



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**MISCELLANEOUS CIVIL APPLICATION NO. 368 OF 2009**

**IN THE MATTER OF: AN APPLICATION BY CAPTAIN**

**J.N. WAFUBWA TO APPLY FOR ORDERS OF MANDAMUS**

**AND**

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

**BETWEEN**

**REPUBLIC**

**AND**

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

**RULING**

The ex parte applicant's application by way of Notice of Motion was brought pursuant to **order 53 rules 1 and 3** of the **Civil Procedure Rules** and all enabling powers and provisions of the law. The ex parte applicant is acting in person. In the application he seeks the following orders:

**"1. That leave having been granted to the applicant, the honourable court be pleased to grant orders of Mandamus against the respondents to compel them appoint and delegate any principal pensions officer who is under their control to compute the petitioner's benefits from his chosen favourable law as provided under Section 3 (1), (5) and Section 4 of The Pensions Act for services rendered under the Military Law.**

**2. That costs of this application be awarded to the applicant.”**

The application was based on grounds that:

**“(a) That under Sections 3(1) of the Pensions Act Cap 189, it is the respondents who hold the power of the law to appoint and delegate any principal pensions officer to compute the petitioner’s benefits once respective departments or ministries have recommended anybody to draw such benefits.**

**(b) That under Section 3 (5) of the Pensions Act Cap 189, it is the respondents who hold the power of the law to ensure that the principal pensions officer computes by assessing the benefits as provided under the subsection of the Act by complying with the Constitution of Kenya.**

**(c) That under Section 4 of the Pensions Act Cap 189, it is only the respondents who hold the power of the law to ensure that such computed benefits are charged upon the consolidated fund.**

**(d) That save as stated above, the Deputy Chief of Pay under the authority of Defence Council who are bodies not known to the Pensions Act purported to compute the pensioner’s benefits without observing the requirements of Section 3 (5) of the Pensions Act Cap 189.**

**(e) That save as stated in (d) above, under Sections 3 (5) of the Pensions Act, it is the pensioner’s right to choose a favourable law that grants him the best benefits for taking him to the regular Reserve Forces of the Armed Forces.**

**(f) That despite persistent demand letters and pressure from Petition No. 715 of 2006, the respondents have continued to ignore performing their statutory duties vested upon them as stated.**

**(g) That other ground as expressly stated in the annexed statement supporting this motion.”**

Prior to filing this application, the ex parte applicant had filed several suits and/or applications relating to his employment and/or payment of his terminal benefits. One of those cases is **HCCC No. 674 of 1993** which was heard and determined by Hayanga, J. on 26<sup>th</sup> June, 2003. In that case he sought, *inter alia*, the following reliefs:

**(a) A declaration that the notice to retire given to him is unlawful, invalid, of no legal effects and is null and void.**

**(b) General damages for illegal and unlawful termination of employment.**

The court granted the two prayers as above. In respect of prayer (b) the court directed that the general damages for wrongful termination of service be assessed at 10 months salary as at the date of retirement. The court further ordered that the applicant be paid all his terminal benefits in form of pension and gratuity. The court further held that the applicant was to retire at the age of 39 years and by the time he was given authority to retire he was about to reach that age. The court further held:

**“I find that the plaintiff deserved being promoted to the rank of Major and if he had been so promoted at the time of his being retired he should have carried Major’s salary upto the age of 44 years. I therefore, decide that the plaintiff is entitled to salary of Major for the 5 years from the**

**date of retirement to the time he attained 44 years.”**

Being dissatisfied with some findings of the said judgment, the ex parte applicant preferred an appeal to the Court of Appeal. His major grounds of appeal were that the trial court erred in fixing his retirement age when the evidence on record established that he did not qualify for any pension or gratuity and that the terms of service on age limitation are invalid and cannot be enforced under the **Armed Forces Act**.

The Attorney-General also filed a cross appeal against the judgment of Hayanga, J.

In **Civil Appeal No. 278 of 2003** the Court of Appeal, having carefully considered all the issues raised in the two appeals, held, *inter alia*, that:

- The appellant’s retirement from Armed Forces was valid.
- By virtue of **Section 227 (1) (f) of The Armed Forces Act** the Defence Council, with the consent of the Treasury may make provisions with respect to the pay, allowances, pensions and gratuities of members of the Armed Forces.
- That the applicant’s suit before the High Court, HCCC 674 of 1993, was wholly misconceived since the applicant had been lawfully retired on age basis which was one of the basic terms and conditions of the service.
- The assessment of the applicant’s terminal benefits, pensions, etc based on the High Court’s findings was erroneous and illegal.

The court allowed the cross appeal in its entirety and dismissed the applicant’s appeal. That in effect meant that the judgment of Hayanga, J. was set aside and vacated together with all consequential orders.

In his affidavit in support of the application, the applicant stated that soon after the Court of Appeal judgment he wrote to the respondents stating that he wanted to be paid his terminal benefits computed in terms of **Section 112** of the repealed **Constitution**. After waiting for a long time without any response, he decided to file **Petition No. 715 of 2006**. In the said petition he also filed an application by way of Chamber Summons dated 4<sup>th</sup> February, 2008. The orders that were sought therein are as follows:

**“1. The honourable court be pleased to direct the Hon. Minister for Finance/Treasury to assess the petitioner’s benefits for services rendered under the Military Law.**

**2. The costs be provided for.”**

The respondents in the said petition are the Hon. the Attorney-General and the Minister for Finance. The respondents filed grounds of opposition and the application was heard before Dulu, J. In his ruling delivered on 25<sup>th</sup> May, 2009, the learned Judge held, *inter alia*, that a constitutional court had no jurisdiction to deal with the said matter. He observed that the petitioner had acknowledged that his pension had been assessed at **Kshs.203,850/=** as lump sum and monthly pension of **Kshs.3,397.50/=**. The petitioner contended that he had filed the petition before the Court of Appeal gave its decision. The Judge further held that the matter was also res judicata, the applicant having earlier filed **HCCC No. 674 of**

1993 which had already been determined and **Civil Appeal No. 278 of 2003** also having been finalized. The judge was of the view that the applicant was trying to challenge those decisions through an application.

