



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
PETITION NO. 52 OF 2018

(Before Hon. Justice Mathews N. Nduma)

HON. ALFRED INDECHE.....PETITIONER

VERSUS

THE SPEAKER, COUNTY ASSEMBLY OF VIHIGA.....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF VIHIGA.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF VIHIGA.....3RD RESPONDENT

THE COUNTY SECRETARY, VIHIGA COUNTY.....4TH RESPONDENT

THE COUNTY SERVICE BOARD, VIHIGA COUNTY.....5TH RESPONDENT

THE GOVERNOR, VIHIGA COUNTY.....6TH RESPONDENT

RULING

1. Application dated 20th October 2018 and filed on 30th October 2018 prays for an order interalia to vacate and/or set aside its orders of 29th October 2018 allowing the petitioner's prayers as sought in the petition here and the petition be fixed for hearing on the merit.

2. The application is based on grounds set out on the face of the application to wit:

3. Judgment was entered on grounds that there was no appearance on record on behalf of 1st, 2nd and 3rd respondents. That the 1st, 2nd and 3rd respondents had already entered appearance in the matter. There is an error apparent on the face of the record. The respondent is still interested in having the petition heard on merit. There is no inordinate delay in bringing the application.

4. The application is further supported by an affidavit of Maxwell Sherrah Didi sworn on 29th October 2018 in which he deposes that he is an advocate on record on behalf of the 1st, 2nd and 3rd respondents and that on 18th September 2018, he had entered appearance on behalf of the said respondents. That judgment was entered erroneously on 29th October 2018 when matter was set for mention to confirm filing of submissions based on the error that no appearance had been filed on behalf of the respondents.

5. The deponent has attached a copy of notice of appointment of advocate dated 8th September 2018 bearing a court stamp dated 18th September 2018. The deponent has also attached draft submissions on behalf of the 1st, 2nd and 3rd respondents. The applicant prays the application be allowed with costs.

6. The petitioner filed a notice of preliminary objection against the application dated 30th October 2018 to wit:

“The application has been drawn and filed by an entity foreign to the court record, the application should be struck out with costs”

Determination

7. The application filed on 30th October 2018 is dated 29th October 2018 and is drawn and filed by Maxwell Sherrah Didi Advocate on behalf of the 1st, 2nd and 3rd respondents.

8. The said Advocate for the 1st, 2nd and 3rd respondents has attached an alleged notice of appointment of Advocate for the 1st, 2nd and 3rd respondents drawn and filed by Francis Otieno Rakewa, Principal Legal Counsel, Vihiga County Assembly. The alleged notice is dated 8th September 2018 and allegedly filed on 18th September 2018.

9. The court record does not bear the original version of the copy attached to the application. Mr. Maxwell Sherrah Didi, Senior Legal Counsel who drew and filed the application is from the same legal office of Vihiga County Assembly that purports to have filed a notice of appointment of Advocate on 18th September 2018.

10. It is indeed very strange that there is no record of the said filing in the court file. The petitioner/Respondent has not filed a replying affidavit to the application other than the preliminary objection.

11. Even though, the court does not have the original notice of appointment by the County Assembly, Legal office, this court gives the applicant the benefit of doubt because the said copy bears the official court stamp dated 18th September 2018.

12. The court entered ex parte judgment against the respondent on the belief that no appearance had been entered on behalf of the 1st, 2nd and 3rd respondent.

13. Article 159(2) (d) provides that:

“Justice shall be administered without undue regard to procedural technicalities”

14. Given that Counsel for the respondents have filed their draft submissions on the merits of the petition, the court is satisfied that the respondents have a genuine desire to defend the petition and the court is aware also of *Article 50 of the constitution* which provides:

“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

15. It is the finding of the court that it is in the interest of justice and fair play for the court to set aside the ex parte judgment entered by the court in favour of the petitioner/respondent against the respondent, on 29th October 2018. The application was filed without any inordinate delay and there was an apparent error by the court in that a notice of appointment of advocate on behalf of the 1st, 2nd and 3rd respondents had been filed though was missing from the court file.

16. In the final analysis, the ex parte judgment entered on 29th January 2018 is set aside. The petitioner to file final written submissions on the merits of the petition within 14 days and the respondents within 14 days of service. Costs in the cause.

17. Interim orders granted by Abuodha J. on 7th August 2018 are extended. There was however indication that the term of the petitioner was due to end in the month of April 2019. If the term has indeed lapsed, the substratum of the suit may be already spent and further proceedings would be in vain.

Ruling Dated, Signed and delivered at Nairobi this 30th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Nyamwea for the petitioner

Mr. Rakewa for Respondent

Chrispo – Court Clerk