REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 431 OF 2013

[Consolidated with Cause No.430 of 2013]

MAJOR GENERAL (RTD) ENOCH SASIA……..…… CLAIMANT

LIEUTENANT COLONEL (RTD) BARNABASRONO ……..…… CLAIMANT

VERSUS

ATTORNEY GENERAL……..…...1ST RESPONDENT

THE DEFENCE COUNCIL……...…....2ND RESPONDENT

CHIEF OF KENYA DEFENCE FORCES…….……..3RD RESPONDENT

RULING

Dr. Khaminwa Advocate, Senior Counsel

Assisted by Chelanga Advocate of Chelanga & Co. Advocates – for the Claimants

Ms C. Kassim, Litigation Counsel, for Attorney General – for the respondents

1. On 5th December 2014, the respondents filed application dated 4th December 2014 under the provisions of Rule 32 of the industrial Court (Procedure) Rules, Articles 50 and 159 of the Constitution. The respondents are seeking for orders;

1. Spent

2. Spent.

3. That the court be pleased to set aside and or review the judgement entered against the respondents/applicants herein on 18th November 2014

4. That the court be pleased to set aside and or review the orders issue don 18th November 2014;

5. The court be pleased to set aside orders of 6th October 2014 together with the proceedings hereof;

6. The court be pleased to allow the respondents/applicants cross examine the claimants''

witnesses and further be allowed to put their case forward for hearing.

7. That costs of this application be provided for.

2. The application is supported by the annexed affidavits of Mary Chege, Catherine Kassim and Lt. Col D.O. Odeny and on the grounds that the respondents have a strong defence with merit and triable issues. The matter proceed before court on 6th October 2014 without the presence of State Counsel as she was in another hearing before another court and upon the claimants giving evidence, counsel requested for time to study the evidence and pleadings on record to prepare for cross examination and court ordered parties to be present at 2pm to proceed with cross examination. Counsel proceeded to her office for lunch where she met Lt. Co. D.O. Odeny and on the way to court was caught in traffic only to arrive in court and find the court had directed parties to file written submissions as the claimant had closed their case.

3. Other grounds are that on 23rd October 2014 court mentioned the matter to confirm filing submissions. The respondents made application to recall the claimants for cross examination and was allocated time at 2.30pm but counsel was held up in another court and application was dismissed for non-attendance. An application for reinstatement was made but counsel was informed that the file was missing and it was not until 18th November 2014 when counsel while handling a different matter heard the judgement delivered. The respondents did not know of the judgement notice and case was not listed.

4. Other grounds are that the respondents will suffer great injustice if the judgement is not set aside because they are keen to defend its matter and they stand to lose a great deal if the claimants are not recalled and cross examined. In the interests of justice the application should be granted as failure to present the defence was not by design and is excusable.

5. The affidavit of Mary Chege support the affidavit and state that as counsel handing the matter for the respondents and was in conduct of the matter on 6th October when it came for hearing but was held up before another court and was later unable to attend court at 2pm as directed as she was held up in traffic and on 23rd October 2014 when the matter was to come for mention it was not listed and efforts to apply to recall the claimants for cross examination were not possible as that application was dismissed. Further that efforts to have the application reinstated were not possible as the file was missing from the registry and in the interests of justice, the respondents should be allowed to given their defence by the court setting aside the judgment and proceeding herein.

6. In the supporting affidavit of Catherine Kassim counsel in the Attorney General's chambers avers that on 13th November 2014, her colleague in conduct of the matter requested her to file application seeking to reinstate an earlier application dated 10th October 2014 which was dismissed for non-attendance. At the registry she was told the file was missing but on 18th November 2014 while attending court she heard the reading of the judgment herein and out of courtesy entered appearance for her colleague and informed the court that there was an application seeking to recall the claimants for cross examination. The matter was not listed for the day but judgement was delivered.

7. In the affidavit of Daniel Omondi Odeny and in support of the application herein he avers that he represents the 2nd and 3rd respondents and has followed up on the matter with the various counsels from the Attorney Generals Chambers and when application dated 10th October 2014 was filed to review orders herein he was aware that the orders sought were to request court to recall the claimants for cross examination. Counsel was held up in court and the court hearing the application was different and was called before the hour counsel had been adviced for hearing gat 12.00 hours. The matter was called and dismissed for nonattendance. Counsel mistake should not be allowed to visit suffering on the respondents as efforts to trace the file later were not fruitful until 18th November 2014 when another counsel heard the judgment read in court. It is only fair that the defence be presented by the recall of the claimants for cross examination as there are triable issue and a good defence herein.

8. In his Further Affidavit, Daniel Omondi Odeny avers that the claimant resigned and there was

approval by the Defence Council, terminal leave was granted and pension calculated and a lump sum paid to the claimants. Both claimants received their transport allowances and nothing is due in pension payments. The claimants retained their former ranks and no additional privileges are due other than accruing pension which they receive to date from the Pensions Department.

