



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO.7 OF 2016

PETER WANGAI.....APPLICANT

VERSUS

EGERTON UNIVERSITY.....RESPONDENT

RULING

The applicant, Peter Wangai by application and Notice of Motion dated 17th July, 2019 and filed under the provisions of Order 40 Rule 1 & 2, Order 50 Rule 15 of the Civil Procedure Rules and section 1A, 1B & 3A of the Civil Procedure Act and seeking for the court to vary and or discharge the orders made on 25th November, 2016 to the extent that the applicant pay costs to the respondent.

The application is supported by the applicant's affidavit and on the grounds that the respondent has filed a bill of costs due for taxation on 23rd July, 2019 and seeking the payment of Ksh.648, 537.20 following what the applicant filed on 15th July, 2016 challenging the dismissal of his employment by the respondent on 6th July, 2016 and seeking for judicial review orders against the respondent. The respondent in response to the matters filed a replying affidavit of one Janet Bii which contained defamatory matter of the applicant.

The applicant other grounds in support of his application are that the court delivered judgement on 25th November, 2016 with a finding that the procedure adopted by the applicant to challenge his dismissal from employment by the respondent was not appropriate and proceeded to strike out the judicial review proceedings with costs to the respondent. On this basis the applicant filed his memorandum of Claim on 18th May, 2017 being ELRC Cause No.224 of 2017 challenging dismissal from employment. Judgement was delivered on 24th January, 2019 and the court held that the allegations made against the claimant the applicant herein lacked evidence and termination of employment was contrary to section 43 and 45 of the Employment act, 2007 and there was reinstatement back to employment and payment of back wages.

The respondent has refused and or neglected to comply with the court orders issued in the judgement in **ELRC Cause No.244 of 2017** ad has resulted in taxing the bill of costs herein to frustrate the applicant in his quest for justice and thus seeking to have the orders for the payment of costs be varied and or be discharged.

The respondent in reply filed the Replying Affidavit of Janet Bii and who avers that as the Senior Legal Officer for the respondent has authority to respond herein being personally conversant with the proceedings herein.

Ms Bii also avers that the court has issued final orders on the substance of the proceedings herein and the only option for the applicant was to file an appeal and not commence review proceedings. The court as it stand if *functus officio* upon its judgement and final determination way back on 26th November, 2016. The award of costs was made conscious and deliberate exercise of discretion donated to the court by law and or discretion after hearing representations by both parties and to allow a review in this instance and after two years would amount to abuse of court process and defeat the ends of justice. The arguments advanced by the applicant and the subsequent decisions cannot apply to vary the orders on costs and the application should be dismissed with costs.

Both parties made oral arguments in court.

The applicant is seeking for the stay of taxation of the bill of costs and that the court be pleased to vary and or discharge the orders of 25th November, 2016 to the extent that he should pay costs to the respondent. Substantively the applicant is of the view that by the court delivering judgement and orders for the payment of costs herein, the matters had not gone into the merits as these were judicial review proceedings and subsequent to such orders he filed a claim challenging his dismissal from employment and the court has since ordered for his reinstatement and payment of back wages of which the respondent has failed to comply with.

The variation and discharge of court orders issued by this court is addressed under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. For the court to vary or discharge its orders, there must be a new matter which has come to the attention of the applicant and which was not within his knowledge by the time the subject order(s) was issued; there is discovery of new and important

matter; there is error apparent on the face of the record or that there is good cause to justify for a variation and or review of the orders.

These provisions in the Court Rules must be read with section 12 (4) with regard to the court awarding costs in the following terms;

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

It therefore becomes absolutely discretionary for the court to direct on the payment of costs to any party as the *court may consider just*. Each case must then be assessed on its own and on the merits as to why orders for costs must issue.

As correctly submitted, in the case of **Parliamentary Service Commission versus Martin Nyaga Wambora & others [2018] eKLR**, the Supreme Court while addressing the issue of a court discretion and whether this is subject of review relied on the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** and the findings that;

... This [discretionary powers] can be perceived by the use of the word “may” in crafting of the rule. This discretion is a very powerful tool which in our view should be exercised with abundant caution, care and fairness; it should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realized.

...This Court has the power ... where compelling reasons are given that the decision given was erroneous. However, as such a review will entail an interference with the exercise of a judge’s discretion; it is guided by stringent legal principles. ... This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, 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

Then going back to Rule 33 of the Court Rules, in this case is there a compelling reason(s) to allow for the variation of the orders of 25th November, 2016 directing the applicant to pay the respondents costs and is such compelling reason(s) arising from accident, inadvertence, excusable mistake or error or is there obstruction of justice?

The applicant has moved the court two years after the impugned orders of 25th November, 2016 and following what he considers finding in ELRC Cause No.244 of 2017 where the court made findings with regard to his summary dismissal and ordered for his reinstatement after he had tried to move the court herein through judicial review proceedings for orders of certiorari and for the quashing of the letter dated 6th July, 2016 by the respondent dismissing him from his employment.

In my humble view, the court herein confirmed the judicial review application on the merits and delivered judgement on 25th November, 2016. At paragraph 25 of the judgement there was a finding that the *procedure followed by the ex parte applicant in challenging his dismissal was not appropriate and the issue, therefore becomes one of the appropriate orders to make*. The court proceeded to address the various options available and one included the dismissal of the judicial review proceedings.

In these circumstances the Supreme Court, cited above in further analysis of how far the court should not interfere with discretion even at the appeal stage relied on the case **Mbogo and Another versus Shah [1968] EA 93** that

....[the court] should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice

.....

(ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

(iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

(iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

(v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

(vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and: ...

Accordingly, in this case this court finds no matter for the disturbance of the court discretion in awarding costs in a matter which was well reasoned and the applicant found to have commenced judicial proceedings against the respondent inappropriately and correctly advised to proceed in a different procedure and which he has since addressed and received redress. He cannot now turn after the fact and rely on such matter to stop the payment of due costs. Where the applicant was dissatisfied with the court’s order with regard to the payment of costs, reason demanded that he files an appeal and not wait for other matters filed with the court to urge his case on a variation of the orders on costs.

To move as the applicant has herein is not advancing justice.

Discretion is sacrosanct.

It is well settled that whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner.

As set out above, the court will not interfere with discretion of the court similarly placed and even where such opportunity arise unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion, and which is not the case here, the court will proceed with great caution and upon being satisfied of the inherent jurisdiction to review its decision in exceptional circumstances. This case and the applicant's Notice of Motion does not present as exceptional for the variation or discharge of the orders of 25th November, 2016 with regard to his payment of costs to the respondent.

Accordingly application is hereby declined. Each party shall bear own costs with regard to application dated 25th July, 2019.

Delivered at Nakuru this 17th day of October, 2019.

M. MBARU

JUDGE

In the presence of:

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