



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW APPLICATION 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 LENGOIBONIAPPLICANTS/CONTEMPTNOR

-VERSUS-

SIMON P. KAMAU & 19 OTHERS.....RESPONDENT

AND

TEACHERS SERVICE COMMISSION.....INTERESTED PARTY

RULING

1. Background to Application dated 18th March 2015

On the 23rd October 2008, this court in its judgment (D.K. Maraga, J) as he then was in **High Court Civil case No. 65 of 2006 – Simon P. Kmau and other – vs- Teachers Service Commission** - decreed as follows:

(a) That plaintiffs and all other retired teachers covered by the agreement dated 11th October 1997 between the defended and the Teachers Union (KNUT) as read together with **Teachers Service Commission (TSC) Circular Number 1397** 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 Plaintiffs and those they represent** the unpaid gratuity and pensions due to date and base all their future pension payments on the entire salary increment of 1997 as per particulars in Paragraph 8 of the plaint.

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

2. The defendant (TSC) being dissatisfied with the Judgment preferred an appeal vide **Court of Appeal Case No. 300 of 2009** – upon summarised grounds that:

- (1) The suit was filed against the wrong party
- (2) That the superior court misapplied the applicable law
- (3) That the order was incapable of compliance on execution.
- (4) That leave to file a class action had lapsed at the time the suit was commenced.

The Learned Judges of Appeal in dismissing the appeal the 12th November 2010 expressed themselves that, according to the agreement between the parties the Plaintiff/Respondents and other retirees, had earned the lumpsum salary awarded and this additional increment should have been reflected in their payslips as the “**last salary**” and upheld the superior court's judgment.

3. The defendants(TSC) did not settle the decretal sums owed to the Plaintiffs, the Retired Teachers.

It is then that the Exparte applicants herein filed Judicial Review proceedings in **JR. No. 7 of 2012** and **JR. No. 18 of 2012** on the 26th March 2012 seeking orders of *Mandamus* to compel the Secretary, TSC to pay the decretal sum, then standing at KShs.16.7 Billion plus taxed costs of KShs.382,600,000/= with interest.

4. On the 23rd October 2012, Justice W. Ouko, *J(as he then was)*, issued the following orders:

- a) an order of *mandamus* be and is hereby issued compelling and/or commanding the Secretary, Teachers Service Commission, the respondent herein to pay part of the decretal sum which stands at KShs.16.7 billion being unpaid pension up to the year 2003 plus costs taxed at KShs.382,600,000/= together with interest from the year 2008 at court rates in **Nakuru HCCC 65 of 2006** more specifically ordered by the High Court in its ruling of 19th December 2011.
- (b) The Respondent do forthwith release to the Applicants KShs.3.34 Billion provided for in the current financial year 2011/2012 Government Budget.

The Respondent did not comply with the above orders, leading to the Ex-parte Applicants application dated 10th October 2012 which sought orders, that the Secretary, Teachers Service Commission be committed to civil jail for contempt of court order of *mandamus* issued on 23/4/2012 for a period of 6 months and costs of the application.

5. After lengthy and detailed submissions, the court - (J. Anyara Emukule), in its ruling dated 16th May 2014 found the Teachers Service Commission Secretary one Gabriel Lengoiboni, the then current holder of the office, guilty of contempt of legitimate court orders by failing to pay the applicants Salary arrears, and consequential pension based upon the last salaries accrued under the Collective Agreement of 1997, and sentenced him to six months detention at Kamiti Maximum prison. The sentence was however suspended for 90 days to enable the Commission Secretary to take all steps to comply with the court orders. By the 2nd March 2015 compliance had not been achieved and the Applicants had not been paid. Upon application, the suspension order was lifted and a warrant of arrest issued against the contempnor, Gabriel Lengoiboni. However, before the warrant of arrest was executed, the TSC Secretary applied, by the application under consideration for stay of execution of the Committal Orders and Review of the Court's Judgment and subsequent orders in the enforcement proceedings. On the 19th March 2015 an order staying execution was issued pending hearing and determination of his application dated 18th March 2015.

6. The above chronology of events, in my view, is necessary to bring all parties and stakeholders in perspective of the issues at hand.

The Application

7. By a Notice of Motion application dated 18th March 2015 and brought under Section 3A and 80 of the Civil Procedure Act, the Applicant and Contempnor Gabriel Lengoiboni, sought the following orders that:

(1) -

(2) -

(3) Nakuru High Court **Judicial Review Application No. 7 of 2012 and No. 18 of 2012** be consolidated.

(4) That this Honourable court be pleased to Review and set aside orders of *mandamus* made on the 23rd April 2012 and issued on the 24th April 2012

(5) that this Honourable court be pleased to Review and set aside the committal order against Gabriel Lengoibini made on the 16th May 2014 and all subsequent orders made in furtherance of the orders made on the 16th May 2014.

(6) ---Spent

(7) The costs of the application be borne by the Respondent.

8. The application is based on the grounds that:

(a) There is an error apparent in the order made on the 23rd April 2012 and issued on 24th April 2012.

(b) That Gabriel Lengoiboni is in imminent danger or losing his liberty for six months as a result of an irregular order of this court.

9. The application is opposed by an affidavit sworn and filed on the 26th March 2015 by the 3rd Respondent Joseph M.N. Mwenja on behalf of the all the Respond

The Applicants' Case and Submissions.

10. In his supporting affidavit, the applicant deposes that in the enforcement proceedings in **Judicial Review No.7 and 18 of 2012** the Respondents caused the court to alter or vary, in an unlawful manner the decree in **HCCC No. 65 of 2006**, in that the Applicant was directed “**to pay or to liaise with the Pensions Department to pay the plaintiffs and those they represent the unpaid gratuity and pension dues to date.**”

It was further averred that by an order issued on the 24th April 2012 the court by way of an order of *mandamus* compelled the applicant to pay “**that part of the decretal sum which had been allocated by parliament to settle this claim to be released to the Applicants forthwith.**”

11. The applicant deposes further that he has fully discharged his obligation created in the decree in **Hccc No. 65 of 2006** by liaison with the Pensions Department and other Government Departments therefore cannot be said to be in contempt of the court orders.

It was stated that the variations in **Judicial Review Application No. 18/2012** in the order of *mandamus* rendered the entire proceedings irregular as the obligation then created was limited to paying the decretal sum as opposed to the order in the decree where it was obligated to either pay

or liaise with the Director of Pensions. It is also sought that the proceedings and enforcement orders in **JR No. 7 2012 JR** and **No.18 of 2012** be consolidated, and set aside.

12. Counsel for the Applicant Mr. Nyamodi in his submissions urged that there was material variation of the decree in the enforcement orders in **JR No. 7 of 2012** in that the applicant's (TSC) **obligation was to pay or liaise with the Pension Department** to pay. He stated that where the word "or" is used in between two actions, the person to whom a duty is placed may do either of the two.

To that extent, it was his contention that the contempnor/Applicant had discharged his obligation under the decree by liaison.

13. To prove discharge of the duty, he stated that the applicant had since the decree was issued in **Hccc No. 65 of 2006**, been in liaison with other State Officers and produced various letters from the Cabinet Secretary National Treasury, Dated 26th February, 2015 where he had requested for money to satisfy the decree after conclusion of the Appeal in the Court of Appeal. Other letters dated 24th December 2012, 30th May 2013, 20th June 2013 – where meetings between the Director of Pensions, National Treasury, Secretary/Chief of Staff in the Deputy President's office, and the Attorney General's offices, and subsequent meetings with the states stakeholders where the issues concerning payment of the decretal sum were raised. Through the said correspondence and meetings he deposes that he has taken very seriously the court orders and decree and has thereby discharged his duty and obligation by liaison.

It was further submitted that there can be no liability that may accrue on the contempnor on the unlawful variation of the decree, and sought to set aside the orders as aforementioned.

14. On the issue of inordinate delay in bringing these proceedings, counsel for the applicant Mr. Nyamodi submitted that though an important consideration, there had been no delay as liaison to fulfill the applicant's obligation were on going from date of decree up to February 2015.

He urged the court to allow the application in the manner sought.

15. **The Respondents' case and submissions**

The Respondent submitted that the application was brought to further the delay and conclusion of the case that has been in court for 7 years since judgment in favour of the Respondents was delivered. He relied on the Replying Affidavit sworn on the 26th March 2015 and stated that all the issues raised by the Applicant were canvassed in the Court of Appeal vide **Court of Appeal Case No. 300 of 2009** where the applicants appeal was dismissed.

16. It was Mr. Kimatta Advocate's submission that there is no material variation between the judgment in **HCCC No. 65 of 2006** and the ruling issued on the 23rd April 2012 as confirmed in the judgment of the court of Appeal on 12th November, 2010. It was his contention that the court in the ruling issued on 16th May 2014 gave reasons why the Contempnor/Applicant was held liable, that both decree and the orders speak of the core intention, that is payment of the decretal sum to the respondents.

17. In the matter of the decree to "---- **either pay OR liaise with the Pensions Department---**" It was his contention that the "either or" gave no option to the applicant, but to pay in its ordinary meaning and construction. He submitted that the applicants contention that he had a choice to either pay or liaise--- is misleading, and would make the court's judgment and orders senseless and an exercise in futility. He stated that the Respondents did not in any way mislead the court into making the alleged variations as the proceedings which were urged interpartes speak for themselves.

18 On the orders issued on the 23rd April 2012 by J. Ouko, Judge(as he then was), it was the respondents submission that the Government of Kenya had made a budgetary allocation for the payment of the teachers in the sum of KShs.3.34 Billion in the 2011/2012 financial year, so that when the court made the said order, it was specific on the sum that was available for payment, forthwith. The order did not give the applicant an option of “**either-or**”, and that no challenge has been mounted in respect of the said orders of the 23rd April 2012. No explanation was tendered why the Sum of KShs. 3.34 Billion was not paid.

19. Mr. Kimatta Advocate for the Respondents (teachers) argued that the contempt proceedings arose from the court orders issued on the 16th May 2014 by Emukule, Judge, that concerned, not the full decree, but a specific sum of KShs.3.34 Billion. He further submitted that the application before the court was an abuse of court process as it asks this court to sit on appeal of its orders by giving the Judgment and orders a different interpretation. The said Judgment and orders, having not been set aside remain valid, and as the contempnor had not purged the contempt, it was his submission that the application ought to be dismissed-with costs.

20. It was urged that the retired teachers have not been paid to date, that for the applicant to state that it had discharged its obligation, and therefore not in contempt would be a mockery of justice and court orders. It was his submission that this case was about payment, and the application is an attempt to take away the pensioners entitlement as ordered in the judgment.

Mr. Kimatta's final submission was that the Applicant is in collusion with the office of the Attorney-General to frustrate the pensioners.

21. **Findings and determination**

The court has considered all the materials placed before it and submissions by the learned counsel.

The Applicant is the Secretary of the Teachers Service Commission that until the Promulgation of the 2010 Kenya Constitution was a Government Department.

Article 237 of the Constitution establishes the Teachers Service Commission whose function, among others, is to recruit and employ registered teachers. **Article 249(1)(a)(b)**, it is mandated to protect the sovereignty of the people and secure the observance by all state organs of democratic values and principles.

It is a body corporate with perpetual succession.

22. The Teachers Service Commission like every other Commission is funded by the Government. **Article 249(3) of the Constitution**, states:

“Parliament shall allocate adequate funds to enable each commission and independent offices to perform its functions and the budget of each Commission, and independent office shall be a separate vote.”

23. This court has perused various letters exchanged between the applicant and various government departments.

The court agrees with the applicant that there has been liaison. The liaison the courts view was a prerequisite to payment. The payment has not been actualised. It cannot be said that the obligation and duty imposed by the decree and subsequent orders of this court and the Court of Appeal have been discharged. To come to that conclusion, would, as stated by counsel for the respondents, give a very narrow interpretation of the clear duty and obligation placed upon the TSC, to pay. Whatever route the TSC would take, either by liaison with other Government Departments, the obligation would be discharged only upon payment of the decretal sum as stated

in the 23rd October 2008 Judgment in **Hccc No. 65 of 2006**. Only by making payment as decreed, would the TSC be seen to protect the sovereignty of the people, its employees and former employees, the Retired Teachers in this case. By its failure, it is in contravention of the provisions of **Article 237 of the Constitution**.

24. The Applicant's argument to support its contention that the 23rd April 2012 orders were irregular by imposing a new obligation, to pay, upon the applicant in my view cannot be a proper interpretation of the court's intention when it made the orders. If that were so, then the Applicant would have complied with the specific order to pay part of the decretal sum of KShs.3.34 billion, that needed no liaison for it to be paid. This court finds that the orders of *mandamus* and subsequent committal orders to civil jail of the applicant appropriate – in the circumstances.

25. It is curious that when the applicant went to the Court of Appeal, no issue was raised as to the meaning and purport of the phrase, “.....**to pay or liaise to pay**” – as appears in the judgment. The court's view is that this is an afterthought, and a further attempt to perpetuate the delay and disobedience of the legitimate court orders. This court has been called upon to declare the court orders issued on the 23rd April 2012 irregular and unlawful by way of Review Orders.

As stated earlier, for this court to purport to do so would be sitting on appeal on an order of a parallel court. If indeed the said order was deemed irregular and therefore unlawful, an opportunity presented itself to the applicant in **Court of Appeal No. 300 of 2009**. It lost that opportunity.

In its prayer No. 4, the applicant seeks

4: *”This court be pleased to review and set aside its orders of mandamus made on 23rd April 2012 and issued on 24th April 2012.*

5: *”This Honourable court be pleased to review and set aside the committal order against Gabriel Lengoiboni made on 16th May 2014 and all other orders subsequently in furtherance of the orders made on 16th May 2014.”*

In essence, this application seeks Orders of Review. The substantive statute that governs Review applications is Order 45 of the Civil Procedure Code. It alleged that there is an error apparent on the order made on 23rd April, 2012, as opposed to the Decree of the court in **HCCC No. 65 of 2006**.

26. The court has searched for the apparent error on the order, in the supporting affidavit and in submissions by counsel. An apparent error ought to be obvious and visible without much effort or with minimal effort. I find no departure or variation in the orders of 23rd April 2012 from the original decree of the court. What comes out clearly from the material tendered before the court is a search for interpretation and construction and possible variation of the phrase “**to pay or liaise to pay**.” This, in the court's view cannot be an error apparent on the order, so that when the court issued the orders of 23rd April 2012

“to pay part of the decretal sum which has been allocated by Parliament to settle this claim to be released to the Applicant forthwith,”

the duty and obligation placed on the Applicant to pay or liaise to pay by the judgment cannot, by any stretch of imagination be construed to be an error apparent on the order. In his own admission, Mr. Nyamodi Advocate urged the court to interpret the meaning of the decree in **HCCC No. 65 of 2006**. By that express admission, the proceedings before the court are incompetent and an abuse of the court process as they seek for interpretation of the decree in **HCCC NO. 65 of 2006**, but not review of the Judgment and the subsequent enforcement order.

Having so pronounced, the court finds no basis upon which it can review and/or set aside the orders of *mandamus* made on the 23rd April 2012 or the committal orders against Gabriel Lengoiboni made on the 16th June 2014 and subsequent orders in furtherance of the said orders.

27. In the case **Kenya Bus Services Ltd -vs- AG & Another (2005)IEA**

It was held that fundamental rights cannot be enjoyed in isolation and by selected few while they trample on the others upon their enjoyment. The Respondents employment benefits have been trampled upon the applicant and other government bodies, since 2008, October when Judgment was delivered.

The function of the court faced with this situation has to do a balancing act by considering and shared values, objectives and service of responsibility proportionate to public interest and policy considerations. When a statutory duty is placed upon a Government Officer in his official capacity and the duty is owed to any person with sufficient legal interest in the performance of the duty, he may apply for an order of *mandamus* to enforce performance, if the said duty is clearly and plainly defined as, I hold, is the case in the matter at hand. The Applicant is answerable to Parliament as well as to the Respondents hereof. The court in granting the orders of *mandamus* took into account a variety of exigency and exercised its discretion. I have no reason to interfere with the courts discretion in granting the order of *mandamus*.

28. In **Judicial Review Application No. 132 of 2010 R-vs- Permanent Secretary, Office of the President and Others,**

the court,(Odunga J) stated that taking a successful litigant in circles when adequate notices have been given would be to turn the legal process into a theatre of the absurd. This court declines to be turned into a theatre of sorts and shall dispense substantial justice as mandated under **Article159(2)(a)(b)**, to all irrespective of status.

The retired teachers have waited to reap the fruits of their judgment since 23rd October, 2008. It is time that the Applicant and by extension the TSC and all other stakeholders, Parliament, Director of Pensions, the Auditor General, the Treasury, the Attorney General and others take decisive and purposeful steps to pay or liaise to pay the respondents. The duty and obligation placed upon the applicant will only be discharged upon payment.

29. It is now in the public domain that the contempnor and applicant herein left office as the Secretary of the Teachers Service Commission on the 30th June 2015.

As stated in the body of this ruling, the TSC is a statutory commission established under Article 237(1) of the Constitution. It has perpetual succession. The decree and subsequent orders on **JR 7 of 2012 and JR 18 of 2012** that I now order consolidated, were directed to the Secretary of the Commission – which is a Juridical entity. It operates through its Chief Executive Officer, the Secretary, and other Officers. Needless to state, there is already in office a Secretary to the Commission. Like the Biblical Elijah, the mantle must pass to Elisha, the current Secretary to the Commission,

“... to pay or liaise to pay with the Pensions Department”

30. The upshot of the above is that the court finds no error apparent in the order made on the 23rd April 2012, and that the applicant has not discharged the duty and obligation placed upon him and by extension the Teachers Service Commission by the decree in **HCCC No.65 of 2006** and the enforcement orders issued on the 23rd April 2012.

31. Consequently the court finds no sufficient grounds for review in the application dated 18th March 2015 and proceeds to dismiss it.

The interim orders of stay of execution of the committal orders made on the 19th March 2015 are lifted and discharged.

32. The Respondents shall have costs of the application.

Orders accordingly.

Dated signed and delivered in open court this 30th day of July 2015

JANET MULWA

JUDGE

In the presence of:

Mr. Kimatta - for the Respondents

Mr. Kereri holding brief for Gumbo - for the Applicant

Court clerk - Linah.