



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E083 OF 2020

IN THE MATTER OF DENIAL OF RIGHTS, VIOLATION AND INFRINGEMENT

OF ARTICLES 1, 22, 23, 28, 41, 47, 48, 50 & 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 3, 4 & 12 OF FAIR ADMINISTRATIVE

ACTIONS ACT, NO. 4 OF 2015

AND

IN THE MATTER OF THE OFFICE OF THE DIRECTOR OF PUBLIC

PROSECUTIONS ACT

AND

IN THE MATTER OF RULES 7 AND 17 OF THE EMPLOYMENT AND

LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016

AND

IN THE MATTER OF RULES 3(4), 4, 11, 13,19 AND 23 OF THE CONSTITUTION

OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF GUIDELINES ON THE BOND FOR TRAINING PUBLIC

SERVANTS, 2018

AND

IN THE MATTER OF THE ODPP HUMAN RESOURCE MANUAL, 2013

JAMES MURIITHI NJOGU.....PETITIONER

VERSUS

THE OFFICE OF THE DIRECTOR OF PUBLIC

RULING

1. What is before me for determination is the Respondent's Notice of Motion application dated 16th July 2021 expressed to be brought under Articles 1, 2, 47, 48, 50, 157 and 159 of the Constitution of Kenya, 2010, as well as Sections 1A, 1B and 3 of the Civil Procedure Act. In it, the Respondent seeks various orders:-

1. *Spent*

2. THAT this Honourable Court be pleased to set aside its orders issued on 14th July 2021 allowing the matter to proceed for formal proof hearing.

3. THAT the Honourable Court does set aside its proceedings of the 14th of July 2021 and allow for the Applicant to defend its position in the issues raised in the Petition.

4. THAT this Honourable Court be pleased to reinstate this suit to be heard on its merits *inter-partes* and the Applicant's Replying Affidavit dated 13th July 2021, duly filed and served on even date be considered as part of the court's proceedings.

5. THAT the costs of this Application be provided for.

2. The application is supported by grounds on the face of it as well as the affidavit of Berryl Marindah State Counsel. She deponed that there will be no prejudice to the Petitioner/Respondent if the matter is heard *inter parties*. She deponed that when the matter came up before the Deputy Registrar of the Court it was directed that it appears before the Honourable Judge for further directions on the 21st April 2021. The Petitioner/Respondent was to issue a Mention Notice but they failed to do so and having not been served with a notice, the Respondent/Applicant were not aware that indeed the matter came up on 21st April 2021 so it failed to attend. The Court made orders that the matter does proceed for formal proof hearing as it was undefended on the 14th July 2021. She deponed that the Respondent/Applicant was served with the hearing notice for the 14th July 2021, prepared the Replying Affidavit to the Petition and filed the same via the e filing platform on the 13th July 2021 and served the Replying Affidavit upon the Petitioner vide his advocate's official email address and copied the same to the Petitioner's email that he had shared with the Respondent/Applicant on that day. She deponed that by the 14th July 2021, the Petitioner/Respondent had been served with the Response and was well aware of the Respondent/Applicant's intention to come on record but failed to notify the Honourable Court. She deposed that unfortunately on the 14th July 2021, she was not able to log in when the matter was called out due to technological hitches and the matter proceeded as if it were undefended. She deponed that the record will show that on 14th July 2021 she only managed to enter appearance in ELRC Petition No. 003 of 2021, Wilkister Ojienda versus The ODPP but was however online the entire period despite the technical hitches. She deponed that she immediately followed up with the Court Assistant on the directions given and realized that the matter had been fixed for submissions on the 22nd July 2021 and the hearing had proceeded undefended. She deponed that the Applicant has been vigilant and remains vigilant in presenting their case as there lies a lot of untruths in the petition that will greatly prejudice the Applicant if the matter is not heard *inter-partes*. She deponed that any perceived delay to put in a response and come on record by the Respondent/Applicant has not been intentional and that a reasonable explanation exists for the same and that the Court should allow this matter to proceed to full *inter-partes* hearing. She deponed that the Respondent/Applicant is ready to comply with the Court's directions as the matter raises serious triable issues and it is only upon the final disposition of the suit *inter-partes* that justice would be served. The Respondent/Applicant thus prays for a chance for a fair hearing and the Replying Affidavit dated 13th July 2021 be deemed to be duly filed and part of the Court's proceedings. The Respondent/Applicant sought the vacation and setting aside of the orders directing that the matter proceeds as undefended and permits the Respondent/Applicant to be heard.

3. The Petitioner/Respondent is opposed to the motion and filed an affidavit wherein he deposed that the process herein has always been served, received and stamped by the Respondent/Applicant as can be shown by the annexures to his replying affidavit. He deponed that the Respondent/Applicant blames the court, blames his counsel but does not see its fault and indolence. He deponed that cumulatively for six months the Respondent/Applicant never filed its response without any justifiable reason and such unexplained delay is inordinate and the Court should not exercise its discretion or permit such indolence. He deponed that the Counsel for the Respondent/Applicant is not truthful in response as after dealing with Petition No. 003 of 2021, she logged off and it is not true that there were any technical hitches. The deponent was of the view that this is a mere excuse which is now rampant a matter the Court ought to take judicial notice. He stated that he remained in the session with his advocate until the end as this file was the last. He deponed that an officer of the court who has taken deliberate and unfortunate path of deceit, complete falsehoods and attempt to mislead the court to obtain orders at all costs should not be entertained by the court and that there is no interest of justice in presenting a false and concerted version of events just to obtain favourable orders. He asserted that he was aggrieved by the conduct of the Respondent/Applicant whose officers wielding stale powers and intimidate everyone should remember that power is transient. He deponed that the Court has a duty to stop frivolous proceedings as sustained by the Respondent/Applicant and keep the integrity of the Court. He thus prayed the Court to dismiss the application, only for its untruthfulness and attempts to arm-twist and mislead court.

4. The motion was disposed of by way of written submissions. The Court has considered the motion, the affidavit in support, the affidavit in

opposition, the submissions (in as far as they related to the late filing) and come to the following determination. The issue at the fore is whether the Respondent should be permitted to have the opportunity to have its defence on record. I have noted that the judgment herein would have been in September were it not for the delay in getting the Respondent's defence on record being the replying affidavit it has filed. From a perspective of justice, there is no defeat or delay to justice if the replying affidavit is considered as part of the Court record and because parties have already filed their final submissions it would serve justice if instead of this Ruling a final determination had been written. As the matter is one that does not require oral hearing the Court will allow the defence to be 'heard' through the Replying Affidavit. To that end the Court will make its final determination on 19th October 2021. Granted the motion was successful and granted the Respondent has not been charged any fees for filing there will be no order as to costs. Judgment on 19th October 2021.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER 2021

Nzioki wa Makau

JUDGE