9. **In response**, the claimants in their Replying Affidavit sworn by Maj. Gen. (RTD.) Enoch Sasia as one of the claimants avers on his behalf and that of Lt. Col. Barnabas Rono that judgement herein was delivered on 18th November 2014 and the application herein does not outline any ground for review and ought to be dismissed. The application revolves around the conduct of counsel and the court having pronounced itself in judgement, where there are no grounds for review, the respondents' only option is appeal. There is nothing new or error in the judgment to warrant application for review and the application is only meant to embarrass administration of justice.

10. The claimant also avers that hearing date for 6th October 2014 was taken in court by consent but counsel or the respondents were absent from court. Upon appearance, counsel found the claimant giving evidence and was given time to come back in the afternoon for hearing but failed to attend and the respondents were absent. The claimants travel long distances from Eldoret to be in court on time and on the allocated date and the least counsel could have done is to seek another advocate to hold brief and state that she was held up in another court.

11. Upon hearing, parties were directed to file written submissions and mention on 23rd October 2014 to highlight submissions and to take judgment dates when the respondents were absent. The respondents have thus not been keen to have the matter heard and concluded. From the affidavits of the respondents, it is apparent that they were aware the matter was in court on 23rd October 2014 but failed to attend and when Ms Kassim appeared in court on 18th November 2014 and heard the judgment read, it took over one month to file this application. The delays are not explained and cannot be excused. The mistakes herein cannot be visited upon the court and its staff as they are the doing of the respondents who were absent from court at the dated hearing was scheduled.

12. Maj. Gen. (RTD.) Enoch Sasia also avers that the respondents were served with a mention notice for 18th November 2014 when the judgment was delivered. For the counsel to thus state that Ms Kassim appeared in court and made appearance courtesy of her colleague is surgery. Both parties have right to get copies of the judgment, but the respondents can have the same free of charge while the claimant have to pay for the service. The counsels herein are officers of the court with a duty to assist the court by giving correct information even when seeking the court to order as applied. The current application is brought in bad faith, meant to scuttle the progress so far made and should not be allowed and instead should be dismissed.

Submissions

13. The respondents in support of their application submitted that the court can exercise judicial discretion to set aside its own judgment on failure of attendance by party in court. Section 16 of the Industrial Court Act empowers the court to review its judgements and orders as held in **Pithon Maina versus Thuku Mugiria [1983] eKLR.** In this case the respondent's field their defence that has triable issues that should be heard on merit and by closing out this evidence; the court is denied such evidence.

14. The respondents also submit that the conduct of counsel should not be visited on the parties. Counsel failed to attend court for hearing on 6th October 2014 and was not in court on 23rd October 2014 as such dates were not brought to their attention. The right to fair trial in judicial proceedings will not be achieved as under Article 50 of the Constitution if the respondents are not heard due to mistake of counsel. The court has the discretion to set aside the *ex parte* judgement herein in default of appearance of counsel as this arose without the knowledge of the respondents. This is an excusable mistake of counsel that should not be allowed to deny the respondents a chance to submit their defence.

15. In response, the claimants submit that the respondent's application is an appeal disguised as a

review application. When the court delivered judgement on 18th November 2014 it became *factus officio* and cannot be invited to review it without good cause as this is meant to be an appeal. All court appearances herein were within the knowledge of the respondents. On 6th October 2014 the date was taken by consent; the mentions on 23rd October and 18th November 2014 were with due notice to the respondents and cannot then be found to say they were not aware. There is evidence of service that has not been disputed. In **Kenya union of Commercial Food and Allied Workers versus Pembe Flour Mills Limited, Cause No.971 of 2011,** the court refused to seat in its own appeal on good basis. This application is meant to have an appeal and should not be allowed. The claimants shall suffer prejudice by re-opening the case by being made to go back on what the court has already been determined. The court has already considered all the evidence, analysed the defence filed and to seek as applied is an abuse of the court process.

Whether the court should set aside and or review the judgement;

Whether the court should set aside order of 6th October 2014;

Whether the court should allow the respondents to cross examine the claimants witnesses; and

Whether costs are due.

16. Before delving into the issues raised, I note the Further Affidavit of Daniel Omondi Odeny sworn on 18th December 2014, regard matters of evidence with regard to the defence filed by the respondents which matters have already been addressed by the court while writing judgement. This shall be disregarded for purposes of the current application.

17. The application herein is premised on the provisions of Rule 32 of the Industrial Court (Procedure) Rules and Articles 50 and 159 of the Constitution. Rule 32 outlined above relate to review applications but such application for review should first have its basis within a substantive law and for purposes of proceedings for review before this court, reference should be the industrial Court Act. However such an application once made should adhere to the set principles as;

a) Discovery of new and important matter or evidence;

b) There is an error or Mistake apparent on the face of the record; or

c) For any other sufficient reason.

