



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)

Petition 715 of 2006

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER SECTION 70, 71, 74, 75, 77 AND 112 AS READ WITHIN SECTION 77 OF  
THE CONSTITUTION

BETWEEN

CAPTAIN JN WAFUBWA..... PETITIONER

AND

THE HON. ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT

THE MINSITER FOR FINANCE..... 2<sup>ND</sup> RESPONDENT

RULING

Before me is a Chamber Summons dated 4<sup>th</sup> February, 2008 and filed on the same date by the Petitioner **CAPTAIN J.N.WAFUBWA**. The respondents are named as **THE HON. ATTORNEY GENERAL (1<sup>st</sup> respondent)** and **THE MINISTER FOR FINANCE (2<sup>nd</sup> respondent)**. The Chamber Summons (*application*) is purported to be brought under section 112(8) of the Constitution. The orders sought are that-

1. *The Honourable court be pleased to direct the Hon. Minister for Finance/Treasury to assess the Petitioners benefits for services rendered under the military law.*
2. *The costs be provided for.*

The grounds of the application are that-

- (a) *The Hon. Attorney-General has failed to secure assessment of the benefits from the military authority.*
- (b) *In the alternative to the aforementioned assessment, the court held a view that such assessment be made under judicial review which is not appropriate since the Minister has never refused to perform that duty.*

**(c) The Hon. Minister for Finance/Treasury is competent and empowered under the Constitution to assess the benefits without the court interfering with the military authority.**

**(d) The decision dated 12<sup>th</sup> October, 2007 is not absolute, as such this court can grant further orders for the rights being sought as provided in the Constitution.**

The application was filed with a supporting affidavit sworn by the petitioner on 4<sup>th</sup> February, 2008. It was deponed in the said affidavit, inter alia, that after the decision (**ruling of the court**) was made on 12<sup>th</sup> October, 2007 the applicant wrote to the military authority through the Attorney-General for assessment of his benefits and under military law; though he later wrote to the Attorney-General to reply, the applicant had failed to get any response from the military even though the court had on 26<sup>th</sup> February, 2007 issued an order for negotiations which could lead to assessment of his benefits with the Minister of Finance/Treasury; that though the court was of the view that judicial review was the best alternative, the petitioner/applicant believed that it was not entirely correct and warranting orders of mandamus since the Minister has never refused to assess benefits, save for the court's refusal to give directions for granting of the rights by the Minister; that the petitioner believed that judicial review procedure did not apply to this case but the applicant powers are under section 112 of the Constitution with regard to pensions for military officers; that it was surprising that a Judge can doubt if section 112 of the Constitution applies to the Armed Forces; that Commissioned Officers of the Armed Forces were not party to the provident fund; that on his retirement the petitioner/applicant was under section 112 (1) (2) and (3) of the Constitution entitled to an absolute right to chose the options under section 170(2) or 182 which was favourable to him; that he had made up his mind to draw his benefits under section 182; that section 227(2) of the Armed Forces (**Pension & Gratuities**) Act Cap. 201 did not give the Defence Council powers to compute pensions as provided for under section 112 (1) (2) and (3) of the Constitution; that when the Defence Council made Regulations in Legal Notice No. 61 of 1980 it usurped the provisions of the first schedule to the Pensions Act (Cap. 189) by introducing retirement limitation ages between 39 years to 62 years; that the Court of Appeal at page 14 (of its judgment) was not sincere when it referred to the Treasury and Defence Council as to which one of the two bodies carries more power in determining entitlement in the Armed Forces; that the notice to retire the petitioner dated 24<sup>th</sup> September, 1992 could only be a posting letter to the Minister for Finance/Treasury with the aim of securing his retirement.

The applicant also filed written submissions on 9<sup>th</sup> March, 2009. In the written submissions the petitioner, inter alia, admitted that he had filed a case HCCC 674 of 1993 which went right to the Court of Appeal and was decided by the Court of Appeal in 2006. The Petitioner acknowledges that his pension was already assessed at Kshs.203,850/= as lumpsum and monthly pension of Kshs.3,397/50. He however contends that he filed this present matter before the Court of Appeal gave its decision. He asserted that under section 112 of the Constitution, this court has jurisdiction to entertain and determine the matter, and that this matter is not res judicata. He contends that the respondents did not file a replying affidavit, so the application is not opposed.

