



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
J.R. MISC. CIVIL APPLICATION NO. 79 OF 2013

IN THE MATTER OF: AN APPLICATION BY CAPTAIN J.
N. WAFUBWA FOR LEAVE TO APPLY
FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF: CHAPTER 199, CHAPTER 200 AND
THE PENSIONS ACT, CHAPTER 189
OF THE LAWS OF KENYA

BETWEEN

CAPTAIN J. N. WAFUBWA.....APPLICANT

AND

GENERAL JULIUS KARANGI.....1ST RESPONDENT

MONICA JUMA THE P/S DEFENCE.....2ND RESPONDENT

NANCY KIRUI, THE OUTGOING P/S DEFENCE ..3RD RESPONDENT

JUDGEMENT

INTRODUCTION

1. By an amended Notice of Motion filed on 17th July, 2013 and dated 16th July, 2013, the applicant herein, **Captain J N Wafubwa**, seeks the following orders:
 1. **THAT order so mandamus compelling the Respondents to re-assess as shown and stated in paragraph 4(b) of the Statement and pay the Applicant his compensation and terminal benefits under the laws that were used to remove him from office be granted.**
 2. **THAT during the re-assessment, the Respondents to do so in consultation with the Applicant to avoid unacceptable final figures.**

3. THAT costs of this application be provided for.

APPLICANT'S CASE

2. *The Motion is supported by a supporting affidavit sworn by the applicant on 16th July, 2013.*
3. *According to the applicant, he took action against the Defence Council for illegal retirement and illegal assessment of his terminal benefits and the Court of Appeal while upholding his retirement, did set aside the assessment of his terminal benefits. He then brought petition No. 715 against the Defence Council for re-assessment of his proper lawful terminal benefits, but the order thereto indicated the process must start from the laws that were used to remove him from employment. In the year 2009 the Attorney general made arrangement for an out of Court settlement, but the Respondents ignored what the Attorney General and the applicant had agreed. Soon after the ruling by **Justice Musinga** the Attorney general made another attempt, but once again the Respondents ignored the Attorney General's advice.*
4. *On 20th February 2013, the applicant issued a notice to the 3rd Respondent, but the Respondent has once against refused or ignored to re-assess his lawful terminal benefits forcing him to petition the Prime Minister to intervene since the Respondent was appointed to that Office through the ODM party under the coalition government agreement. According to the applicant, military administrative early retirement does not end the military contract of service under the **Armed Forces Act** since firstly, military members can be recalled to duty and secondly, they are at liberty in law to change service from military to civil service. Therefore despite his early retirement, he still remained subject to the **Armed Forces Act** until age 65 years till then the military contract ceases to exist in law.*
5. *Therefore it was the applicant's view, which view, according to him was supported by the Court of Appeal in Civil Appeal No. 278 of 2009, that his employment is statutorily "protected by statute" and unless the "statutory provisions" are fully complied with his removal from the service stands illegal. However since the Court of Appeal declared his retirement lawful, the 1st Respondent ought to have exercised his lawful powers under Section 227 (2), (c) and (d) of Cap 199 by transferring him and his certificate of service no.00408, his last pay slip and a summary of his flying qualifications (C.V) as extracted from his personal flying log-book to the Public Service Commission for change of service. It is therefore the applicant's view that the 2nd and 3rd Respondents should be ordered re-assess his pension benefits or the compensation as prayed in paragraph 4 (b) of the statement of facts since in law he is still in the service of the Armed Forces.*
6. *According to the applicant, from the Attorney General's letter dated 26th July 2013 under ref AG/JRP/DOD/23/13, the Respondents have admitted voluntarily that the monthly pensions are paid by the Director of pensions which to him, is not the same as the compensation he is seeking herein. Therefore the Respondents should be ordered to release the last payment vouchers through the applicant or as the Court may deem fit since there is no upper age limit for Pilots to retire and the vouchers to take the position of the last pay slip for enabling the Director assess the monthly pensions and the lump sum payments to him for services provided.*
7. *According to the applicant, the salaries for members of the Armed Forces are not interfered to by the **Pensions Act**. On the 26th June 2013, the 3rd outgoing Respondent caused the 1st Respondent to release through the Attorney General vital documents that will enable the Court make proper orders and from the documents sent by the Attorney General, it is clear the Defence Council never sent my documents to the Public Service Commission to change his service to civilian service. Despite the fact that the Public Service Commission has been advertising for experience Helicopter pilots, the applicant is unable to provide that service since the 1st Respondent has refused to send his papers to the Commission.*
8. *The applicant further deposed from the Attorney General's letter it is clear the Respondents are mistaken since the applicant cannot, and it will be ridiculous for him to present the same documents which the Court of Appeal ordered erroneous and illegal to the authorities for payment of his terminal benefits. In his view, it is not possible to be paid terminal benefits as demanded by the Respondents since any Kenyan, body, or civil society can move the High Court for recovery of such payments, and not only for him but also for people who were paid in the same manner when they were less than 50 years of age under the **Pensions Act**.*

9. It is therefore deposed that the Respondents have abused Chapter Six of the Constitution, but the 3rd Respondent wants to leave the office without giving any reasons for continuously violating the applicant's rights once changes are made in the government in a few weeks time.

