995-1998) 1 EA 192 where in an application for leave to seek an order of certiorari, the superior court refused to grant the prayer for stay without hearing counsel for the applicant who was present in court on appeal this Court stated:-***

***"On the face of the record, it appeared that the appellants counsel had made no submissions before the learned Judge in the court below, since if they had been made, they would have been reflected in the record. There was thus an order on record in the presence of the appellants' counsel but without affording him an opportunity to address the Judge. This was a fundamental breach of the rule that no man shall be condemned unless he has been given a fair opportunity to be heard, which is a cardinal principle of natural justice. Any order that flowed from such a fundamental breach cannot be sustained."***

13. From the evidence on record, we are of the view that the appellant was indeed given an opportunity to defend himself in writing before the decision was made by both the 1st respondent and the Public Service Commission. We concur with the following findings of the learned Judge:-

***"Regulation 41 of the Public Service Commission (Local Authority Officers) (Amendment) Regulations of 1988 (L.N 136 OF 1998) provides:-***

***"41 (1) If a local authority, after having considered every report in its possession made with regard to a local authority officer, is of the opinion that it is desirable in the public interest that the services of the local authority officer should be terminated on the grounds which cannot suitably be dealt with under any provisions of these Regulations, it shall notify the officer in writing specifying the complaints by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the local authority officer.***

***(2) If, after giving the officer an opportunity of showing cause why he should not be retired in the public interest, the local authority in full meeting is satisfied that the local authority officer should be required to retire in the public interest. It shall:-***

***(a) In the case of local authority officers to whom regulations 34 and 35 apply, forward to the commission the report on the case, the local authority officer's reply and the local authority's recommendation, and the commission shall decide whether the officer should be required to retire in the public interest.."***

***…As reproduced above, regulation 41 requires an officer being considered for retirement in the public interest to be notified in writing, specifying the complaints by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the public officer. In this case the appellant was informed in writing of the allegations against him which led the 1st respondent contemplating his retirement in public interest by a letter dated 15th December, 1999 and was required to make a response within 14 days which he did by a letter dated 29th December, 1999. To this extent the court is not persuaded that the appellant was denied an opportunity to be heard on his defence."***

14. Having perused the record, we concur with the trial court that the appellant failed to prove that the said retirement process was contrary to the 1st respondent's disciplinary procedure and the terms and conditions of his employment. Why do we say so? The appellant did not produce a copy of the contract of employment or documents setting out the 1st respondent's disciplinary procedure. Therefore, it was not possible for the trial court to make a finding on whether the said retirement was contrary to the 1st respondent's disciplinary procedure.
15. The appellant argued that the trial court denied him an opportunity to call witnesses in support of his case. From the record, after the appellant had testified on 6th July, 2010, his counsel sought for adjournment to call more witness. The application was opposed by both respondents. The trial court vide a ruling dated 6th July, 2010 declined to grant the adjournment sought on the ground

that the matter was an old matter and the appellant closed his case. No appeal was preferred against that decision. We find that the said decision is not subject of the appeal before us and consequently it must fail.

16. While considering an application for review a court exercises its discretionary power. In ***Mulembe Farm Ltd & Another –vs- John B. Masika & 3 others- Civil Appeal No. 230 of 2004***, this Court stated:

***"Whether or not a decision or order should be reviewed is a matter within a judge's own discretion. For an applicant to succeed he must place material before the court to show any one or a combination of the three factors which we earlier set out. The appellants did not satisfy that condition. The power of review is not the same as the power exercisable on appeal. That is why the jurisdiction of the court in review is circumscribed. The court in a review is called upon to exercise a discretion in a situation where, if the power is not exercised injustice or hardship will result and is invoked to help a party who is shown to have taken all essential steps in a matter but because of factors beyond his control he was not able to avail all relevant material or evidence, or that an error or mistake occurred."***

17. Pursuant to ***Order 45*** of the ***Civil Procedure Rules*** the respondent sought review of the judgment dated 26th November, 2013. ***Order 45*** sets out instances when an order of review can be granted. This Court in ***Harold Kidem Mganga & another –vs- Constance Mwai Mtoto – Civil Appeal No. 244 of 2004*** sets out the instances as follows:-

***"Since the application was for review it was upon the appellants to show that there had been the discovery of new and important matter or evidence which was not within their knowledge or could not be produced by them at the time the decision was made. The appellants could succeed if they were able to show that there had been some mistake or error apparent on the record. They could also succeed if they could show any sufficient reason why the previous decision should be reviewed"***

The appellant's application for review was not made on the basis of any of the above mentioned instances. We concur with the learned Judge that the said application was tantamount to asking the Industrial court to sit on appeal of its own decision. We find that the learned Judge did not err in summarily rejecting the application.

18. On the issue of costs, ***Section 27*** of the ***Civil Procedure Act*** provides that costs ought to follow the event. In ***James Koskei Chirchir –vs- Chairman Board of Governors Eldoret Polytechnic- Civil Appeal No. 211 of 2005,*** this Court held:-

***Notwithstanding the provisions of section 27, above, costs are generally a matter within the discretion of the court. The court did not, however, explain why it denied the appellant his costs before the trial court. In absence of any explanation in that regard we think that the learned Judge of the superior court erred in denying the appellant the costs of the suit before the trial court.***

19. In this case, the learned Judge neither made any orders as to costs in respect of the appeal therein nor did he give reasons for not doing so. We find that the learned Judge erred in not granting the respondents costs of the appeal. On the other hand, the learned Judge made no orders as to costs on the application for review. We find that the learned Judge exercised his discretion properly in respect of the application because there was no reply filed by the respondents to the application and secondly, the application was summarily rejected.
20. The upshot of the foregoing is that the appeal herein lacks merit and is hereby dismissed; the cross-appeal partially succeeds. The respondents shall have cost of both the appeal in the industrial court and in this Court. Parties will bear their own costs on the cross appeal.

***Dated and delivered at Nyeri this 30th day of July, 2014.***

***ALNASHIR VISRAM***

**……..**

***JUDGE OF APPEAL***

***MARTHA KOOME***

**…….**

***JUDGE OF APPEAL***

***J. OTIENO- ODEK***

**……**

***JUDGE OF APPEAL***

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**