



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION CAUSE NO. 115 OF 2018

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 ARTICLES 10;19 (2) 20(1)(2)(3) & (4) : 27(4);41(1) & (2): 165(3)
(b)246(1)(2)(3) & (4): 250(6) (7) & (8): 260 AND**

IN THE MATTER OF: THE NATION POLICE SERVICE ACT, LAWS OF KENYA

AND

**IN THE MATTER: UNCONSTITUTIONAL STOPPING OF THE SALARY AND BENEFITS OF A COMMISSIONER OF THE
NATIONAL POLICE SERVICE COMMISSION ON THE 10TH OF FEBRUARY, 2014**

BETWEEN

DR. MAJOR (RTD)SHADRACK MUTIA MUIU 1st CLAIMANT

AND

THE NATIONAL POLICE SERVICE COMMISSION1st RESPONDENT

THE SALARIES AND REMUNERATION COMMISSION.....2nd RESPONDENT

THE HON. ATTORNEY GENERAL3rd RESPONDENT

RULING

1. The application before me is the Respondent's Notice of Motion dated 21.6.2019. it is brought under Rules 13(5), 17(3), and 28 (1) f the ELRC (Procedure) Rules, Order 45 of the Civil Procedure Rules, Articles 41,43 (f), 47,50 and 53 (i) (b) of the Constitution and it seeks the following orders:

- (a) **That the application be certified as urgent and service be dispensed with in the first instance owing to the urgency of the matter.**
- (b) **The court be pleased to set aside ex-parte order issued on the 20th of June, 2019 by Hon. Justice Onesmus Makau**
- (c) **That the court be pleased to allow the Respondent to proceed by way of a defence hearing on the earliest date possible**
- (d) **That Respondents be allowed to call witnesses to testify**
- (e) **That each party bears its own costs.**

2. The application is supported by the Affidavits sworn by Beatrice Akuno, Paul Ojwang and George Okinda on 21.6.2019. The main ground upon which the application stands is that the suit was fixed for defence hearing on 20.6.2019 at 2.30 p.m. but the court mentioned it at 11.09 a.m. and closed the hearing without affording the respondents a chance to call their witnesses. In addition the applicants contend that the suit was not in the cause list of 20.6.2019 and as such there was nothing to show that the hearing of the petition had been shifted from 2.30 p.m. to 9.0 a.m.

3. The petitioner has vehemently opposed the application and contended that the respondents have never been ready to proceed with the

hearing; that it is not the first time the defence is making an application to reopen trial since the petitioner's case was closed on 15.5.2019; that the applicants witness statements and documents were filed on 18.6.2019 after the close of the petitioner's case and they were highly prejudicial; that the suit was not fixed for hearing at 2.30 p.m. but 9.00 a.m. on 20.6.2019; that the court record does not indicate that the suit was fixed for hearing at 2.30 pm; and finally, the respondent was given a chance to tender their defence but they squandered the chance.

4. The application was disposed of by written submissions.

Applicants' submissions

5. The applicants submitted that the court has wide discretion to set aside the impugned orders and re-open the suit for defence hearing. They relied on **Patel v East Africa Cargo Handling Services Ltd [1974] Shah v Mbogo [1967] EA 166** among other authorities but availed no copies to the court.

6. They urged that unless the order sought is granted, they will suffer unjust prejudice. They further urged that granting the orders sought will be in the interest of justice since the matter is in the public interest considering the amount of money at stake.

Petitioner's submissions

7. The petitioner submitted that this matter was listed in the cause list for 20.6.2019 which started at 9.00 a.m. She contended that the respondents would not have attended court at 11.30 a.m. had the matter been fixed for hearing at 2.30 p.m. He maintained that the respondents were given opportunity to present their defence but they squandered the same by failing to attend court.

8. He submitted that he is old, sickly and has been travelling from far to attend court but the defence has been engaging on delaying tactics. He urged the court to proceed to render its judgment because he has already filed his final submissions after the issues for determination.

