



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 80 OF 2018**

**IN THE MATTER OF ARTICLES 27,28,41,47,50(1),50(2)(B),50(2)(F),  
50(2)(J) AND 50(2)(K) OF THE CONSTITUTION OF KENYA, 2010  
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS**

**ACT, 2015**

**IN THE MATTER OF ILLEGAL, UNCONSTITUTIONAL AND UNFAIR  
TERMINATION OF EMPLOYMENT OF REUBEN NGILAKITONYI  
BY THE CENTRAL BANK OF KENYA**

**IN THE MATTER OF ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 27,28, 41,50(1),50(2)(b),50(2)(f),50(2)(j)  
AND 50(2)(k) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF VIOLATION OR THREATENED VIOLATION OF THE  
CONSTITUTION OF KENYA AND THE ENFORCEMENT AND PROTECTION  
OF THE CONSTITUTION OF KENYA, 2013**

***BETWEEN***

**REUBEN NGILA KITONYI.....PETITIONER**

***VERSUS***

**CENTRAL BANK OF KENYA.....RESPONDEN**

**RULING**

**INTRODUCTION**

1. The application before the court is the petitioner’s notice of motion dated 29/5/2019 seeking the following orders.

- a) That this application be certified as urgent.
- b) That this Honourable Court be pleased to review and set aside the orders made on 9th April 2019; and the Petition dated and filed

on 22nd August 2018 be deemed to be duly reinstated.

- c) That the applicant's written submissions dated 7th May 2019 and filed on 9th May 2019 be deemed to be properly on record for purposes of responding in opposition to the respondent's Notice of Preliminary Objection dated 5th December 2018.
- d) That the respondent's Notice of Preliminary Objection dated 5th December 2018 shall be heard and determined on merit.
- e) That the costs of this application be in the cause.

2. The application is brought under Rule 33(1)(d) and (3) of the Employment and Labour Relations Court Procedure Rules, Article 159(2)(d) of the Constitution of Kenya and the inherent powers of the Court. It is supported by the petitioners own affidavit sworn on 29/5/2019.

3. The application was opposed by the respondent vide the grounds of opposition filed on 10/6/2019 by which she prays for the court to dismiss the application with costs because it falls short of meeting the legal threshold for granting of the review sought. The application was disposed of by written submissions followed by brief highlights by counsel on 19/6/2019.

### **Factual background**

4. The petitioner/applicant was employed by the respondent from 1977 as a clerk to 26/9/1996 when he was dismissed for gross misconduct while serving as senior clerk. Thereafter he engaged several lawyers who kept on serving letters on the respondent alleging that his services were unlawfully terminated and demanding for reinstatement.

5. When the respondent refused to give in to the demands the petitioner filed Judicial Review Application No. 390 of 2015 in the High Court seeking order of Mandamus to compel the respondent to reinstate him to his employment but the same was dismissed. Thereafter he filed Judicial Review Application No. 501 of 2016 seeking a similar order of madamus but the High Court struck it out for lack of jurisdiction since the dispute related to employment.

6. As a result the petitioner brought the instant petition on 22/8/2018 seeking declaration his constitutional rights under the retired constitution were infringed by terminating his services without being heard and he was discriminated by being treated differently from others. He prayed for reinstatement to his employment without loss of benefits, payment of his retirement benefits and pension, General damages for constitutional violations, compensation for unfair termination, costs and interest.

7. The respondent filed Replying Affidavit to oppose the petition and in addition filed a Notice of Preliminary objection for determination by the Court *in limine* on grounds that the suit is time barred by dint of section 90 of the Employment Act; that the alleged constitutional violations are meant to circumvent the statutory provision on Limitation of Actions; the suit is incompetent, scandalous, vexatious, frivolous and an abuse of the court's process; and that the suit should be dismissed in furtherance of the overriding objective of timely disposal of proceedings in Article 159(2) and the Employment Act at section 3.

8. On 6/3/2019 counsel for two parties agreed to dispose the preliminary objection by written submissions and the court granted each party 14 days to do so starting with the respondent. The respondent filed and served her submissions on 19/3/2019, but the petitioner never filed his' within the ordered time or at least by 9/4/2019 when the matter came up for highlighting of the submissions. On the said date, the petitioner's counsel sent Mr Malinzi Advocate to hold his brief and seek 14 days leave to file petitioner's written submissions.

9. The respondents counsel did not object and the court gave the leave of 14 days on condition that should the petitioner default to comply within the 14 days period, the preliminary objection shall stand allowed for being unopposed. The petitioner defaulted to comply with the leave directions and the axe fell on him automatically. He nevertheless filed his submissions to oppose the preliminary objection on 8/5/2019, about 2 weeks out of time.

