



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

BETWEEN

J N WAFUBWA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

MINITER FOR FINANCE 2ND RESPONDENT

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

SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL) HIGH COURT (PRACTICE & PROCEDURE) RULES,
2006

RULING

The chamber application dated 24th November, 2006 seeks two substantive orders save for the prayer on costs namely:-

- (i) That the honourable court do issue interim orders that the petitioners employment being protected by the statute must be “observed and complied with” by the 2nd respondent**
- (ii) That the Honourable court do issue interim orders that the 2nd respondent to meet and negotiate with the Petitioner with the aim of paying for the chosen favourable law by complying with the requirements of petitioners employment.**

(iii) That the costs of this application be in the cause.

I have read the affidavit in support of the application the two sets of written submissions by the applicant and the written submissions filed on behalf of the respondent.

The application is misconceived and incompetent for the following reasons:

(1) It is an abuse of the court process and an affront to the principle of the hierarchy of courts in that it purports to seek this court's intervention to enforce a Court of Appeal judgment. This is a lower court in terms of hierarchy and it cannot enforce Court of Appeal decisions – they are self regulating or self enforcing. Indeed every judgment or order of any court has the same qualities and it does not have to be enforced by another court unless specifically transferred for enforcement. The only unique features of the High Court and which sets the court apart are two:-

(i) the unlimited jurisdiction under s 60

(ii) the original jurisdiction as regards the enforcement of fundamental rights and freedoms under Chapter 5 ie s 84 of the Constitution.

Prima facie on the facts the applicant does not fall under s 71, 73 and 74 of the Constitution which are the only ones he would have come under if he still contends to be in the military. All the other provisions of Chapter 5 would not apply to him. Consequently no interim relief lies under s 84 and rule 20 of LN16/06.

(2) Prima facie, the court does not share the applicant's view of the Court of Appeal holding, in Civil Appeal No. 2003 at page 13 in that the court has made a categorical adjudication that the applicant employment was properly terminated. It follows that his entitlements (if any) following the termination must be as per the law that was applied to terminate his services.

If as he contends the law is s 112 of the Constitution he could not possibly have accessed or moved this court by way of a petition and if in the alternative the entitlements if any are regulated by statute accessing the court by Petition is not the correct approach. It is not clear why judicial review was not considered. The application is therefore incompetent

(3) Conservatory orders as the name suggests are principally aimed at preserving the subject matter of the petition until it is determined on merit. The orders sought are neither interim measures or conservatory. There is nothing interim or conservatory in the orders sought. No interim orders or conservatory orders would lie unless they spring from the Petition and in view of the court's tentative findings in 2 above the application should be disallowed even on this ground.

(4) The fourth and final reason why the application must fail in that the Court of Appeal in the case cited above did rule on a point of principle and which is binding on this court to the effect that military matters are not justiciable. One of my decisions was given before the decision of 2007 by the Court of Appeal and the other given after the Court of Appeal decision in 2007. The cases are:

(1) *R v Non Gouvernemental Organisations ex parte Manduli (NEPAD) Misc Civil Application No. 1124 of 2005*

(2) *R v Attorney General ex parte Anyang' Nyong'o and others Misc Civil Application No. 1078 of 2007.*

The upshot is that the application is dismissed.

Costs shall abide the outcome of the petition.

It is so ordered.

DATED and delivered at Nairobi this 12th day of October, 2007.

J.G. NYAMU

JUDGE