The respondents herein filed grounds of opposition and stated as follows:

- “1. That the issues being sought herein were determined in Nairobi HCCC No. 674 of 1993, Civil Appeal No. 278 of 2003, Nairobi High Court Petition No. 615 of 2006 in the decision made on 12<sup>th</sup> October, 2007 and 25<sup>th</sup> May, 2009 respectively and as such the court is no longer seized of this matter the same being functus officio.**
- 2. That the application before the court is an appeal from its previous decisions and court simply lacks jurisdiction to under the application.**
- 3. That the application is frivolous, vexatious and defective.**
- 4. That the prayers in the statement are not similar to those in the Notice of Motion hence the application is incompetent.**
- 5. That the application has no basis in law and fact as it is wanting in material disclosures.**
- 6. That there is totally no evidence contained in the affidavit and it is of no evidential value and the application lacks evidence in support .**
- 7. That the applicant has not complied with order LIII of the Civil Procedure Rules.**
- 8. That Judicial Review is concerned with the process and not the merits of the decision.**
- 9. That Judicial Review remedies are discretionary remedies in nature.**
- 10. That the application lacks merit”.**

In an earlier application filed by the applicant and dated 24<sup>th</sup> November, 2006 in Petition No. 715 of 2006, the applicant had sought, *inter alia*,

**“That the honourable court do issue interim orders that the 2<sup>nd</sup> respondent to meet and negotiate with the petitioner with the aim of paying for the chosen favourable law by complying with the requirements of the petitioner’s employment”.**

The application was heard before Nyamu, J. (as he then was). The Judge, in dismissing the application, held that it is an abuse of the court process and an affront to the principle of the hierarchy of courts in that it was purporting to seek the court’s intervention to enforce a Court of Appeal judgment. The court further held that the Court of Appeal had made a categorical adjudication that the applicant’s employment was properly terminated and therefore his entitlements, if any, must be as per the law that was applied to terminate his services.

The current application was argued on 7<sup>th</sup> February, 2011. The parties had earlier filed their respective written submissions. I need not re-state their arguments.

The major issue which this court must determine is whether the application before it is *res judicata* or not. If it is, the court will have no jurisdiction to consider it any further.

In **GEORGE W.M. OMONDI & ANOTHER vs NATIONAL BANK OF KENYA & OTHERS HCCC NO. 958 OF 2001**, the court was dealing with a case in which it was claimed that it offended the *res judicata* rule. Although several new parties had been added to the new suit, in striking out the suit the court observed that:

**“In that regard, I accept submissions by the counsel for the defendants that the doctrine of *res judicata* would apply not only in situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction, but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments.”**

In **BOOTH IRRIGATION vs MOMBASA WATER PRODUCTS LIMITED HCC MISCELLANEOUS APPLICATION NO. 1052 OF 2004**, the court held that the doctrine of *res judicata* applies in constitutional references.

Although the prayers in the present application are worded in a slightly different manner from the earlier ones in **HCCC No. 674 of 1993** and **Petition No. 715 of 2006**, some of the issues raised are more or less the same. They relate to the appropriate law under which the applicant’s pension and/or terminal benefits ought to have been computed. If the applicant was dissatisfied with the rulings by both Justice Nyamu and Justice Dulu, he ought to have preferred an appeal against the decisions. That was not done. This court cannot now grant the orders being sought by the applicant because by doing so it would be sitting on appeal against the said decisions. I would agree with the respondents that in view of the aforesaid findings, this matter is *res judicata*. In any event, the applicant had told Justice Dulu that his pension had been assessed but it seems he did not agree with the formula that was used to compute the same. I must re-state that in judicial review the court is not concerned with the merits of a decision that has already been made but the manner in which it was made. If the court allows the application it would in effect have nullified and/or quashed the assessment of the applicant’s pension that has already been done when there is no application for such orders before it.

As regards the Court of Appeal decision, the court held that the assessment of the appellant’s pension and/or terminal benefits based on the judgment by Hayanga J. was erroneous and illegal. The court did not say that the *ex parte* applicant is not entitled to his pension at all. However, in page 14 of the said judgment, the Court of Appeal expressed its disapproval of the current 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 of members of the Armed Forces. The court observed:

**“This fusion seems to occasion some uncertainty to which of the two bodies carries more power in determining the entitlements of the Armed Forces personnel. We would, however, agree with the appellant that the functions of the Defence Council are limited and it cannot by itself order any grant or gratuities to the members of the Armed Forces without the consent of the Treasury”.**

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 the 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.

In the cause of submissions the court was told that there was a report on the review of pay, allowances and terms and conditions of service for the personnel of the Armed Forces that was prepared and presented to His Excellency the President by The Armed Forces Pay Review Board sometimes in the year 2003. The court was further told that the said Board gave some important recommendations that are yet to be implemented. This court hopes that the Office of the President and the Attorney-General will consider the said recommendations alongside the current provisions of the Pensions Act and other relevant law and make the necessary amendments regarding computation and payment of pensions to the personnel of the Armed Forces.

In view of this court's finding that the applicant's application is res judicata, I dismiss the same with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF APRIL, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – court clerk**

**Mr. Wafubwa present**

**No appearance for respondents**