RESPONDENT'S CASE

10. In opposition to the application the respondents filed the following grounds of opposition:

1. **The orders sought cannot be issued as against the Respondent herein as the Applicant has not demonstrated a justifiable case against the Respondent.**
2. **The Applicant has not demonstrated that the Respondent has refused to carry out their statutory duty owed to the Applicant if any.**
3. **The Court has no jurisdiction to issue the orders sought as the same is res judicata the issues herein having been substantively dealt with in Nrb. HC Pet. No.715 of 2006, Captain J.N. Wafubwa Vs Attorney General & another.**
4. **The judicial review remedies sought cannot issue in the circumstances as the law on assessment of pension is very clear.**
5. **Judicial review remedies are not the most efficacious in the circumstance and the Applicant has failed to pursue the available remedies and court orders cannot be issued in vain.**
6. **The application has no legal basis hence the prayer by the Respondent for its dismissal with costs.**

11. The Respondents also filed a replying affidavit sworn by **Lieutenant Colonel Paul Mwangemi Kindochimu**, a Commissioned Military Officer deployed as Staff Officer 1 at the Ministry of Defence based at the Headquarters in charge of all service personnel records on 15th October 2013.

12. According to the deponent, the Applicant was lawfully retired from Service in the Kenya Defence Forces in 1992 and since the retirement, the Applicant has engaged the Ministry of State for Defence in unending and vexatious court battles pursuing among other his retirement pension as the instant case. The Courts have, however on various occasions found the retirement of the Applicant from Service was procedural and in accordance with the Law. However, the Applicant has not accorded the Government an opportunity to pay him the pension due to him as to date, as he has adamantly refused to clear from his former Unit and Service in the Kenya Defence Forces and cannot thus be heard to allege any default on the part of the Government and the Respondents in particular. To the deponent, assessment and payment of pensions to the Applicant is purely under the purview of the Director of Pensions and the Respondents' role is only to facilitate such a process once the Applicant clears with the Defence Forces Service which to date he has failed to do despite the Respondents having facilitated him to clear. While admitting that as a result of the foregoing, the pension due to the Applicant has never been assessed, he believes that the order sought to compel the Respondents to re-assess the terminal benefits cannot issue in the instant case.

13. In his view, the retirement in the Kenya Defence Forces is determined by the mandatory retirement ages pegged on each rank as stipulated by the law and not on the trade or cadre as alleged by the Applicant and there is no Law requiring the Respondents to transfer the services of the Applicant and/or members retiring from Kenya Defence Forces Service to the Public Service Commission since the Public Service Commission is an independent entity governed by distinct law and does not in any way operate under the direction of the Respondents and/or the Ministry of Defence.

14. It is deposed that for the duration the Applicant was in Service, he met the rating standards for a Pilot qualified to operate Kenya Air Force State aircrafts. Accordingly, the issues raised as to the flying qualifications being suited for alternative employment fall outside the mandate of the Respondents as they can only be determined by the relevant regulatory authority.

15. In the deponent's view, the application before court is frivolous, vexatious and an abuse of the court process and should be struck out as the issues raised herein are res judicata. Apart from that judicial review proceedings should be against administrative bodies and not individual persons and the instant proceedings ought to be struck out as they have been instituted against public

officers in their personal capacities.

DETERMINATIONS

16. In this case what the applicant seeks is an order of mandamus. The scope of judicial review remedy of mandamus was the subject of **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge** (supra). In the said case the Court of Appeal held *inter alia* that:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

17. The first issue for determination is therefore whether there is a legal duty imposed upon the Respondents to re-assess the applicant’s compensation and terminal benefits under the laws that were used to remove him from office be granted. If there is such a duty, the next issue would be whether there is a further duty imposed upon the Respondents to do so in consultation with the Applicant to avoid unacceptable final figures.

18. According to the applicant this duty arises from the decision of the Court of Appeal in Civil Appeal No. 278 of 2013. I have no doubt at all in my mind that where a Court of law exercising its competent jurisdiction makes orders directed upon a particular person, that person is under a legal duty to comply with the said orders and failure to do so may in appropriate circumstances warrant the order of mandamus where there are no specific legal remedies for enforcing those orders. It is clear that execution proceedings are not available against the Government or its officers acting in their official capacities. In such cases it is recognised the only mode of enforcing the relief granted by a Court of law is by way of *mandamus*. As I expressed myself in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**:

“...[in] the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure

access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

19. For some reasons which are unknown to the Court the applicant chose to selectively exhibit only portions of the decision of the Court of Appeal. This Court deprecates such conduct on the part of the applicant as such conduct may create an impression that the applicant is hiding certain material from the Court. A judgement of a Court ought to be considered as a whole and not piecemeal since it is well known that certain sentiments made by a Court may not be important for the determination of the issues before the Court. Such comments, in judicial parlance are referred to as *obiter dictum*. The Court is only bound by *ratio decidendi* of a decision as opposed to matter which are *obiter*. *Obiter dictum* is a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive). Strictly speaking, an *obiter dictum* is a remark made or opinion expressed by a judge, in his decision upon a cause, “by the way” – that is, incidentally or collaterally and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy or suggestion. In the common speech of laws, all such extrajudicial expressions of legal opinions are referred to as ‘*dicta*’ or ‘*obiter dicta*’ these two terms being used interchangeably. *Ratio decidendi* are therefore the principle or rule of law on which a court’s decision is founded. It is the rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided otherwise – often shortened as *ratio*. See **Republic Ex Parte Chudasama vs. The Chief Magistrate’s Court, Nairobi And Another Nairobi Hccc No. 473 of 2006 [2008] 2 EA 311**. *Ratio decidendi* is the enunciation of the reason of the principle

upon which a question before a Court has been decided which is alone binding as a precedent. It is the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. It is almost always to be ascertained by analysis of the material facts of the case, for judicial decision is often reached by a process of reasoning involving a major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. See *Halsbury's Laws of England, 4th Ed. Vol. 26 Para 573*. *Dicta* are statements which are not necessary to the decision, which go beyond the occasion and lay down that it is unnecessary for the purpose in hand. They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of a Judge are known as “*obiter dicta*”, whilst considered enunciations of the Judges opinion on a point not arising for decision and so not part of the *ratio decidendi*, have been termed “judicial *dicta*.” See **Mwai Kibaki vs. Daniel Toroitich Arap Moi Civil Appeal Nos. 172 & 173 of 1999 (Consolidated) [2008] 2 KLR (EP) 351; [2000] 1 Ea 115.** A statement *obiter dictum* is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the case. See **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR (SCK).**

20. Again it is important to exhibit the whole decision in order for the Court before whom the decision is sought to be relied upon to make a decision whether or not the expressions made and relied upon were not made *per incuriam*. A decision *per incuriam* is mistaken, as it is not founded on the valid and governing pillars of law. *Obiter* decisions (which in most cases is strictly speaking is not a decision but a mere opinion) and *per incuriam* decisions are not binding on Court which ordinarily would be bound by *stare decisis* for the determination.
21. The applicant, being a layman can however be forgiven for this omission. I have taken the liberty of perusing the decision of the Court of Appeal. The High Court in its judgement found that the applicant deserved promotion to the rank of major at which he would have earned the respective salary until the age of 44 and awarded him the foregone salary along with general damages for wrongful termination of service, terminal benefits, pension and gratuity, costs and interest. On appeal the Court of Appeal found that the entire suit was misconceived and that the applicant was lawfully retired on age basis. The Court went ahead to find that the assessment of the appellants terminal benefits, pensions etc. based on the same findings by the High Court was erroneous and illegal. Accordingly, the applicants appeal was dismissed but the Respondents cross-appeal was allowed with the result that the judgement of the High Court was set aside and vacated and the suit dismissed with costs.
22. It is therefore clear that the said judgement of the Court of Appeal cannot be a basis upon which *mandamus* can be granted in favour of the applicant as sought.
23. In order for the Court to find that the applicant is entitled to terminal benefits and pension, it is my view that the Court would have to hear *viva voce* evidence from the parties herein. In my view an order for *mandamus* ought to be certain on what exactly the respondent is being compelled to do. Without first ascertaining the amount of terminal benefits and pension, assuming the same is payable, the grant of an order of *mandamus* would be speculative. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:**

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the

rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts.”

24. It also clear, from the pleadings, that these proceedings have been brought against the respondents in their personal capacities rather than against the offices they hold. In fact it is instructive that the 3rd respondent is described as the outgoing Permanent Secretary, defence. In **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005**, Nyamu, J (as he then was held:

“The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual.”

25. *Mandamus* is, essentially, English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature. See **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543**.

26. I am, further, cognisant of the position stated in *Halsbury’s Laws of England 4th Edition Vol. II page 805 paragraph 1508*, that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing

against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order, even if would otherwise have been merited, where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

27. In this case to grant the orders of mandamus would not bring this matter to finality since the parties herein would still have to go into the issue of determining how much is actually due to the applicant. In any case the Court has not been addressed on the legal provision which compels the respondents to consult the applicant when computing the applicant's entitlement assuming it is the obligation of the respondents to do so, an obligation which the respondents dispute and no legal provision has been cited which states otherwise.
28. To compel the respondents to determine the applicant's entitlement would amount to compelling the respondents to exercise their powers in a certain manner. The law however is that where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.
29. Apart from that if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done. In this case it is alleged that the Chief of General Staff assessed the applicant's terminal benefits in the sum of Kshs 203,850.00. Whether or not that sum is correct, it is not for this court in an application for *mandamus* to determine.

ORDER

30. Accordingly, I find no merit in the amended Notice of Motion filed on 17th July, 2013 and dated 16th July, 2013.
31. The same is dismissed but as the applicant is yet to clear with the respondent and receive his entitlements, it is my view that it would be unjust to penalise him in costs. Accordingly, there will be no order as to costs.

Dated at Nairobi this 21st January, 2014

G V ODUNGA

JUDGE

Delivered in the presence of the applicant