The respondent filed grounds of opposition on 22<sup>nd</sup> May, 2008. The grounds of opposition were that-

1. **The application dated 4<sup>th</sup> April, 2008 is misconceived and bad in law as the prayers sought cannot be granted by this Honourable Court.**
2. **The application is based on wrong procedure and is therefore untenable.**
3. **The court has no jurisdiction to grant the orders sought.**
4. **The prayers sought in the motion are unsupported by any evidence.**
5. **The application is incurably and fatally defective as the grounds advanced in the supporting affidavit do not support the prayers sought.**
6. **The application is without merit since there is no evidence of infringement and or**

**likely infringement of the petitioner's fundamental rights and freedoms as guaranteed by section 78 and 74 of the Constitution.**

7. ***The application is unreasonable and without merit since the petitioners rights and freedoms as guaranteed by section 78 and 74 of the Constitution are not absolute but could be restricted on public order grounds.***

8. ***The application is otherwise an abuse o the court process.***

The respondents also filed written submission on 2<sup>nd</sup> March, 2009, and relied on Nairobi Civil Appeal No. 278 of 2003 ***CAPTAIN J.N. WAFUBWA –VS- ATTORNEY GENERAL***; and Nairobi High Court Petition No. 715 of 2006 ***CAPTAIN J.N. WAFUBWA –vs- ATTORNEY-GENERAL*** (which is the present case file).

On the hearing date, the Petitioner in person addressed me in support of the application. Mr. Menge a Principal Litigation Counsel addressed me on behalf of the respondents.

I must say at the outset, that in this particular matter, the petition filed by the petitioner on 27<sup>th</sup> November 2006 has not been heard and determined. The present application is one of the applications that has so far been filed following the filing of the petition which alleges violation of fundamental rights of the petitioner contrary to section, 70, 71, 75, 77 & 112 of the Constitution. This is not the first application to be filed, following the filing of the petition.

There was a Chamber Summons filed by the petitioner on 27<sup>th</sup> November, 2006. On the same date after considering the urgency of the application, Emukule, J. stated-

***“In my further respectful opinion, the Court of Appeal has not in its judgment in Civil Appeal No. 278 of 2003 declared that the Petitioner is entitled to any such pension. In the circumstances I would be inclined to summarily strike out this application but because the petitioner is entitled to his day in court, I direct that the application be served upon the Attorney-General and the Minister for Finance for them to make their respective representation. In the result therefore, I do not think that this is a proper case upon which to make the kind of conservatory order sought by the Petitioner.*”**

Consequent upon the above court order, the application was served and after hearing the parties, Nyamu J, (***as he then was***) delivered a ruling on 12<sup>th</sup> October, 2007 dismissing the application on the ground that it was misconceived and incompetent.

The applicant has now come again to court with the present application under section 112(8) of the Constitution. The said section provides-

***“112(8) References in this section to the law with respect to pensions benefits include (without prejudice to their generality) reference to the law regulating the circumstances in which those benefits may be granted or in which the grant of those benefits may be refused, the law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended and the law regulating the amount of such benefits.”***

The above section deals with the laws that relate to award of pensions, and the circumstances in which the pension benefits can be awarded. It does not deal with the jurisdiction of this court to adjudicate on the said pension matters. The applicant has not referred me to any statute law or case authority that would be relied upon to establish that this court has jurisdiction to entertain the application, and grant the orders sought. It is my finding, and I so hold that this court has no jurisdiction to grant the orders sought. Therefore the application has to fail.

If I am wrong on the above, the application will still fail. Though the petitioner claims that the respondents did not file a replying affidavit, so the application is unopposed, that contention cannot be

correct. The grounds of opposition filed were themselves an opposition to the application. The respondents were bound to file a replying affidavit, only if they wanted to controvert the factual averments in the affidavit of the petitioner. They do not appear to have been bothered about the issues raised, presumably because they are aware that the same had arisen in previous proceedings relating to the same petitioner and on the same subject matter. They are interested in the legality or sustainability of the application. Therefore that objection of the petitioner fails. I hold that the application is or has been properly opposed.

The other reasons why this application must fail is that the orders sought appear to come from the blues and are purported to arise from issues which have been determined by this court and the Court of Appeal. In my view, petitioner is bringing to this court (***through this application***) issues which were determined by the High Court in Nairobi HCCC No. 674 of 1993 and by the Court of Appeal in Civil Appeal No. 278 of 2003 – and trying to challenge those decisions through a Chamber Summons. This court cannot change the decision of the Court of Appeal. This court cannot also review the decision of the High Court, which was appealed from and a final decision subsequently made by the Court of Appeal. The application is misconceived.

In the final analysis, I find and hold that this court has no jurisdiction to entertain the application herein. I also find that the application is an abuse of the process of the court, and totally incompetent and misconceived. I dismiss the application with costs to the respondents.

Dated and delivered at Nairobi this 25<sup>th</sup> day of May, 2009.

**George Dulu**

**Judge.**

**In the presence of-**

Petitioner/Applicant in person

Kevin Court Clerk