REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

PETITION NO. 1 OF 2018

IN THE MATTER OF ARTICLES 22, 23, 15, 59 & 249 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENDAL

RIGHTS UNDER ARTICLE 47(1) & 50 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 6 & 12 OF THE FAIR ADMINISTRATIVE ACTIONS ACT OF 2015

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT &

NATIONAL POLICE SERVICE COMMISSION ACT

BETWEEN

SAMSON RAGIRA NYAMWEYA.....PETITIONER/APPLICANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. By a constitutional Petition lodged in court on 5th December 2018, the Applicant challenged the decision of the 1st Respondent to terminate the Applicant's services as a member of the national police service, Kenya. It was the Applicant's case that the vetting process which resulted in his termination was conducted in a manner that violated his constitutional rights to fair hearing and fair administrative action. He asserted that he was not allowed to call witnesses before the vetting committee and neither was he afforded sufficient time to prepare his defense. That he did not get sufficient particulars of the accusations against him to enable him prepare his defense.

2. The Respondents did not file their responses to the cause. As a result, it proceeded as undefended. From the record, although the Petitioner had initially been required to give oral testimony in support of his case, he did not attend court on 26th June 2019, the hearing date. Consequently, his lawyers opted to rely on the pleadings and documents as filed and sought to file written submissions. The court allowed the application to file the submissions but within seven (7) days from 26th June 2019. Meanwhile, it set down the matter for judgment on 1st November 2019. I note that the seven (7) days granted by the court to file submissions lapsed around 3rd of July 2019.

3. On 11th November 2019, the record shows that the court delivered its judgment as scheduled. In the judgment, the court makes mention of the fact that the Petitioner did not file written submissions as directed. And that there were no submissions on the court record at the time of writing the judgment in late July 2019. In the court's judgment, the Petition was dismissed for a number of reasons all of which pointed to insufficiency of evidence to support the Petitioner's claim.

4. The Petitioner has now filed the current application seeking to review and set aside the court's judgment. In the application, the Petitioner argues that there is an error and or mistake on the face of the record which should allow for review. He also asserts that there is new evidence which he was not in possession of at the time the decision was rendered and which he now wishes to be considered by the court.

5. The 2nd Respondent, who never entered appearance in the cause, has now filed grounds opposing the application for review. The grounds are dated 1st February 2022. I must say that it is difficult to comprehend how a party who has not formally entered appearance in a matter can seek audience in the cause without first filing appearance. I will therefore not say anything in respect of the grounds of opposition filed save to the extent that the legal issue raised in relation to articles 246 and 253 of the Constitution is perhaps germane. The 1st Respondent being an independent constitutional organ and the issues raised in the Petition being related to the exercise of the 1st Respondent's constitutional mandate, it was not proper for the Petitioner to have dragged the 2nd Respondent into the cause purportedly sued on behalf of the 1st Respondent.

6. I will begin to examine the application for review from the point of view of the provisions of law under which it has been filed. This is a constitutional Petition filed under the auspices of the Employment and Labour Relations Court Act and the rules there-under as read with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Of course I am aware that all these pieces of legislation discourage the court from clutching onto undue technicalities at the expense of substantive justice. This guideline has been underscored by no less than the court itself when in ***Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460,*** the Learned Judge of the High Court said thus: -

> ***"…Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it……. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue…."***

7. *However, we must at the same time not throw out through the window these rules as if they count for nothing. Indeed and as was observed by Kiage JA in*, ***Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR***, rules of procedure play a critical role in the process of delivery of justice and it cannot possibly be that the entry of article 159 of the Constitution and other statutory provisions encouraging courts not to sacrifice substantive justice on the altar of technicalities can have been intended to overthrow the place of procedural rules in our justice system.

8. The current application is expressed to be filed pursuant to the provisions of Order 45 rule 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the law. Yet, section 16 of the Employment and Labour Relations Court Act and rule 33 of the Employment and Labour Relations Court (Procure) Rules provide the mechanism for moving this court for review.