10. On 20/5/2019 when the matter was scheduled for highlighting of the submissions, the respondents counsel drew the attention of the court that the preliminary objection had been disposed of automatically after the petitioner failed to comply with the directions of the court on 9/4/2019. The petitioners counsel contended that he had filed his submissions and the preliminary objection should be heard on merit. The court agreed with the respondents' counsel that in view of the directions given on 9/4/2019, the preliminary objection had already been disposed and the petition stood struck out by dint of the said directions.

11. The main issue for determination herein is whether the petitioner's application has met the threshold for granting the review order sought.

### **Applicant's case**

12. The ground upon which the application stands is that the counsel who held brief for the petitioner's counsel on 9/4/2019 gave in correct information that the court had directed the petitioner to file submissions to the preliminary objection on or before 20/5/2019 failing which the preliminary objection shall stand allowed for being unopposed. He admitted that he never filed his submissions within the 14 days granted by the court on 9/4/2019.

13. In his submissions, the applicant contended that he has demonstrated sufficient reasons as envisaged under Rule 33(1)(d) of the ELRC Procedure Rules to warrant granting of the review order sought. That he has shown that the failure to file the submissions on time was due to a mistake on the part of his counsel and that should not be visited on him. He relied on **Silasa Mugendi Ngugi suing at the legal representative of the estate of Lucy Njoki Kithaka Vs. Nairobi Women's Hospital [2015]eKLR.**

14. He further submitted that the respondent will not suffer any prejudice if the review order is granted, and contended that even if any prejudice was likely, an award of costs would sufficiently remedy the same. He further submitted that the court has an unfettered discretion when it comes to review of its orders. He relied on **Shah Vs Mbogo & Another [1966] EA 116 and Patel Vs EA Cargo Handling Services Limited [1974] EA 75** to support the foregoing contention and the fact that the purpose of the court is to do justice. He relied on various other precedents to urge that the court should not determine the main suit before hearing or on a mention day unless by consent of the parties.

15. He concluded by submitting that failure to file submissions within the required time is not a strong basis to condemn a litigant before being heard. In his view, it would be a travesty of justice for this court to lock out the petitioner from having his case heard on the merits due to a procedural omission and without demonstrable prejudice being shown to have been suffered or likely to be suffered by the respondent if the application is allowed.

#### **Respondent's case**

16. The respondent opposed the application on grounds that it is incompetent, incurably defective and bad in law; that it lacks particulars of any sufficient reason for seeking review; that the application does not fall within the four corners of the ELRC Procedure Rules; that what the applicant considers to constitute "any other sufficient reason" under the Rules as the ground for review does not meet the legal muster as they are not analogous or *ejus dem generis*; to mistake or error on the face of the order or discovery of new evidence; that the reason why the preliminary objection was allowed was the failure by the applicant to comply with court order dated 9/4/2019 and as such the petitioner should not hide under the alleged "mistake of the counsel;" that the petitioner is a perennial litigator who does not accept an end to litigation; and that it is meet and in furtherance of the overriding objectives of Article 159(2) of the constitution and section 3 of the ELRC Act and the Rules thereunder and for timely disposal of the proceedings that this court peremptorily dismiss the application with costs as an abuse of the process of the court.

17. In her submissions, the respondent contended that the application for review has not met the threshold of the law as set out under Rule 33 of the ELRC Procedure Rules which bears semblance to order 45 Rule 1 of the Civil Procedure Rules. She submitted that 'any other sufficient reason' as a ground for review under the ELRC Procedure Rules must be a reason analogous or *ejusdem generis* to mistake or error on the face of the record or discovery of a new evidence. He relied on **Stephen Gathua Kimani Vs Nancy Wanjira Waruingi t/a Providence Auctioneers [2016]eKLR** to fortify the foregoing submission.

18. She further submitted that on the face of the application and the affidavit in support, the applicant has not demonstrated any sufficient reason to warrant the review sought. She observed that the applicant was aware that on 9/4/2019, he was directed by the court to file and serve submissions within 14 days but his counsel misinterpreted it to mean that the court directed him to file the submissions on or before 20/5/2019.

19. As regards the petitioner's invocation of Article 159(2)(d) of the constitution, the respondent submitted that the same is not meant to be a panacea for all ills including total inaction and subversion of the court process. He contended that the conduct by the petitioner does not deserve any discretion of the court in his favour. He relied on **Nicholas Kiptoo Arap Korrir Salat Vs IEBC & 6 others [2013]eKLR** where the Supreme Court of Kenya held that Article 159 of the Constitution did not overthrow or destroy the rules of procedure or provide cover to parties who exhibit scant respect for rules and time lines.

20. Finally, the respondent submitted that the petitioner was a perennial litigator who instituted vexatious proceedings in High Court JR Appl. No. 390 of 2015 and 501 of 2016 which sought similar orders as in the instant petition. She contended that the petitioner is zealous to keep her perennially in the courts over frivolous claim and applications which end up being dismissed with costs. She therefore prayed for the instant application to be dismissed with costs.

