



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW 12 OF 2017

JUDY WANJIRU NGUGI.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. By a motion dated 24th July, 2017 the respondent sought an order that the court vacates or set aside the order made on 27th April, 2017 granting leave to the claimant to file a substantive motion application. The respondent further sought the dismissal of the Judicial Review application.
2. The application was based on the ground that the court on 27th April, 2017 granted the claimant leave to institute judicial review proceedings against the respondent within 21 days but failed to do so and that the failure to comply with the courts directions was a breach of order 52 rule 3(1) of the Civil Procedure Rules 2010.
3. Ms Rutto further submitted that almost three months after the orders were issued and after the claimant failed to file the motion the respondent moved the court to vacate and or set aside the orders made on 27th April, 2017. Counsel further submitted that it was a mandatory requirement of law for an applicant for Judicial Review to file the substantive motion within 21 days after leave has been granted. According to counsel, Order 53 is couched in mandatory terms and the period cannot be extended once time lapses. Counsel further submitted that the applicant had not cited a specific provision of law granting jurisdiction to extend time provided under Order 53 rule 3. In support, counsel relied on the case of **Gatimu Farmers Company Vs Geoffrey Kagiri Kimani & Others 2005 eKL**.
4. Ms Rutto further submitted that the court is bound to facilitate expeditious resolution of court matters and similarly parties to the dispute are also bound to participate in court proceedings and comply with court directions in furtherance of the principal objective of the ELRC Act.
5. Mr Omari for the claimant on his part submitted that on 27th april, 2017 the claimant moved the court to grant leave to file a substantive JR motion despite the fact that she filed concurrently with the application for leave. According to counsel, it was not in dispute that the substantive motion was already on record by the time the leave was sought and granted. The claimant's counsel therefore submitted that the motion be deemed to have been properly filed and at any rate no prejudice would be visited upon the respondent by virtue of premature filing of the substantive motion.
6. Under Article 159 of the Constitution, the court is guided by one of the principles thereunder that in exercise of judicial authority justice shall be administered without undue regard to procedural technicalities.
7. The applicant/claimant herein filed concurrently with the application for leave, the substantive motion. The bundle of documents was served on the respondent who filed a notice of appointment and a replying affidavit. An application for leave to file a judicial review application is usually ex-parte and once granted the applicant will file a substantive motion together with a statement a supporting affidavit. The ex-parte chamber summons once dealt with and leave granted becomes spent and there would be nothing to reply to by way of an affidavit. The respondent's replying affidavit sworn by Cicily Musyoki can only therefore be deemed to be a response to the substantive motion.
8. The apparent delay or omission to file the substantive motion could be attributed to the honest mistake or assumption that once the leave was granted the substantive motion filed concurrently with the application was deemed to be properly filed. Whereas the applicant did not apply for the deeming of the substantive motion as properly on record. It is a procedural technicality which the court can invoke article 159 (2) (d) to resolve. As pointed out by the applicant, no prejudice would be occasioned to the respondent if the substantive motion is deemed to have been properly filed.

9. The proper order to make in the matter would therefore seem to be that the motion herein is properly on record and that the orders made by the court on 27th April, 2017 shall apply accordingly.

10. The parties shall proceed to prepare and set the JR application for hearing on priority basis.

11. It is so ordered.

Dated at Nairobi this 21st day of September, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 21st day of September, 2018

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent.