REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

PETITION 21 OF 2008

KENNETH NJOROGE GITAU.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

JUDGEMENT

Kenneth Njoroge Gitau is the petitioner in this petition whereas the Attorney General of the Republic of Kenya and the Teachers Service Commission are the 1st and 2nd respondents respectively. The petitioner's case is well set out in his petition dated 18th January, 2008 and in his supporting affidavit sworn on even date. Most of the facts deponed to by the Petitioner in support of his case have not been controverted by the respondents. We will start by giving a brief outline of the undisputed facts.

The petitioner is a retired teacher. He was employed as a teacher by the 2nd Respondent and served as such from 1959 upto 1974. It is the Petitioners case that in 1974, His Excellency the Late President Jomo Kenyatta decreed that teachers be exempted from resigning their positions in order to serve as councilors in Kenyan local authorities.

Following the said decree, the Petitioner contested and won a civic seat in Kiambu County Council and served both as a teacher and a councilor from 1974 to 1978. In 1978 when his Excellency President Daniel Arap Moi took over Kenya's presidency after the death of President Jomo Kenyatta, he revoked the exemption granted to teachers by the late President Kenyatta so that teachers who were councilors had to make a choice regarding whether to remain as councilors or full time teachers. The election was to be made before 31st December, 1978. The Petitioner opted to remain as a councilor and consequently resigned as a teacher with effect from 31st December, 1978 as shown by letters dated 27th December, 1978 and 30th January, 1979 annexed to the further affidavit sworn by Peter Ole Shonko on behalf of the 2nd Respondent.

In January, 1980 the petitioner was re-employed as a teacher and continued working as such upto 1994 when he retired on attaining the normal retirement age. The Petitioner made several attempts through the

relevant Government offices and authorities to have his pension for the entire period he worked as a teacher paid but the Government and the 2nd Respondent refused and/or failed to compute and pay pension for the service rendered between 1959 -1979. This is what triggered the filing of the instant petition on 18th January, 2008 in which the Petitioner prays for the following orders and declarations.

(a) A declaration that the exercise of executive authority by the president in accordance with Section 23 of the constitution is not subject to the Pensions Act or any rules made thereunder.

(b) A declaration that the petitioner is entitled to the payment of pension benefits for the entire period he served as a teacher notwithstanding the short break in 1979 when he served as a councilor, there having been a condonation of break of service by order of his Excellency the President.

(c) An order that the decision of Mr. Joseph Kinyua Permanent Secretary Treasury bearing reference No. EPN/1/92/10/9TSC & APN/PC 93099 dated 22nd January, 2007 is a misinterpretation of the law and accordingly is wrongful and a nullity.

(d) An order directing the Teachers Service Commission to calculate and forthwith pay the Petitioner's withheld pension benefits.

(e) Damages for breach of fundamental rights under Sections 70(C) and 75(2) of the constitution.

(f) Costs of this Petition.

(g) Any such further orders, writs and/or directions the Honorable court may consider appropriate for the purpose of enforcing or securing the enforcement of provisions of sections 70(c) and 75(2) of the Constitution to have been breached.

The 2nd Respondent opposed the application through a replying affidavit sworn on 11th August, 2008 by G.K. lengoiboni the 2nd Respondent's Secretary and further affidavit sworn by Peter Ole Shonko. The 2nd Respondent's case is that by virtue of Regulation 16(1)(i) of the Pensions Act Cap 189 Laws of Kenya the Petitioner is not entitled to pension for the period between 1959-1979 since there was a break in his service in 1979 as he had voluntarily resigned from the teaching service and there was no condonation of the aforesaid break in service.

To counter the 2nd Respondent's claim that his resignation amounted to a break in service, the Petitioner asserted that retired President Daniel Arap Moi in another decree made in 1992 directed that teachers who resigned after revocation of the decree made by the late President Jomo Kenyatta would not loose their pension for the years they had served before resigning in favour of electoral posts.

The Petitioner contended that the presidential decree made by his Excellency retired president Daniel Arap Moi in 1992 amounted to a condonation of the break of service and that therefore he was entitled to pension benefits for the years he had worked as a teacher including the period between 1959 to 1979.

The 2nd Respondent avers that if indeed such a presidential directive was issued, the same was not documented into a circular or any other written form to enable the 2nd Respondent comply as directed.

To further advance their respective positions in this matter, parties herein filed written submissions which their respective counsel highlighted before us on 19th March, 2012.

Mr. Kounah counsel for the Applicant submitted that the Petitioner was entitled to pension for all the years he had served as a teacher including the period between 1959 to 1979 as the presidential directive issued by Retired President Moi amounted to condonation of break of service in 1979.

He further submitted that presidential directives issued in the exercise of executive authority under

Section 23 of the repealed constitution acquired the force of law under Section 14 thereof and that it did not need any administrative action in order to have it implemented. It was further argued on behalf of the Petitioner that failure of the Permanent Secretary Treasury or the 2nd Respondent to take administrative action to implement the directive should not be visited on the Petitioner.

On her part Miss. Mumassabbi on behalf of the Respondents submitted that the petitioner was not entitled to pension for the years worked before he was re-employed in 1980. She submitted that the brief interruption of the Petitioners teaching service in 1979 amounted to a break in service and that therefore the Petitioners service from 1959 -1978 cannot be said to have been continuous and qualifying service for purposes of computation of pension benefits. Counsel further submitted that an undocumented presidential directive or clarification such as the one relied upon by the Petitioner to claim that there was condonation of break of service cannot override the provisions of Regulation 16(1) of the first schedule of the pensions Act which is subsidiary legislation. Such a provision, counsel argued can only be altered by amendments to the said legislation or promulgation of another set of subsidiary legislation.

After considering the pleadings in this petition and the submissions made by counsel for the parties herein, we are of the view that the key issue for determination in this petition is whether the petitioner is entitled to payment of pension for the entire period he worked as a teacher notwithstanding the interruption of service in 1979 and whether there was condonation of break of service in 1979 when the Petitioner served as a councilor.

We find it important to note that Section 3 (1) of the Pensions Act Chapter 189 Laws of Kenya (hereinafter referred to as the Act) Provides that:-

"Pensions, gratuities and other allowances may be granted by the Minister in accordance with the Pensions Regulations, to the officers who have been in the service of the Government"

The power given by section 3(1) of the Act to the Minister was delegated to the Director of pensions by Legal Notice No. 317 of 1974. It is not disputed that the Petitioner being a retired teacher was entitled to pension but this pension was to be computed and paid in accordance with the provisions of the Act and regulations made thereunder. Regulation 16(1) as shall be demonstrated shortly provides that only continuous Service will be taken into account as qualifying or pensionable service for purposes of payment of pension.

We find it necessary to reproduce Regulation 16 (1) of the first schedule of the Act in order to appreciate its full meaning and import.

16. (1) Except as otherwise provided in these Regulations, only continuous service shall be taken into account as qualifying service or as pensionable service:-

Provided that -

(i) any break in service caused by temporary suspension of employment not arising from misconduct or voluntary resignation; and

(ii) in the case of an African subordinate police officer or an African subordinate prison officer, any break in service between discharge and re-enlistment which has been disregarded for the purpose of the grant of a gratuity in accordance with subsection (4) of Section 20 of the Police Ordinance, 1930 (now repealed) or paragraph (3) of rule 5 of the Prisons Rules, 1930 (now revoked, respectively,

Shall be disregarded for the purposes of this paragraph.

It is clear from Regulation 16(1)(i) that any break in service caused by voluntary resignation among other factors shall be disregarded in the computation and payment of pension benefits.

In this case, it is not disputed that the Petitioner resigned from the teaching service in 1978 and remained out of the teaching profession for the whole of 1979. He was re-employed as a teacher in 1980. There cannot therefore be any doubt and we so find that there was a break in the Petitioners service as a teacher in 1979. We find that according to Rule 16(1) of the Pension Regulations, such a break in service would disentitle the Petitioner of his pension benefits from 1959-1979 unless there was condonation of the said break in service which would have the effect of making the Petitioners service continuous and pensionable.

The Petitioner has maintained that there was a presidential directive issued by retired President Moi in 1992 which condoned the said break in service

In paragraphs 14 and 15 of his supporting affidavit, the Petitioner deponed as follows:-

14. On or about 6th March, 1992 His Excellency President Daniel Arap Moi at a meeting with officials of the Kenya National Teachers Union and a delegation of retired and serving teachers of which I was one present and in my hearing at State House – Nairobi clarified that the revocation of the decree by President Kenyatta did not entail loss of pension benefits to those who resumed their teaching careers.

15. I have been advised by my advocates on record and believe that this clarification was another exercise of Executive Authority of the President pursuant to Section 23(1) of the Constitution and I verily believe that this had the effect of overriding the provisions of Regulation 16(1) (1) First Schedule of the Pensions Act and amounted to condonation of break of service."

The Petitioner's assertion that the President issued a directive condoning the break in service was responded to through paragraphs 9 and 10 of G.K. Lengoiboni's replying affidavit in which he stated:-

"9. THAT in March 1992, the teacher wrote to the Commission inquiring on the loss of his 20 years service stating that the President had directed that those teachers and Public Servants who had opted to remain councilors have their services reinstated.

10. THAT there was no documentary evidence/directive received by the Commission and we advised him that on receiving the directive, we will act accordingly."

The issue was also referred to by Joseph Kinyua, the permanent Secretary, Treasury in his letter dated 22nd January, 2007 addressed to the Petitioner. The relevant part of the letter states as follows:-

"RE: PRESIDENTIAL

DECREE ON OFFICERS RESIGNING TO JOIN POLITICS – KENNETH N. GITAU TSC NO 05203

I refer to your letter addressed to the Minister for Finance on the captioned subject matter and thank you for bringing it to the attention of this office. A number of queries have been raised by retired teachers owing to the loss of service that arose from their resignations in 1979 to continue holding electoral posts.

From the contents of these letters, it would appear that on or about 1979, the then President Daniel Arap Moi made a new Decree that teachers had to choose either to serve as councilors or as teachers but not to hold both posts. However, it is stated in the correspondence, that on or about 1992, President Moi decreed that they should not lose their prior service once they made the choice.

As you may be aware such presidential Decrees are normally followed up with administrative action by the office of the President and other relevant Ministries in Order to implement them. This was not done in this case hence the decrees did not and become binding on the Government."

The evidence placed before the court as outlined above shows that though the Respondents do not expressly dispute that such a decree was ever made by retired President Moi, they have equally not admitted its existence. The law is that whoever alleges the existence of certain facts has the burden of proving such facts. The Petitioner has not placed before the court any evidence to prove that such a decree also referred to in his pleadings as a "clarification" was made as alleged. In the absence of evidence that such a decree ever existed, we are of the view that the petitioner's case cannot succeed.

In any event, if the said decree was issued as alleged, then it would appear that the same was never documented or followed up with any administrative action by the Office of the President or any other relevant Ministry in order to bind the Government and through the Government the 2nd Respondent.

The Petitioner argues that the said decree was issued in the exercise of executive authority by the President in accordance with Section 23(1) of the repealed Constitution. We agree that the President was indeed clothed with executive authority by the said Section. We however find that such executive authority could only be exercised in accordance with the law. If the President issued any decrees, they were expected to be in consonance with the existing laws and in the event that they were not, they would be converted into legislation either amending the existing laws or creating other laws to give such directives legal effect. We find that the Presidents alleged directive or clarification however well intentioned cannot in law override the clear and explicit provisions of subsidiary legislation unless and until it was enacted into law. This was not done in this case. We are therefore of the view that the Petitioner has not demonstrated that there was any condonation of his break in service in 1979 which was occasioned by his voluntary resignation.

Following Regulation 16(1)(i) of first schedule of the Act, we are of the view and we so hold that the break in the Petitioner's teaching service in 1979 disentitled him to payment of pension for the years between 1959-1979.

The Petitioner has urged this court to protect his property rights guaranteed by Section 70(c) and Section 75 (2) of the repealed constitution. The Petitioner contends that denial of his pension for 20 years service between 1959-1979 amounted to deprivation of his property and that he was entitled to protection of the law under Section 70(c) and 75 (2) of the former constitution. Section 70 (c) protects an individual's right to the privacy of his home and other property and from deprivation of property without compensation.

Section 75 on the other hand deals with protection from deprivation of property due to compulsory acquisition by the Government without prompt and full compensation.

The question that we must pose at this juncture is – Had the Petitioner's claim to pension for years between 1959-1979 crystallized into property and if so did the Respondents refusal to pay the same amount to deprivation of his property?

Before answering this question, we wish to state that as a general rule in order to enforce the right to property, a party must demonstrate that he is entitled to the property in issue and that the proprietary interest sought to be protected is defined by existing laws.

In the case of Joseph Ihugo Mwaura & 82 others vs. Attorney General Nairobi Petition 498 of 2009 (unreported), the Court referring to Section 75 of the former Constitution observed that, Section 75 of the constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework.

The Court Of Appeal In The Director Of Pensions Vs. Abdul Majid Cocker Civil Appeal No. 50 Of 1999 when considering how pension for the respondent in that case was supposed to be computed discussed the issue of when pension became property which ought to be protected under Section 70(c) of the former constitution . At page 6 shah J.A (as he then was) stated as follows:-

“property includes choses in action, money or pension. No person who is eligible for pension can be deprived of his pension at the whim of the Director. Once pension becomes due, the director has no choice but to pay the pension .....”

Our understanding of this statement is that pension becomes property when it is due and payable, that is to say, a person can only claim that pension amounts to property when he is eligible for that pension and its payment is due.

It is common ground that pension is paid in accordance with the provisions of the Pensions Act. When pension claimed is not payable under the Act, then no right to property is acquired which is capable of enforcement or protection under the law. As demonstrated earlier, the Petitioner in the instant case was not eligible for payment of pension for years between 1959 -1979. No pension was therefore due to him for those years and none was payable.

In the circumstances, we are persuaded to find that the Petitioner’s claim to pension for the years in question did not translate into property which could be protected under the constitution. We find that in declining to compute or pay the pension for the period between 1959 -1979, the 2nd respondent did not deprive the petitioner his property as the claimed pension had not crystallized into property. In declining to pay the said pension, the 2nd Respondent was merely following the law.

For all the foregoing reasons, we are satisfied that the Petition dated 18th January, 2008 lacks merit and the Petitioner is not entitled to any of the reliefs sought in the said petition. The petition is accordingly dismissed. Considering the nature of the petition and the legal issues involved we do not find it appropriate to award costs to any party.

Dated and signed at Nairobi this 16th day of May ,2012

C. GITHUA **W. K KORIR**

JUDGE **JUDGE**