



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

PETITION 153 OF 2018

JOSEPH KIPKEMBOI TANUL.....PETITIONER

-VERSUS-

CHIEF OF DEFENCE FORCES.....1ST RESPONDENT

KENYA DEFENCE FORCES COUNCIL.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Background

1. The Petitioner filed the Petition herein on 31st December 2018 alleging that his services were terminated by the Respondents unfairly, contrary to the principles of natural justice, and in contravention of his rights under Article 47 of the Constitution. In response to the Petition, the respondents filed Grounds of Opposition and Replying affidavit on 12th March 2019 denying the alleged unfair termination and constitutional violations and objected to the petition on grounds that the court lacked jurisdiction and the suit was *res judicata* with respect to the military summary trial proceedings of 16.2.2018.

2. The petitioner requested for the petition to be expedited because his normal retirement was around the corner and the court fixed it for directions on 28th March 2019. On the said day, the parties agreed to dispense with oral hearing and opted to dispose of the petition by filing written submissions. The court recorded the said consent and directed the petitioner to file and serve his written submissions within 14 days and the respondent to do the same within 14 days after service by the petitioner.

3. In a swift turn of events, the respondents drew the Notice of Motion dated 28.3.2019 and filed it on 29th March 2018 seeking the following orders:

a) THAT the Application herein be certified as urgent and service upon the Respondent/ Petitioner be dispensed with in the first instance.

b) THAT this Honourable Court be pleased to set aside its own orders of 28th March 2019, directing that the entire matter herein be disposed of by way of written submissions.

c) THAT the hearing of the Petition dated 28th December 2018 be dispensed with *viva voce*.

d) THAT the hearing of the Grounds of Opposition dated 12th March 2019 be disposed of by way of written submissions or in the alternative, the Applicant/Respondent be allowed to withdraw the said Grounds of Opposition and substitute the same with the Notice of Preliminary Objection herewith attached.

e) THAT should this court grant Order (d) above, the enclosed Notice of Preliminary Objection be deemed as properly filed before this Court.

f) THAT costs be in the cause.

4. The Application is supported by the Affidavit of the Major Emmanuel Makokha Wandera, a Staff Officer II Records Department at the Kenya Defence Forces Headquarters, and is premised on the following grounds:

a) That the Respondents object to the jurisdiction of this Court.

b) That the Respondents raised preliminary matters of law in their Grounds of Opposition dated 12th March 2019 that ought to be dealt with prior to the main suit.

c) That having perused the Respondent/Petitioner's précis of documents tendered in evidence before this Honourable court,

the Respondents opine that it would be in the best interest of justice that the main petition be disposed of *viva voce*.

d) That it is a fundamental right of the Applicant/Respondent to question its accusers hence it is necessary for this Court to review its orders of 28th March 2019 to dispose of with the entire suit by written submissions.

5. In his Supporting Affidavit Major Emmanuel Makokha Wandera averred that after the Court directed that the entire suit be disposed of by way of written submissions, it came to the attention of the State Counsel on record that the documents in support of the Petition are classified hence should not form part of the record of this Court as they were unfairly obtained. He further averred that the suit is *res judicata*, and this court lacks jurisdiction to hear and grant the orders sought. He therefore contended that the court should determine the issue of jurisdiction and *res judicata* first and if the suit is sustained, the parties be allowed to tender *viva voce* evidence where they can exercise the right to cross examine the petitioner and have the offending documents expunged from the record.

6. The Petitioner opposed the application by filing Grounds of Opposition on 16th April 2019 contending that the application is baseless and premised on hollow beliefs; that the Respondents conceded to the disposal of the matter by written submissions but have not attached any evidence of any change of circumstances that warrants review of orders of this Court made on 28th March 2019; that the Respondents' Grounds of Opposition and Replying Affidavit both dated 12th March 2019 are analogous and they raise similar points of law and should be heard together to save judicial time; that the application for substitution of Grounds of Opposition with a Preliminary Objection is an afterthought coming too late and falling short of the threshold of a Preliminary objection as enunciated by **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 69**; and that this court is empowered by Rule 21 and 25 of the Employment and Labour Relations Court (Procedure) Rules 2016 to order for a matter to proceed without *viva voce* evidence.

Arguments

7. The application was heard on 30.4.2019, orally in the open court. Ms. Mjomba learned state counsel urged the case for the applicants. She submitted that the respondents have since discovered that the documents relied on by the Petitioner are confidential military documents and should therefore be struck off the court record. She further submitted that allowing the suit to proceed by oral testimonies will not prejudice the petitioner and urged the application be allowed.

8. Mr. Otieno learned counsel for the Petitioner opposed the application contending that granting order 2 of the Application will prejudice the Petitioner because it will delay the finalisation of the Petition and that will render the case nugatory because the Petitioner will have been retired. He argued that, in furtherance of the directions issued by the Court on 28.3.2019, the petitioner had already filed his written submissions. He relied on the decision in **Stephen Kimotho & 7 Others v Attorney General & Others [2006] eKLR**, filed in the Petitioner's Digest of Authorities, where the Court held that the burden is upon the Applicant to show that there is a new matter to warrant the hearing of the Petition by oral testimony.

9. He submitted that the Preliminary Objection should not be allowed to substitute the grounds of opposition observing that the issues in the intended Preliminary Objection should be argued under the Grounds of Opposition if they are similar as alleged.

10. In rebuttal, Ms. Mjomba argued that the Grounds of Opposition and the intended Preliminary Objection raise pure points of law which, if argued and allowed, there will be no need of proceeding with the main Petition. She admitted to having been served with submissions on that day but argued that this was after she had filed the application.