#### **Analysis and determination**

21. The legal threshold for the court to review its own decision is set out under order 33(1) of the ELRC Procedure Rules which provides as follow:

***"A person who is aggrieved by a decree or order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time apply for a review of the judgment or ruling –***

***a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or order made;***

***b) On account of some mistake or error apparent on the face of the record;***

***c) If the judgment or ruling requires clarification; or***

***d) For any other sufficient reason."***

22. In the instant application, the reason cited for review is:

“any other sufficient reasons” under Rule 33(1)(d) of the ELRC

Procedure Rules. The reason given is that a counsel (Mr Malinzi) who held brief for the petitioners counsel (Mr Wandati) on 9/4/2019 when the court made the impugned directions, did not give the latter counsel accurate information about the directions given by the court regarding the filing of submissions to the respondent’s preliminary objection. He further contends that his counsel misinterpreted the information given by Mr. Malinzi Advocate to mean that he could file the submissions on or before 20/5/2019. He contended that the mistake by his counsel should not be meted on him, an innocent litigant. He therefore believed that the mistake of counsel is a sufficient reason for court to review the impugned order which was a matter of procedural lapse. He further believed that such procedural lapse is not a strong ground for the court to deny him audience in his petition without any proven prejudice or likely prejudice to the respondent which cannot be remedied by costs.

23. The respondents contended that the application has not met the legal threshold for grant of review. In her view the petitioner was given opportunity to file submissions but failed. That the petitioner was aware of the directions given by the court and the consequences of default to comply. She has further described the petitioner as a perennial litigant who wants to keep her in courts for vexatious claims which are always dismissed without costs.

24. I have carefully considered the material presented to the court by both parties. There is no dispute that the court has unfettered discretion to review its own decisions to meet the ends of justice. In **Shah Vs. Mbogo and another [1966] EA 166, Harris J.** set out the guiding principle on a Judge’s discretion in setting aside a judgment.

*“I have carefully considered the principles governing the exercise of the courts’ discretion to set aside a judgment obtained exparte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”*

25. In this case, the applicant annexed as exhibit, screenshots of the sms correspondences between him and Mr Malinzi, the Adocate who held his brief on 9/4/2019. At 9.33 a.m. Mr Wandati asked Mr Malinzi whether the court had started to which Mr Malinzi responded at 9.49 a.m.

*“Yes. Mention on 20 of May, 2019. Claimant granted 14 days to file written submissions on or before the date. If no submissions are filed the application will stand to be allowed.”*

26. The foregoing information was in accurate and contrary to the directions made by the court on the said date. The court’s direction was that the petitioner was to file submissions within 14 days and in default, the preliminary objection would stand allowed for being unopposed. Accordingly, the court finds that the reason why the petitioner failed to comply with the court’s directions to file submissions within 14 days from 9/4/2019 was because his counsel was not given accurate information. Consequently the court finds that the applicant has demonstrated a sufficient reason for this court to exercise discretion in his favour as envisaged under Rule 33(1)(d) of the ELRC Procedure Rules. The said provision extends the court’s discretion to review its decisions on the basis of any other sufficient reason beyond reasons envisaged in Rule 33(1)(a)(b) an (c) aforesaid.

27. Although the respondent contended that “any other sufficient reason” under Rule 33(1)(d) must be analogous (*ejusdem generis*) the reasons for review set out under Rule 33(1)(a)(b) and (c), the guiding principle of exercising judicial discretion set by **Shah Vs. Mbogo and Another**, aforesaid, must be considered as opposed to limiting the scope of the reasons to consider. The court should consider whether the impugned decision was due to the applicant’s willful neglect or inadvertence or excusable mistake or error, and whether the failure to exercise the discretion, the applicant will suffer injustice or hardship. If the court finds that like in this case, that the impugned decision was not due to willful neglect on the part of the applicant, the court must always be alert that its primary duty is to do justice. The second issue the court must be alert to is whether granting the review order, will occasion prejudice on the respondent which cannot be remedied by costs. In this case, the court is of the view that the respondent will be sufficiently compensated by way of throw away costs.

### **Conclusion and disposition**

28. I have found that the applicant has met the legal threshold for review of the impugned order as required by Rule 33(1)(d) of the ELRC Procedure Rules, namely, a sufficient reason not founded on willful neglect on his part. Finally I have found that throw away costs will sufficiently compensate the respondent in the circumstances. Consequently, I allow the application as prayed but the applicant is condemned to pay to the respondent throw away costs of Kshs.10,000/= within 14 days of the date hereof.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of September 2019.**

**ONESMUS N. MAKAU**

**JUDGE**