9. Further, as this is a constitutional Petition governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (CKPP rules) as dictated by rule7 (1) of the Employment and Labour Relations Court (Procure) Rules, one would imagine that at the very least, the Applicant would consider invoking rule 3(8) of the CKPP rules in filing the current motion. Surprisingly, the Applicant ignores all these provisions of law and instead elects to move the court under inapplicable sections of the Civil Procedure Rules.

10. I have previously expressed my doubts about the wholesale applicability of the Civil Procedure Act and the rules there-under to employment disputes in view of the fact that this court has its own rules of procedure (see ***Vincent Mwatsuma Nguma & 5 others v Kilifi Mariakani Water & Sewerage Co Ltd (KIMAWASCO) [2021] eKLR***). However, as the Applicant has asked the court to consider all other enabling provisions of the law, I will say no more on this issue in relation to the current application.

11. As mentioned above, one of the grounds in support of the application is that there is a mistake or error on the face of the record. I suppose that the mistake or error that the Applicant refers to is the fact that the court observed that the Applicant had not filed submissions when in fact he had. As a consequence, his submissions were not considered by the court in its decision.

12. I have considered this ground. It is true that the court mentions that at the time of writing its judgment, there were no submissions on record. Yet, the Applicant appears to have lodged his submissions on 5th of July 2019. What I notice however is that the submissions were filed outside the time given by the court. This may as well explain why they did not make their way to the court file. I believe that by the time the Applicant presented his submissions on 5th July 2019, the court file was already with the learned Judge for purposes of judgment writing.

13. I also note that the submissions on record do not have an accompanying original filing receipt. Neither do they bear the assessment stamp for the requisite court filing fees. This is unlike the other documents on record such as the Petition and the application dated 18th August 2020 which bear a stamp showing: the name and signature of the officer assessing the court fees to be paid on the document; the amount of court fees assessed on the document; and the date the document was assessed for court fees. This leaves me with the impression that the assessed original copy of submissions never found its way onto the court record. Perhaps the Petitioner's advocates withheld them upon realizing that the court file was already out of the registry and may have placed the duplicate copy on record afterwards. This thinking is informed by the Petitioner's advocate's own indication in the Certificate of Urgency filed on 6th October 2020 when he accuses the court registry of having failed to place his submissions in the court file. Otherwise, I honestly cannot comprehend how the learned Judge would have observed that he did not have the Petitioner's submissions at the time of writing his judgment if they indeed were already on record.

14. But even if I were to find that there is an error on record in respect of the learned Judge's observations in respect of the Applicant's submissions, I must be satisfied that the error materially affected the outcome of the case. I have looked at the court's decision. In his judgment, the learned Judge dismissed the Petition because it was not supported by documentary proof: of the fact of employment of the

Petitioner by the 1st Respondent; of the proceedings of the vetting committee that terminated the Petitioner; and of the impugned M-pesa records. The court also held that the Petitioner did not disclose the names of the witnesses the Petitioner says he was not allowed to call during the vetting and the nature of their evidence. The court also lamented that the Petitioner did not provide details of the rules that were allegedly flouted by the Board that vetted and dismissed the Petitioner.

15. To my mind, the court was simply saying that the Petitioner's case was not sufficiently supported by evidence that would enable the court rule in favour of the Petitioner. In my view, this scarcity of material evidence would not have been remedied through written submissions by the Petitioner. He simply failed to avail adequate evidence in support of his case and the absence of submissions would not have changed this critical factor. Therefore, whether there was an error in respect of non-recognition of the submissions filed by the Petitioner as alluded to in the application would in my view have made no material difference in the court's ultimate verdict as the submissions would not have served to introduce the evidence that the court said was lacking. I will therefore decline to grant the application for review on the ground of error or mistake on the face of the record.

16. The second ground that the Applicant relies on to urge for review is that he has come across material evidence that he was not able to procure during the trial even after the exercise of due diligence. The Applicant now seeks to introduce the evidence that the learned Judge observed had not been furnished at the time of hearing the Petition.

17. The Applicant says that this evidence was under the control of the 1st Respondent. I understand his affidavit to indicate that the records containing the evidence were somewhere in a drawer in the desk that the Applicant was using while in service and that he was initially unable to access them and only managed to do so after the case had been heard.

18. It is noteworthy that before the Petition was heard, the Applicant never brought to the court's attention that there were documents that were critical to his case that he left behind at his work station as he was terminated and which the 1st Respondent had withheld. There was no application to the court to have this evidence procured before the Petition was heard. Further, it is unclear how and when the Applicant subsequently accessed the documents that he alleges the 1st Respondent had withheld and declined to permit the Applicant to access.

19. The way I understand it, an application for review on this ground presupposes discovery of a new and important matters or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made. The matter must be: -

> ***a) New and important;***
>
> ***b) It must not have been within the knowledge of the applicant at the time the cause was heard and determined;***
>
> ***c) Or if he knew of it, the applicant must have been unable to procure the evidence even after the exercise of due diligence.***

20. Is the Applicant in this position in relation to the records he now seeks to introduce through this application for review? In my view he is not. He was aware of the existence of the records he was required to produce in support of his case. He was aware, if at all, where they were. He did not exercise due diligence to procure their release to him through an application to the court. The existence of these records was within the knowledge of the applicant and so he cannot assert that he made a discovery about them after his case had been heard. In a nutshell, I am not convinced that the applicant meets the threshold for applying for review on the foregoing ground.

21. **Finally,** ***under rule 33 of the ELRC rules,*** **an application for review must be lodged** within reasonable time. What is meant by reasonable time is not elaborated under the rules. However, as was indicated in ***Jaber Mohsen Ali & Another vs. Priscillah Boit & Another E&L No. 200 of 2012[2014] eKLR,*** what amounts to unreasonable delay is a matter of fact that can only be construed from the circumstances of every individual case. In discussing this factor, the court observed as follows:-

> ***'The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.'***

22. I understand this to mean that absent any constraining factors, an applicant seeking review of a court's decision must move the court with promptness. And where there is delay in applying, such delay must be appropriately accounted for in order for the court to reach the conclusion that the circumstances occasioning the delay are not such as to render it unreasonable. In other words, failure to account for apparent delay in filing an application for review would be fatal to such application.

23. This point is made in ***Judiciary of Kenya v Three Star Contractors Ltd [2020] eKLR*** *when the court observed as follows: -*

> ***"The instant motion was filed on 2nd November 2020. In other words the Respondent/Applicant took about 3 years and 8 months from the date of judgment to file the instant motion. I have carefully perused the supporting affidavit sworn by Mr. Ashoya Biko and it is clear that there is no single paragraph the deponent offered to explain why it took the Respondent/ Applicant more than three years to file an application for review. The record shows the advocates from both sides were present when this court delivered its judgment on 31st March 2017.***

In the absence of any explanation for the delay for 3 years 8 months, I am convinced that the instant motion was filed after unreasonable delay hence it should not be entertained.''

24. In the instant case, the decision of the court that is sought to be reviewed was rendered on 1st November 2019 in the presence of the Petitioner/Applicant. The application for review was filed on 1st September 2020 about ten (10) months down the line. Yet, in the affidavit in support of the application, the Applicant does not explain the reason for the delay in filing the application. Absent this explanation, I find that the application was filed after unreasonable delay.

25. For the reasons I have alluded to above, I find that the current application is unmerited. Accordingly, I dismiss it but without an order as to costs as the matter was for all purposes and intents undefended.

DATED, SIGNED AND DELIVERED ON THE 24TH DAY OF FEBRUARY, 2022

B. O. M. MANANI

JUDGE

In the presence of:

No appearance for the Claimant

No appearance for the Respondent

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE