



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
JUDICIAL REVIEW NO. 18 OF 2012
IN THE MATTER OF AN APPLICATION FOR ORDERS OF *MANDAMUS*
AND
IN THE MATTER OF JUDGMENT IN NAKURU HCCC NO. 65 OF 2006
GABRIEL LENGOIBONI.....APPLICANTS/CONTEMPNOR
VERSUS
SIMON P. KAMAU & 19 OTHERS.....RESPONDENT
AND
TEACHERS SERVICE COMMISSION.....INTERESTED PARTY

RULING

1. By their Notice of Motion application dated 13th May 2016 and filed on even date, the Applicants/decreed holders sought the following orders:

(a) ---

(b) *That this Honourable Court be pleased to issue an order for the arrest of the current Chief Executive Officer(CEO), Teachers Service Commission and committal to civil jail for six(6) months at Kamiti Maximum Prison for being in contempt of orders of this court as previously ordered.*

(c) *An order to the Inspector General to arrest the current Chief Executive Officer of the Teachers Service Commission and escort her to Kamiti Maximum Prison for six (6) months as ordered by the court.*

2. The application is brought under the provisions of **Order 50 Rule 1** of the **Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act** and is supported by the Affidavit of Joseph M.N. Mwenja, the 3rd Applicant. The application is opposed upon grounds of opposition filed by The Chief State Counsel representing the Teachers Service Commission and the interested party by her Notice of appointment dated the 23rd May 2016 and filed on the same day.

3. The background to this application is stated in my ruling dated the 30th July 2015. I need not repeat it

here.

4. As at 30th July 2015, the contemnor was the retired Teachers Service Commission Secretary, Gabriel Lengoiboni. Ms. Nancy Njeri Macharia took over from Gabriel Lengoibini as the Chief Executive Officer thereafter. In my ruling of the 30th July 2015 it was my holding that the Teachers Service Commission being a Statutory Commission has perpetual succession and it operates through its Chief Executive Officer the Secretary, currently, Ms. Nancy Njeri Macharia – who holds the mantle passed over to her by the retired Secretary that entails taking on board all duties of the said office including **compliance with all lawful court orders and decrees of the court issued and directed to the office bearer**. In particular, and the subject matter of the application before the court, is **the decree issued on the 23rd October 2008 in Nakuru HCCC No 65 of 2006** - Simon P. Kamau and 19 others, being a class action where other 53,338 retired teachers were represented by leave of the court in the class suit.

For clarity purposes, the decree reads as follows:

(a) that the plaintiffs and all other retired teachers covered by the agreement dated 11th October 1997 between the defendant and the teachers Union (KNUT) as read together with Teachers Service Commission (TSC) Circular Number are entitled to their retirement benefits being based on the entire salary increment contained in that agreement and circular.

(b) That on the basis of that increment the defendant to pay or liaise with the Pensions Department to pay the plaintiffs and those they represent the unpaid gratuity and pensions.
(emphasis mine).

(c) That the plaintiffs shall have costs of this suit.

5. This court notes that an order of *Mandamus* was issued against the Teachers Service Commission Secretary, being the Chief Executive Officer to release to the applicants Kshs.3.34 Billion provided for in the financial year 2011/2012 Government Budget. That was the Order issued on the 23rd October 2012 by Hon. Justice W. Ouko (as he then was).

That order was not complied with and no explanation was offered. On the 16th May 2014 the Court (J. Emukule) found the Teachers Service Commission Secretary guilty of contempt of legitimate court orders and issued as suspended sentence.

By March 2015, there was no compliance has been made by the Respondents. The retired teachers, twenty plus other 52,338 have not been paid their salary arrears and pension todate.

6. In their arguments before this court, both counsel have confirmed that the Government has made a budgetary allocation of Kshs.6.5Billion in the 2016/2017 financial year for part payment of the decree in this case. Out of that allocation, counsel and specifically Ms. Wanjiku for the respondents and interested parties has confirmed that a sum of Kshs.1.5 Billion has been released to the Teachers Service Commission for payment of pension.

The applicants in their submissions by their Advocate Mr. Kimatta seek that in the interim, the sum of Kshs.1.5 Billion in the Teachers Service Commission custody be released to the applicants pending full payment upon certain datelines.

7. Objecting to the release of the Kshs.1.5 Billion by the Teachers Service Commission, the respondents urged that modalities of payment are yet to be agreed, that computation of figures and sums payable to each individual applicant has to be verified and agreed and that, apart from the twenty(20) applicants who are the plaintiffs in **Nakuru HCCC No. 65 of 2006**, the other claimants are an undeterminable number and the burden of proof lies with the applicants advocates to provide data on all the other persons.

It is her further contention that there is no ascertainable sum of monies whatsoever on account of pension

due to each individual claimant that Ms. Nancy Njeri Macharia, the current Chief Executive officer of Teachers Service Commission can be deemed to have declined to pay in breach of the court orders.

8. With respect to Ms. Wanjiku Learned Counsel arguments, the respondents have not appealed against the judgment and decree of the court. The sums found due and payable to the applicants and their numbers were determined, in the primary suit and decree issued on the **23rd October 2008 in HCCC 65 of 2006.**

For the court to have arrived at the sum of Kshs.16.5 Billion then, it needs no rocket science to conclude that the figures payable to each of the applicants was laid bare, clarified and confirmed. It is this court's finding that the claimants are ascertained, determined and there is no room for further interrogation of the Judgment and decree of the primary suit at this stage.

9. The applicants are duly represented by their advocates of choice. The decretal sum ought to be paid through their Advocates unless otherwise which is not the case here.

It can therefore not be sound or plausible submission that there is no ascertainable sums of money to be paid to each individual applicant, and therefore the Teachers Service Commission Secretary has not declined to pay any of the individual applicants. That submission in my opinion, can not be taken seriously. It demonstrates none appreciation of final court decrees and orders.

10. Ms. Wanjiku, Senior State Counsel confirmed that the **sum of Kshs.1.5 Billion released to Teachers Service Commission was with a rider that the same was for payment of pension.** In the same breath she stated that the function of paying any pension benefits is not the mandate of Teachers Service Commission and by extension the Chief Executive Officer of the Teachers Service Commission. Why then would that money be released to the Teachers Service Commission if it was not made for payment to the pensioner? The decree of the court talked of both pension and salary arrears. The sum of Kshs.16.7 Billion ordered payable as at 23rd October 2008 in the decree included both pension and salary arrears. As stated above, this application should not be treated as an appeal from the decree of the court. **The decree remains as it was on the 23rd October 2008 plus taxed costs and accrued interest. The judgment debtor is therefore under an obligation to pay failing which the contempt of court orders issued, specifically against the Teachers Service Commission Secretary shall be enforced.**(emphasis mine).

11. On whether the current Teachers Service Commission Chief Executive Officer, Ms. Nancy Njeri Macharia is in contempt of the court orders, it is common knowledge that the said officer took office sometimes in July 2015, together with the duties and obligations of the office. She is under an obligation to satisfy all decrees against the Teachers Service Commission among them the subject of this application. No plausible explanation has been given as to why almost one year down the road no attempt or at all has been made towards satisfaction of the decree.

12. In the **Supreme Court Application Number 38 of 2014** involving all the parties in this application and the case at large, the court observed in **Paragraph 82** of its **Ruling** that:

“We are also minded to say that considerable numbers of persons are involved here as litigants. The High Court did not confine its award only to some twenty claimants who were before it.

It decreed that the respondent/plaintiffs “and all the other retired teacher covered by the agreement of 1997 would be entitled to salaries allowances, pension dues as contained in that agreement --- it is a matter to be considered as important.”

13. The Highest Court in the land recognised and pronounced itself of the importance of this matter. It recognised that those to be paid as per the decree are not only the 20 plaintiffs but all those teachers covered under the agreement of 1997 – the 52,338. It further recognised that there has been no compliance by the current Teachers Service Commission Secretary, Ms. Nancy Njeri Macharia. It declined to issue stay of execution orders of the contempt of court orders. This was by its judgment dated

9th December, 2015 being aware that the contempt of court orders had earlier been issued against the retired Secretary. It would have been very easy for the Honourable Justices of the Supreme Court to declare that the current Teachers Service Commission secretary, Ms. Nancy Njeri Macharia could not be cited for contempt as she was not in office when the said orders were issued. I fully agree that contempt orders are issued in persona. In my earlier ruling of 30th July 2015, I held that the Teachers Service Commission being a juridical entity operates through its Chief Executive Officer. I further held that this court refuses to be turned into a theatre of the absurd. See **JR Application No. 231 of 2010 R -vs- Permanent Secretary, Office of the President and Others**. Taking successful litigants in circles is not acceptable and the court is mandated and enjoined by the law and the Constitution to dispense substantive Justice without undue regard to procedural technicalities that do not go into the merits of a case.

14. In **Wildlife Lodges Ltd -vs- County Council of Narok and Another, Ojwang J** (as he then was) held that the whole process of litigation as a process of judicial administrations is lost if court orders are not complied with.

It is trite that a party who knows of an order whether null or void, regular or irregular, cannot be permitted to disobey it.

Further in the matter of **The Teachers Service Commission -vs- The Kenya National Union of Teachers and 2 Others (2013)e KLR**, the Kenya National Union of Teachers officials disobeyed lawful court orders. They were cited for contempt. The Honourable Judge Linnet Ndolo, J pronounced herself thus:

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this this remains the case. To see it in any other way is to open doors to chaos and anarchy and this court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option. The court proceeded to punish and sentence the respondent's officials to hefty fines. This court associates itself with above pronouncements.”

15. I have considered authorities tendered by the respondent and the interested party. With respect, they are irrelevant to the circumstances of the matter before this court.

16. This matter has been in the courts for the last eight(8) years since the decree was issued. There is no appeal pending. The case has gone upto to the Supreme Court. Litigation must come to an end. The applicants have been shut out of the enjoyment of the fruits of their judgment. It is trite law that Justice delayed is justice denied. There being no reasonable explanation, technicalities aside(see **Article 159(2) (d) of the Constitution**), as to why the Teachers Service Commission and by extension the other Government agencies – the Director of Pensions, the Honourable The Attorney General, the Cabinet Secretaries-Education and Treasury - the Controller of Budget and all other relevant bodies why the court orders cannot be obeyed. This court has no option but to do justice by condemning their conduct that defies the authority and dignity of the court, because such conduct interferes with the administration of Justice. It is the fundamental supremacy of the law which is challenged by such conduct.

17. **Article 159 (b) of the Constitution** enjoins the court to exercise its judicial authority that is derived from the people of Kenya including the applicants upon principles, among them that Justice shall be done to all, irrespective of status, and shall not be delayed, and such Justice shall be administered without undue regard to procedure technicalities. These are principles that must be promoted and protected, so as not to contravene the Bill of Rights as enshrined in **Chapter 4 of Constitution**.

Article 43 of the Constitution on Economic and Social Rights states that:

“Every person shall have the right to social security. The applicants are retired teachers. Their salary arrears and pension constitute their social and economic security. This right has been denied to them by the respondents and the stated Government organs among others. It is a

fundamental duty of the state and every state organ to obscure, respect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. See Article 21 (1) of the Constitution.”

18. If the state is, for whatever reason unable to comply with **Article 43**, it is mandated under **Article 20(5)** of the **Constitution** to explain itself as hereafter:

“20(5) – In applying any right under Article 43, if the state claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles.

(b) It is the responsibility to show that the resources are not available.”(emphasis mine).

19. I have rendered myself sufficiently that the state organs holding the key to the solution of this matter have not attempted to explain themselves in terms of the constitutional provisions. The applicants have failed to bring on board all the relevant organs as stated. (See Paragraph 16 above). This court shall not descent to the arena of conflict. It must be moved for the necessary orders against necessary parties. Only then would it issue orders it deems fit against the said parties to comply or show cause why the court orders cannot be complied with in line with **Article 20(5) of the Constitution**.

It is in the public domain and judicially noticed, that the Respondents in their names or in their official capacities or otherwise know of the orders and therefore they, cannot perpetually be allowed to disobey court orders – See **Wildlife Lodges Case** above.

20. For those reasons, and after careful and thoughtful consideration and taking into account all earlier orders issued by the court and the Honourable Judges of the **Supreme Court in Application No. 38 of 2014** on the 9th December 2015, this court proceeds to make the following orders and direct that:

1. Ms. Nancy Njeri Macharia, the Chief Executive Officer, Teachers Service Commission do attend court on the 13th June 2016 TO SHOW CAUSE

(a) Why the sum of Kshs.1.5 Billion already released to TSC for payment of Pension and Salary arrears to the applicants should not be released and paid forthwith through their Advocates of choice for onward transmission.

(b) Why the full decretal sum cannot be paid as ordered and decreed in Nakuru HCCC No.65 of 2006 on the 23rd October 2010.

(c) Why she should not be punished for contempt of lawful and valid court orders issued on the 16th May 2014 and others subsequent thereto by committal to civil jail.

2. Costs of this application shall be in the cause.

Dated, signed and delivered in open court this 31st day of May 2016.

JANET MULWA

JUDGE