



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**JUDICIAL REVIEW NO. 2 OF 2019**

**IN THE MATTER OF AN APPLICATION BY JOSEPH MWANGI MAINA**

**FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT 2007**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF LAIKIPIA.....RESPONDENT**

***EX PARTE JOSEPH MWANGI MAINA***

**RULING**

1. Before me is the Respondent/Applicant's notice of motion application dated 13<sup>th</sup> May 2019 seeking to set aside the orders and decree of

the court. The Respondent/Applicant asserts that the Petitioner's advocate did not serve it with the suit papers and that the matter proceeded *ex parte* to the detriment of the Respondent/Applicant. The Respondent/Applicant therefore seeks that the proceedings herein be set aside and the matter heard *de novo* and the Respondent/Applicant be granted unconditional leave to defend. The *ex parte* Applicant/Respondent is naturally opposed and filed a notice of preliminary objection asserting the motion was a non-starter and incurably defective. It was also asserted that the court is *functus officio* and therefore lacks jurisdiction to hear and determine the Respondent/Applicant's application.

2. The parties filed submissions in support and opposition of the application. The Respondent/Applicant submitted that it had laid a sufficient basis for the court to reopen the proceedings and grant the Respondent/Applicant unconditional leave to defend. The Respondent/Applicant cited the case of **Republic v Director of Survey & 2 Others ex parte Sayani Investments [2018] eKLR** on the rationale underlying the court's discretionary power to set aside. The Respondent/Applicant asserts that the court is not *functus officio* and can grant the orders sought by the Respondent/Applicant.

3. The *ex parte* Applicant/Respondent submitted that the motion was incompetent and an abuse of the process of the court. It was argued that the Advocates for the Respondent/Applicant could not have audience before the court as they had not sought leave prior to filing the judgment as the memorandum was filed after the judgment of the court. The *ex parte* Applicant/Respondent submitted that the court was *functus officio* having pronounced itself. The *ex parte* Applicant/Respondent cited the cases of **Supreme Court of Kenya Civil Application No. 11 of 2016 – Hon. Lady Justice Kalpana Rawal H. v Judicial Service Commission** and **Supreme Court of Kenya Petition No. 10 of 2013 – Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 Others**. The *ex parte* Applicant/Respondent submitted that under Section 8(3) and (5) of the Law Reform Act orders issued in judicial review proceedings are final subject only to an appeal at the Court of Appeal.

4. In the case the *ex parte* Applicant asserts that the court is *functus officio*. That cannot be further from the truth as the court can hear a review application or an application to set aside. I therefore agree with the Respondent/Applicant that the attack by the *ex parte* Applicant/Respondent was misplaced and misguided. In the submissions filed, the *ex parte* Applicant/Respondent cited cases that were neither produced nor expounded on. For instance, the case cited as an authority to reiterate the **Mukisa Biscuit** case being the **Supreme Court of Kenya Petition No. 10 of 2013 – Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 Others** was neither attached to the submissions or the list of authorities. What was actually attached was the decision of the Court of Appeal reported as **Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 Others [2013] eKLR** which had no bearing to the arguments being advanced. Be that as it may, the application is however bound to fail on account of the law. The court granted orders of *certiorari* which quashed the decision of the Respondent/Applicant. The only recourse that was open was an appeal but none was filed. The application by the Respondent/Applicant is therefore devoid of merit and is dismissed with costs to the *ex parte* Applicant.

It is so ordered.

**Dated and delivered at Nyeri this 23<sup>th</sup> day of July 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**