



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

JUDICIAL REVIEW NO. 1 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF ARTICLES 23(3)(F) AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE SECTION 4 & 5 OF THE CONTEMPT OF COURT ACT, NO. 46 OF 2016

AND

IN THE MATTER OF THE ENFORCEMENT OF THE DECREE ISSUED ON 18TH SEPTEMBER 2017 IN ELRC NO. 280 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

AND

COUNTY GOVERNMENT OF EMBU.....1ST RESPONDENT

THE GOVERNOR,

COUNTY GOVERNMENT OF EMBU.....2ND RESPONDENT

EMBU COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

EX PARTE: KANAKE JOSHUA MUGO

RULING

1. Before me is the Respondents’/Applicants’ notice of motion application dated 21st November 2018 seeking a review of the orders of the Court issued on 9th October 2018. The motion seeks the following prayers:-

1. Spent

2. Spent

3. THAT this court be pleased to review its orders of 9th October 2018 and to correct an error on the face of the record that the firm of Issa & Company Advocates are properly on record on behalf of the Respondents and leave be and is hereby granted to the Respondents to appoint the firm of Wesonga, Mutembei & Kigen Advocates to act for it in this matter.

4. THAT this Honourable Court be and is hereby pleased to review its Orders issued on 9th October 2018 by setting aside the said

Orders and allow the Respondents to be heard on the *ex parte* Applicant's notice of motion dated 17th July 2018 in the interest of justice.

5. THAT the costs of the application be provided for.

The Respondents/Applicants rely on the grounds on the face of the motion as well as the supporting affidavits of Johnson Nguu Nyaga and Jackson Mutinda sworn in support of the motion. The grounds on the face of the motion were to the effect that the court erred by failing to appreciate that even if the firm of Issa & Company Advocates acted for the Respondents in ELRC 280 of 2016, the Respondents were at liberty to appoint any firm including the new firm to act for it in this suit. The Applicant went further to argue that the court made a grave error by indicating that the firm of Issa & Company Advocates are properly on record for the Respondents and thus violated the constitutional rights of the Respondents to appoint an advocate of their own choice to represent it. The affidavits in support were on similar lines.

2. The application was opposed and the *ex parte* Applicant who was the Respondent in this application filed an affidavit in opposition of the motion dated 20th November 2018 and filed on 21st November 2018. He asserts that the Respondents were served through the firm Issa & Company Advocates on record for the Respondents as well as at the Respondents offices. The *ex parte* Applicant stated that the Respondent did not appoint a new firm until after entry of judgment and that in keeping with the requirements of the law ought to have moved court for leave to appoint a new firm of advocates since there was judgment. He thus urged the dismissal of the motion before court with costs.

3. The parties filed submissions in support of the motion as well as in opposition of the motion. The Respondents/Applicants submitted that the only role the firm of Issa & Company Advocates had in the matter was the issue of fees and that the firm of Wesonga, Mutembei & Kigen Advocates should be permitted to come on record. The Respondents/Applicants submitted that the leave application can be combined with any other prayers as sought in this motion. The Respondents/Applicants argued that they were not attempting to take over the matter that had been concluded.

4. The *ex parte* Applicant submitted that the Respondents were out to frustrate the conclusion of the matter by purporting to withdraw instructions from the firm of Issa & Company Advocates which had continued to appear in the matter while the firm of Wesonga, Mutembei & Kigen Advocates stated that it had been instructed to take over the matter. The *ex parte* Applicant submitted that the application by the Respondents/Applicants was merely vexatious intention to frustrate the course of justice and ought not be allowed. It cited the case of **Republic v Land Disputes Tribunal Court Central Division and Another ex parte Nzioka [2006] 1 EA 321** per Nyamu J (as he then was) cited with approval in **Republic v Sacco Societies Regulatory Authority ex parte Joseph Kiprono Maiyo & 3 Others [2017] eKLR** that leave should be granted if on the material before court that there is an arguable case for granting leave.

5. When the matter came for hearing, it was an action to enforce judgment of this court and the firm of Issa & Company Advocates appeared for the 1st and 2nd Respondents at the time. There was also the firm of Wesonga, Mutembei & Kigen Advocates who were then seeking to come on record. The court did not err when it proceeded to hear the application then before it seeking to enforce the judgment of the court in presence of the advocates who were representing the Respondents Issa & Company Advocates and who were present in court as the firm of Wesonga, Mutembei & Kigen Advocates had not come on record as its motion to come on record is the present one. The motion that is now seeking to review the orders granted on 9th October 2018 is therefore not tenable as where there is a valid judgment on record, leave must be sought and first obtained prior to the new advocate coming on record. There was no such effort by the Respondents as the record reveals. The court upon pronouncing itself on the enforcement of the judgment is now *functus officio* and the appropriate forum is the Court of Appeal as I cannot review the decision of Ongaya J. nor the decision on the enforcement of the judgment. The application is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 24th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar