



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Cheruiyot v Teachers Service Commission (Civil Suit 107 of 2003)
[2023] KEHC 22430 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 107 OF 2003
SM MOHOCHI, J
SEPTEMBER 19, 2023**

BETWEEN

MOSES KIPNGETICH CHERUIYOT APPLICANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. By an undated Notice of Motion filed Under section 1A, 1B, 3A, section 95 of *Civil Procedure Act*, Order 42 Rules A3). 6 and under Article 22 and 159 the *Constitution* of Kenya 2010 on the basis that:
 - a. That the unpaid salary directed by the court in judgment of 26th November 2010 and affirmed by judgment delivered on 21st February 2019 has not been paid to date.
 - b. That the previous awarded cost together with interest at court rate is also unpaid.
 - c. That the unpaid pension Benefits from 12th August 2005 the time applicant attain retirement age of 50 Years as per requirement of *TSC Code Of Regulations* 73(1a) and the concern department refused or neglected or failed to do their duty despite affirming employer.
 - d. that this court be pleased to see that by the legal certified Document of the Bank Statement from 2016 to 16" Sep 2022 is the process on how applicant, however he was paid in Decreasing manner is also abnormal for instead of increasing it was in decreased manner which is never normal and decreasing manner is abnormal from 3rd August 2016 to 7th September 2022 for full statements.



- e. That the Respondent failed to comply with the court order the court and applicant can only see the failure to be deliberate disobedience of court order of last ruling entered by court Hon Judge Mumbua T. Matheka on 4th June 2021. and yet respondent in its affidavit filed on 16th August 2021 claims it had reviewed and studied the matter diligently. Also respondent claimed by swearing on 12th Aug 2021 and when he submitted in court he said payment was over by 2 million has been paid in Excess and again he submitted there was underpayment which they secretly deposited in applicant's account on 16th April 2021 an amount of Ksh 613,726.30 and yet the court ordered respondent to do recalculation an deliver in court and not to follow its own order, as per final order of court Hon Judge Mumbua T. Matheka in her last ruling of 4th June 2021 to say the 30 day expired in March 2019.
2. The applicant is humbly requesting this court to be pleased to note that the matter has delayed for long and kindly request to be heard urgently for after all the court, the immediate retired Hon Chief Justice Judge D. K Maraga had given Certificate of Emergency of hearing in 2000 and the current Chief Justice Hon Chief Justice Judge Martha Koome had said in 2007 the matter be heard in priority basis.
3. That during the last ruling the Court, Hon Judge Mumbua Matheka delivered a detailed finding of the whole matter on 4th June 2021 and having respondent accountable and issued summons Respondent after failing to give explanation to date as was summoned applicant moved to Supreme Court of Kenya and whereby applicant was informed by the Deputy Chief Justice of the immandats retired Chief Justice D. K. Maraga that the court is through with the case and gave applicant further direction to move to West Towers Nairobi where the commission administrator on justice are stationed and it is seem applicant went to that office.
4. That it is so surprising that the case has been brought back from Supreme Court to High Court Nakuru by unknown person and same has been there for fourteen (14) years now and yet Applicant has followed the chain of command of the Court after that has been done humbly request for assistance as per the 1 prayers.
5. On the 16th May 2023 this Court directed parties, to file written submissions a maximum of 4 pages and a ruling was reserved for the 19th September 2023.
6. At the time of Ruling the Applicant was yet to file his written submissions, however the Court has keenly considered the Application notwithstanding the absence of the Applicant's written submissions.

Respondent's Submission

7. The Respondent on their part filed grounds of opposition dated 25th July 2023, together with written submissions dated 6th September 2023.
8. The Respondent assert that they cannot discern the exact prayers sought by the Applicant from the body of the Application making their response extremely difficult. Doing the best they can, it is their understanding that the Applicant is alluding to non-compliance with the Court's Judgment. It is on this premise that they submit as follows: -
9. In opposition to the instant Application they filed Grounds of Opposition dated 25th July, 2023 praying that the Application dated 25th April 2023 and filed on 25th April 2023 be dismissed, the



Applicant be declared a vexatious litigator and be barred from filing further Applications on this matter unless with the leave of Court.