7. The Court reading of these principles that apply in an application for review only apply where the aggrieved party has not preferred an appeal as a good ground for appeal in not necessarily a good ground for review. In an application for review, the error or omission must be self-evident and it is not sufficient to say neither that the Court would have taken another view nor that the judge proceeded on an incorrect exposition of the law and therefore reached an erroneous conclusion of the law. Therefore a misconstruction of the law or other provisions of the law is not a good reason for a review. See **Kiliopa Omukuba Okutoyi versus Telkom Kenya Ltd, Cause No.341 of 2010.**

18. The principles applicable with regard to review or clarification of Court orders are to be found under section 12 of the Industrial Court Act and Rule 32 of the Industrial Court (Procedure) Rules thus;

32. Review.

(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—

(a) if there is a 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 the order made; or

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

(c) on account of the award, judgment or Ruling being in breach of any written law; or

(d) if the award, the judgment or Ruling requires clarification; or

(e) for any other sufficient reasons.

(2) An application for review of a decree or order of the Court under subparagraphs (b),

(c), (d), or (e), shall be made to the judge who passed the decree, or made the order sought to be reviewed.

19. The respondent's application does not set out what principles as above relate to their application. I find no basis laid out for review as to invite the court to make any changes of the judgement delivered on 18th November 2014.

20. On whether the court should set aside the judgement and orders of 6th October 2014 is an issue that require a resolution. The holding of this court in **Michael Njai versus Juan Torres and Another, Cause No. 1279 of 2013** is important to revisit. The court in that matter was seized of an application where the Applicant was seeking to vary, set aside or review of court orders, and noted that due to non-availability of the court file the applicant was not able to extract the orders sought to be reviewed and hence asked the court to use its discretion and review of set aside the orders made.

21. Where the court is invited to set aside its orders, even with the best application of the court discretion, the conduct of the applicant is important to revisit. It is not in dispute that the hearing date for the 6th October 2014 was by consent; counsel for the respondent appeared in court late and upon application to recall the claimants for cross examination, court adjourned to have the claimants recalled for this purpose but at the appointed hour, counsel or the respondents were absent. on 23rd November 2014 parties had a mention to confirm filing of written submissions which the respondent's counsel indicate they were aware of as outlined in Ms Mary Chege Affidavit in support of the application herein. Notice was served for court attendance on 18th November 2014 and there is an Affidavit of Service to this effect which the respondents made effort to challenge but the affidavit indicating service is record enough for the court to rely on. That far, on the hearing scheduled for 6th October 2014 and the judgement delivered on 18th November 2014, the respondents were aware. It cannot be a good basis that whatever happened on these dates was strange to the respondents. The cited **case of Pithon Mwangi** related to a matter that proceeded *ex parte* in default of appearance and filing of defence. This case is different as all procedures had been complied with and the matter set for hearing by consent but the respondents or their counsel were absent.

22. The submissions by the respondents that there was application to recall the claimants and another to reinstate the application dismissed is neither here or there as there are no orders to recall the claimants or to have such an application reinstated. As at 18th November 2014 when the court delivered judgement, there was nothing to stop the court in this effort. This is not simply a mistake of counsel. Where the counsel was not present in court on 6th October 2014 or 10th October 2014, Daniel Omondi Odeny states in his affidavit that he was aware counsel appearing on his behalf was held in another court. There is no justification why Daniel Omondi Odeny followed counsel in other matters unrelated to him yet the matter of his concern was before another court. The diligence Daniel Omondi Odeny had in attending court on these dates as evidenced by averments in his affidavit is evidence that as the respondent's core witness, he should have been before this court.

23. I find no basis to justify the grant of orders to set aside the judgment and orders made on 6th October 2014.

24. The court has already pronounced itself herein by judgement on 18th November 2014 and to seek the orders to introduce evidence that was held by the respondents before the judgement is to defeat the very purpose of having judgement upon consideration of available evidence.

25. Before conclusion, I note the respondents have cited the application of Article 50 and 159 of the Constitution. There is good cause for rules of procedures. Justice in itself is not only to an alleged wronged party but equally to an alleged aggressor. That is why courts exists to ensure due compliance to set Rules and regulations otherwise, there would have been no need to the Civil Procedure Act and the Rules thereto as well as the Industrial Court Act and the Rules thereto. Article 159 (2) (d) of the Constitution cannot be relied upon in the face of the specific provision of legislation or the Rules thereto. This is as held in the **Humphrey Nyagoe Makori versus Kenya Ports Authority, Misc. Application No. 6 of 2012.** The *undue regard to* technicalities under Article 159(2) of the Constitution does not remove the operation of Rules of Procedure as by law established as held by this Court in **Cause No. 77(N) of 2009, Kenya Unjoin of Domestic Hotels, Educational Institutions, and Hospitals & Allied Workers (KUDHEIHA) versus Nairobi Club.**

26. The reference of Article 50 and 159 should have relevance and should not be cited in failure to adhere to set rules of procedure. Where a review application require adherence to set principles, it is imperative to make such reference. Equally an application for setting aside court orders, correct provisions of the law should be cited. This is more so where a party has the advantage of legal representation.

In the penultimate, **costs though claimed by the respondents should go to the claimants. The application dated 4th December 2014 is found without merit and is dismissed in its entirety.**

Delivered in open Court dated and signed in Nairobi on this 25th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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