**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR. MISC. CIVIL. APPLICATION NO.368 OF 2009**

**IN THE MATTER OF SECTION 84 OF THE CONSTITUION**

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

***AND***

**IN THE MATTER OF: PENSIONS ACT, CHAPTER 189 OF THE LAWS OF KENYA**

***BETWEEN***

**REPUBLIC.........................................................................APPLICANT**

***AND***

**1.THE MINISTER FOR FINANCE.................................RESPONDENT**
**2.THE PERMANENT SECRETARY, TREASURY........RESPONDENT**

**R U L I N G**

Captain J.N. Wafubwa the Exparte Applicant herein has moved this court through a Notice of Motion dated 3rd May, 2011 and filed in court on 23rd May, 2011 under certificate of urgency seeking what he refers to as further orders in the following terms:

**1. THAT following discovery of new evidence the Honourable Court be pleased to issue further orders as prayed for in the motion for judicial review.**

2. THAT **save for a declaration that the applicants retirement from the Armed forces is lawful, the court be pleased to issue further orders that the doctrine of *resjudicata*, is not applicable to the issue of computation of pensions since the High Court lacks jurisdiction over assessment of military pensions.**

**3.** THAT **the court be pleased to set aside an order given in HCCC 674 of 1993 and its certificate of order against the government, dated 18th October 2004 being the alleged applicants pensions assessed by the Deputy Chief of pay since the certificate served no purpose as payments were not paid out of it.**

**4. THAT cost of the application be provided for.**

The application is premised on grounds stated on the face of the application and is supported by an

affidavit sworn by the exparte applicant on 3rd May, 2011.

The exparte applicant filed and prosecuted the application in person while the respondents were represented by Mr. Menge, Principal State Counsel instructed by the Hon. Attorney General.

The application is opposed through grounds of opposition filed by Mr. Menge on behalf of the respondents on 17th November, 2011.

In support of his case, the exparte applicant filed written submissions on 2nd September 2011 which were titled ***"Further written submission by the Applicant"*** which were formatted in two parts. In the first part, the applicant appears to be making submissions to buttress his case in the substantive motion in which he had sought orders of mandamus against the respondents. It is however worth noting that the substantive motion was fully heard and determined by J. Musinga in a Ruling delivered on 13th April, 2011. In its second part titled ***"Notice of Motion",*** the submissions address the current Notice of Motion dated on 3rd May 2011 but appears to be a challenge on the merits of the decision made by my brother Musinga, J in dismissing the applicant's substantive motion for judicial review.

Both parties appeared before me on 17th November 2011 and made oral submissions in support of their respective cases which I have carefully considered.

Before considering the merits or otherwise of the application, I wish to deal first with the points of law raised by Mr. Menge for the respondents both in his grounds of opposition and in his submissions to the effect that the current application is incompetent and fatally defective and ought to be dismissed with costs as it is premised on Orders 51 Rule I, 4 and Section 3A of the Civil Procedure Act which is not applicable in judicial review proceedings. Mr. Menge also submitted that the applicant is guilty of non-disclosure of material facts in that he failed to disclose in the instant application that he had previously filed other cases namely **NBI HCC 674/1993**, **NBI C/A No.278/2003** and **NRB Petition No.715/2006** which were all dismissed and that therefore he is not deserving of any orders sought in this application.

On the first issue regarding the applicability of the Civil Procedure Act or Rules to Judicial Review proceedings, I wholly concur with Mr. Menge's submission that it is now settled law that the jurisdiction vested in the High Court under Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules is neither civil nor criminal. It is a special jurisdiction which has been described as ***"sui generis***" in which the Civil Procedure Act and Rules do not apply. This was the decision of the Court of Appeal in Kunste Hotel Ltd V The Commissioner of Lands CA 234/1995 and Republic V Communications Commission of Kenya C/A 175/00.

On the face of it, the application before the court is expressly brought under Order 51 Rule 1, 4, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

Though the Court of Appeal in the above cited cases held that judicial review proceedings which invoke the court's jurisdiction under the Civil Procedure Act are incompetent and fatally defective, I find that the current application does not fall in that category since it is not solely based on the Civil Procedure Act and Rules. It is also expressed to be brought under all other enabling provisions of the Law which gives it some saving grace since in my view, this rider can be used to invoke the inherent jurisdiction of the court.

In any event, it is my considered view that failure to cite the correct provisions of the law in an application of this nature is a technicality that goes to the form as opposed to the substance of the application and in the spirit of the Constitution of Kenya 2010, such technicalities should not be used to shut the door of justice to litigants. Article 159 (2) of the Constitution of Kenya 2010 requires courts to dispense substantive justice without undue regard to procedural technicalities.

In the circumstances, I decline to find that the application before the court is incompetent or fatally defective. I find that it is properly before the court.

On the issue of non-disclosure of material facts, I find that though the applicant did not disclose that he was the petitioner in petition No.715/06, he has disclosed in paragraph I of the supporting affidavit that he is the plaintiff in HCC 674 of 1993 and Appellant in C/A No.278/03. Though I agree with Mr. Menge that the applicant did not disclose that all cases he had filed prior to instituting the Judicial Review proceedings had been dismissed, I find that failure to disclose that information did not amount to non-disclosure of material facts since this information was already part of the court record before the applicant filed the instant application.

The existence of the three cases previously filed by the applicant and the fact that they had all been dismissed was discussed at great lengths in J. Musinga's Ruling delivered on 13th April 2011 and was the basis for his finding that the applicant's Notice of Motion seeking orders of mandamus against the respondents was ***res judicata***. These were therefore not matters that were in the exclusive knowledge of the applicant which he would have been under legal duty to disclose to the court and the respondent. They were already part of the court record and it was not necessary for the applicant to disclose the same.

I therefore find no merit in the submission that the applicant was guilty of non-disclosure of material facts.

Turning now to the merits of the application, I find myself in difficulties trying to understand what specific orders the applicant is seeking from this court in the current application.

The court notes that in Prayer 1, the applicant asks the court to issue further orders as prayed for in the motion for Judicial Review while in Prayer 2, he urges the court to issue further orders to the effect that the doctrine of ***res judicata*** is not applicable to the issue of computation of pensions since the High Court lacks jurisdiction over assessment of military pensions.

In the two prayers, the applicant has not specified which particular orders he is seeking from this court.

Having considered the court record, I find that no further orders can be issued by this court in the motion for judicial review since as stated earlier, the said motion was heard and determined by my brother Musinga, J on 13th April 2011 who dismissed it with no orders as to costs. Consequently, there is no room for this court to issue any other orders in the said motion since it is now a finalized matter. What the applicant is asking the court to do in Prayer 1 is to re-open his case in the Notice of Motion for reconsideration which this court does not have jurisdiction to do. This can only be done by the Court of Appeal.

If by any chance the applicant intended to apply for review of the orders dismissing his application in the ruling delivered by Musinga, J on 13th April 2011 on grounds that he has discovered new evidence which was not in his possession or knowledge at the time the orders were made, the remedy of review would still be unavailable to the applicant. This is because the new evidence that the applicant clams to have discovered is the certificate of order against the Government exhibited and annexed to his supporting affidavit marked JNW 70. The said certificate was issued on the basis of the judgment of Hayanga, J in HCC 674/1993 in which the Judge had made orders regarding the assessment of the applicant's terminal benefits and pension after he was retired from the Military Service. However the applicant being dissatisfied with that judgment lodged an appeal to the Court of Appeal and in its decision, the Court of Appeal in C/A 278/03 held that the assessment of the applicant's terminal benefits and pension in HCC 674/1993 was erroneous and illegal. The Court of Appeal proceeded to set aside and vacate the said judgment together with all consequential orders.

The certificate of order against the Government is among the consequential orders arising from the judgment in HCC 674/1993 and by dint of the Court of Appeal's decision, it stands vacated. This means that it is no longer valid or enforceable against the Government and its existence or otherwise would not have made any difference to the applicant's case. It cannot therefore form the basis for reviewing the orders issued by J. Musinga dismissing the applicant's motion for judicial review.

In Prayer 3 of the application, the applicant seeks an order to set aside the order given in HCC 674/1993 and certificate of order against the Government dated 18th October 2004. I find this prayer superfluous since the judgment in HCC 674/1993 was set aside by the Court of Appeal in C/A 278/03 together with all consequential orders and as noted earlier, consequential orders in HCC 674/1993 includes the certificate of order against the Government referred to by the applicant. Having been set aside and vacated by the Court of Appeal, nothing remains of the judgment in HCC 674/1993 which this court can now be asked to set aside.

Turning now to Prayer 2 and considering the way the prayer is drafted, I have no doubt in my mind that the said prayer amounts to an appeal against the orders of Musinga, J in his Ruling delivered on 13th April 2011. It is important to point out that in that ruling J. Musinga dismissed the applicant's motion on grounds that it was ***res judicata*** since the issue of the applicant's employment and/or payment of his terminal benefits had previously been the subject matter of litigation in previous cases culminating in the final decision by the Court of Appeal in the matter in C/A 278/03. I am fortified in this finding by the depositions made by the applicant in his supporting affidavit in paragraphs 11, 18 and 19 where he has deponed as follows:

***Paragraph 11*** **"**THAT **indeed the doctrine of res-judicata does not apply in this suit for computation of pensions, the court of appeal judgment is there and since the certificate of order against the government for the payment of my pensions was rejected by the Respondents/Treasury".**

***Paragraph 18*** **"**THAT **the High Court is merely side stepping its duties of amending and/or protecting Treasury against the big brother who is known for bullying and who achieve his goals through brutal force".**

***Paragraph 19*** **"THAT I swear this affidavit that I have never been party to any computation or ever been paid any terminal benefits by the government, and that pensions can never be resjudicata in any court of law since jurisdiction on terminal benefits is vested upon Treasury".**

A reading of paragraph 18 of the said affidavit shows clearly that the applicant was dissatisfied with J. Musinga's recommendation that the Attorney General should consider appropriate amendments to correct the existing undesirable legal situation where a Civil Law Statute – The Pensions Act and a Military Law Statute – The Armed Forces Act are applied simultaneously in computing pensions and gratuities for members of the Armed Forces. At page 12 of the ruling, J. Musinga expressed himself thus

"This being a Judicial Review matter, its function is not to determine the merits of a decision and neither can it authoritatively comment on the constitutionality of a given section of law. That being the case, it can only apply the law as it exists. It is up to the Attorney-General to consider appropriate amendments that would address the concern that was raised by the Court of Appeal in the aforesaid decision"

It is clear from a reading of the averments in the applicant's supporting affidavit that the applicant was aggrieved by the decision of J. Musinga in his determination of the applicant's substantive judicial review application and having been so aggrieved, the only remedy that was available to him was to lodge an appeal against the Ruling to the Court of Appeal. This court being a high court does not have jurisdiction to sit on appeal against decisions made by another High Court Judge since the two courts enjoy concurrent jurisdiction.

To the extent that the instant application purported to be an appeal against the decision made by J. Musinga in the Ruling of 13th April 2011, I find that it is incompetent, misconceived and is an abuse of the process of the court. In view of the foregoing, this court is satisfied that the application has absolutely no merit and it should be dismissed.

Lastly, I wish to express my sympathies with the applicant's apparent frustration in having failed to secure his pension from the Government through its appropriate organs namely the Treasury and the Defence Council since he was retired from the Military Service on 22nd May 1992. However, it must be

emphasized that as was correctly pointed out by J. Musinga in his ruling of 13th April 2011, the Court of Appeal did not say that the applicant is not entitled to his pension. It only ruled that the assessment of the applicant's terminal benefits/pension based on the High Court's findings was erroneous and illegal. This in my opinion did not preclude the applicant from making a fresh claim for his pension to be computed in accordance with the law that was applied to terminate his services.

For all the reasons considered in this ruling, this court is satisfied that the instant application has no merit and it is hereby dismissed but with no orders as to costs.

**Dated**, **Signed**and**Delivered** by me at Nairobi this 31st day of January, 2012.

C. W. GITHUA
**JUDGE**

***In the presence of:***

Florence – Court Clerk
Applicant in person or Applicant
Mr. Kipkosgei for Mr. Menge for Respondents