Analysis and determination

11. After careful consideration of the application, the supporting affidavit, grounds of opposition and the submissions by counsel, the issue for determination is whether the application has merits. The Respondents mainly seeks for setting aside of the consent order dated 28.3.2019 by which the parties agreed to dispose of the suit by written submissions, and reopen pleadings to enable them substitute their defence by a preliminary objection. The Respondents, further intend that, should the intended preliminary objection fail, they will apply for the classified documents filed in support of the petition to be expunged from the record and thereafter have the suit heard by oral testimonies so that they cross examine the petitioner.

12. The consent order recorded by the counsel for the two sides on 28.3.2019 in my view has the nature of contract between the parties to the suit and it can only be set aside if there exists any of the vitiating factors known in law namely mistake, coercion, undue influence or fraudulent misrepresentation. The burden of proof lies with the person seeking to set aside the agreement, in this case, the applicant. However, no effort has been made to prove that the impugned consent order was entered under any of the said vitiating factors. The only explanation for the foregoing being that the respondents entered the said consent order voluntarily after considering the pleadings and evaluating the implications of the consent order. The alternative to the foregoing view is that the respondents were negligent in their pleadings or on how to use them, and they have now come to their senses and are desperately trying to cover up that negligence through the present application.

13. The question that arises from a comparison between the intended PO and the defence (Grounds of Opposition and Replying Affidavit

filed on 12.3.2019) is whether there is anything new being introduced if the application was to be allowed. In my view, the answer is, no. The main points of law raised in the intended PO are that the court lacks jurisdiction and the suit is *res judicata*. The rest of the points raised are factual and cannot be argued in *limine*. The said points of law were at all material times to this suit known to the respondents and their counsel and they were indeed pleaded in their defence (Grounds of Opposition and Replying Affidavit filed on 12.3.2019).

14. In paragraph 2 and 6 of the said Grounds of Opposition, the respondents stated that the petition is *res judicata* and the court has no jurisdiction to entertain the petition. In addition to the foregoing the respondents gave notice under paragraph 18 of the Replying Affidavit filed on 12.3.2019 that:

“18 THAT... At the appropriate time the respondents shall take the appropriate action to have the petition struck out in its entirety.”

15. Likewise, the respondents were fully aware that the alleged classified documents were filed in court to support the petition and contended that they will apply for them to be expunged from the record. It is therefore not true for the applicants to allege herein that they have since the impugned consent orders become aware that the documents filed in support of the petition were classified military records. Paragraph 16 of the said Replying Affidavit stated that:

“16. THAT further to the above, the respondents shall at the appropriate time seek the expunging from the court record documents produced and relied upon by the petitioner, which otherwise

comprise confidential communications of the 1st respondent.”

16. There is no doubt that the respondents and their counsel knew of their right to object to the petition but chose to deal with the points of law raised once and for all by written submissions in main petition. It follows therefore that the application before the court is an afterthought on the part of the defence and it lacks merits since nothing new is being introduced. All what the defence is attempting to do is to, mischievously reorganize the same defence it has always had so that they can tender it piece meal in the aim of getting a desperate end by trial and error method. Regrettably, I decline to allow that in this honourable court. Although the court exists to do justice, those who seek its discretion must do so with clean hands and after acting with some degree of diligence.

17. In **James Kamangu Ndimu V Margaret Wanjiru Ndimu & Another [2007]eKLR** Kubo J held:

“More fundamentally, I am of the persuasion that the issue of jurisdiction is a pure point of law which can be raised at any time and that it is

better raised at the earliest possible opportunity.”

18. Even if the applicants were to insist that they would be okay with reopening of the hearing only, for purposes of cross examining the petitioner, such a request would demand that they show a good reason for the change of mind. In **Kenya Power & Lighting Company Limited v Kenya Electrical Trades and allied Workers Union [2017] eKLR** Mbaru, J held:

“22. With the consent order and the fact of the respondent filing their written submissions and the claimant failing to set out what substantive questions that can only be addressed by way of viva voce evidence I find no sufficient ground and or reasons to warrant the claimant to enjoy the benefit of having seen the respondent’s written submission and then fail to file submissions despite being allocated sufficient and ample time to do so and for the court to set aside the consent order and proceed to call for viva voce evidence. I find the submission that there is change of mind now given as the reason for seeking to set aside the consent order is not a sufficient reason to warrant the orders sought and to do so will not facilitate the meeting of the ends of justice.

23. Where indeed there are substantive questions that have since arisen, no amendments to the claim have been made or been requested to be made. To therefore go out to change the questions addressed herein since the suit was filed in 2011 so as to appraise the court of the new issues not in the main Memorandum would be to infringe on the respondent’s right to a fair hearing.”

19. As parting shot, I have to say that the application before the court for the substitution of one form of defence with another has not only marvelled me but it is extremely novel. It is not provided for under the Employment and Labour Relations Court (Procedure) Rules 2016, the Civil Procedure Rules 2010, the Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules 2013, or any other law.

Conclusion

20. I have found that the application dated 28.3.2019 lacks merits because the applicants were fully aware and indeed indicated their intention to raise preliminary objection to the petition and seek expunging of the alleged classified documents from the record at the appropriate time. That appropriate time was before the impugned consent order to close the hearing. Consequently, I dismiss the application with costs and direct the respondents comply with the consent directions to file written submissions.

Dated, Signed and Delivered in Open Court at Nairobi this 24th day of May 2019.

ONESMUS N. MAKAU

JUDGE