Issues for determination

9. There is no dispute that on 20.6.2019 at 11.09 a.m. the court made an order declaring the defence case closed without calling witnesses and directed the parties to file submissions within 14 days. The issues for determination is whether the said order should be set aside and the defence witnesses heard.

10. A brief background is necessary in order to answer the said question fairly.

11. The petition was filed on 26.1.2018 and on 25.4.2019, the petitioner brought an application seeking court's directions that the suit be heard and concluded on priority basis because the petitioner was facing serious medical challenges and his salary and benefits had been withheld by the respondents. The court granted the said request and fixed the petition for hearing on 15.5.2019.

12. On 15.5.2019 the defence counsel went to school and sent her colleague to hold her brief. The petitioner testified and closed his case and the defence counsel asked for defence hearing to be adjourned to 10.6.2019 when the defence counsel on record would be back from school. However, the defence counsel and her witnesses failed to show up and the court declared the hearing closed and directed parties to file submissions within 14 days.

13. On 11.6.2019, M/s. Akuno filed application dated 11.6.2019 seeking setting aside of the proceedings of 10.6.2019 so as to allow the defence to call the witnesses. The application was fixed for hearing on 19.6.2019 when the parties compromised the application by allowing it by consent and fixing the suit for hearing on 20.6.2019. The parties agreed further to have the witness statement and documents filed by the defence on 18/6/2019 be deemed as properly on record.

14. On 20.6.2019, the claimant and his counsel attended court at 9.00 a.m. but the respondents and their counsel did not. The court fixed the matter for hearing at 11 a.m. the same day but again only the claimant and his counsel attended. At 11.09 a.m. the court declared the hearing closed once again and directed parties to file submission within 28 days.

15. On 21.6.2019, the respondents brought the instant application seeking for setting aside of the proceedings of 20/6/2019 on ground that the suit was for hearing at 2.00 p.m. but when they attended court at 11.30 a.m they found that the matter had proceeded at 11.09 a.m. and concluded. They kind of blame the court for proceeding with the matter at 11.09 a.m. instead of 2.30 p.m.

16. The question that begs answer is whether the court should grant the application in the circumstances. There is no dispute that the court has unfettered discretion to set aside its ex parte orders. (**See Patel vs East Africa Cargo**). However, there are principles of setting aside ex parte orders as enunciated in **Shah vs Mbogo [1967] EA 166** where the Court of Appeal held that:

“ . . . this discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to abstract or delay the cause of justice.”

17. **In Patel v East Africa Cargo Handling Services Ltd** the court held that:

“There is no limits or restrictions on the judge's discretion to set aside or vary an ex parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

18. The Petitioner argued that the application is a delaying tactic and he will be prejudiced by the reopening of the trial because he has already filed his submissions. He is also old and sickly and in urgent need of funds which have been withheld by the respondents.

19. However, I have considered the material presented by the 2 parties and I am satisfied that the failure by the respondent to attend court on 20.6.2019 at 9.00 a.m. was not a deliberate act intended to delay the cause of justice. It was a genuine mistake by counsel who misled her witness to believe that the hearing was at 2.30 p.m. when the court record did not say so. I have also considered the respondent's defence, the witness statements and documents filed and which were not objected to by the petitioner on 19/6/2019 and found that it raises triable issues. It is therefore in the interest of justice that the respondents be heard on their defence.

20. The prejudice cited by the petitioner can be compensated by costs. Consequently, I allow the application by setting aside the order closing the hearing and proceed to reopen the defence case for hearing. The hearing will be done on priority basis considering the order of the court dated 25.4.2019. The respondents will however pay to the petitioner throwaway costs of Kshs. 20000 before the next hearing.

Dated, signed and delivered in open court at Nairobi this 17th day of January, 2020.

ONESMUS MAKAU

JUDGE