10. That on 26th November, 2010, the Hon. Justice Anyara Emukule delivered Judgment in this suit wherein he directed the Commission to pay the Applicant his retirement benefits amongst other reliefs. Pursuant to the said Judgment, and upon receipt of the Certificate of Order, and subsequent disclosure of the Applicant's account details, the Respondent processed and paid to the Applicant the total of Ksh.1,110,019/= being: Unpaid Salaries, Special Damages, Payment in lieu of Notice and Costs of the suit.
11. In further compliance of the judgment and decree, the Respondent facilitated the processing and payment of the Applicant's Pension emoluments. The same was computed and paid to him as confirmed by Mr. Michael Kagika, the Director of Pensions, National Treasury. In his Affidavit sworn on 12th August, 2021 and filed in Court on 16th August 2021, the Director explained in detail, how the payments were made to the Applicant.
12. To further buttress the Respondent's case, reliance was placed on the Affidavit of Dr. Julius Olayo sworn on the 12th of August 2021 and filed in Court on 16th August 2021, to demonstrate that the Respondent has wholly complied with the Court's Judgment and all the directions issued by Court.
13. That the Applicant had, as of 16th June 2016, received a total of Kshs. 2,166,037/- in terminal benefits and lumpsum pension arrears, which monies were well in excess of the amounts granted in the judgment. The Applicant as a senior citizen is also receiving his monthly pension as confirmed by the Director of Pensions.
14. That despite the clear and elaborate explanation given to the Applicant on his pension calculations and payment, the Applicant has maintained a concerted effort to file papers in Court, with claims at times not discernible, but which at best can be construed to be claiming for the same pension dues that he has already been paid.
15. The Applicant submit that the issues raised by the Applicant's in the Application are Res-Judicata and ought not be entertained by the Court.
16. That Section 7 of the [Civil Procedure Act](#) stipulates that:

“No court shall try any Suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such Subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
17. The Respondent draw's the Court's attention, to the Judgment of the Court delivered on 26th November 2010 and the subsequent decree issued on 8th February 2012.
18. That the Court is functus officio and lacks jurisdiction to hear and determine prayers sought in the instant Application.
19. Once the Court has delivered its Judgment, the Court becomes functus officio under the Doctrine of Finality of Litigation. The Doctrine of Finality of Litigation is based on public policy and interest and intended to uphold and preserve the integrity of the judicial process.



20. Reliance is placed on the case In Nairobi Civil Appeal No. 23 of 2014: *Telkom Kenya Limited v John Ochanda* [2014] eKLR, the Court of Appeal held: -

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued”

21. The Respondent humbly submits that litigation in this matter must now end and that the Court's pen should stop in tandem with the principle of finality of litigation.
22. The Applicant's action to file an Application before the same Court seeking prayers that were declined, refused and/or rejected in a previous application amounts to gross abuse of the court process. Order 2 Rule 15(b) of the Civil Procedure Rules provides that at any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that it is scandalous, frivolous or vexatious.
23. Finally, the Respondent cites the case of *Kivanga Estates Limited v National Bank of Kenya Limited* 2017 eKLR the Court of Appeal held that: -

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses, A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action”

24. The Respondent therefore urges the Court, to strike out the instant Application, declare the Applicant a vexatious litigator and award the Respondent costs to cater for reasonable expenses in defending the instant Application and deter the Applicant from further filing of numerous Applications.

Analysis and Determination

25. Judgment by Emukule J. was entered in this matter on 26th November 2010, the Court thus rendered itself and that the same was never Appealed against.
26. As of 16th June 2016, the Applicant had received a total of Kshs. 2,166,037/- in terminal benefits and lumpsum pension arrears from the Respondent.
27. This Court has pronounced itself on this matter three times. The Court has rendered its Judgment on the substantive suit as well as on several Applications and this is the 4th time.
28. On the 4th of June 2021 this Court considered and dismissed an application similar and identical to the instant application.
29. The issue of non-payment or under-payment of the decretal amount becomes moot and res judicata having been considered by the Court before, the Court is thus functus officio on the issue.



30. The Application with all its shortcomings unfortunately takes up much scarce judicial time, displaces matters awaiting determination and litigants standing inline waiting for their day in Court and such a conduct by the Applicant would warrant serious consequences. This Court however is of the considered view that the litigant can be reprimanded before being adjudged a vexatious litigant.
31. The Court declines the invitation to strike out the pleadings as being a colonial relic that deprives off hearing to the litigant filing the same. The Court has considered the Application as a basis of this conclusion.
32. The Applicant is reprimanded that should he file an application such as this in future the Court shall not hesitate to condemn him to costs.

Conclusion

33. In the upshot, I find this Application to be without merit and accordingly dismiss the same:
 - a. This file shall be marked as closed.

It is So Ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 19TH SEPTEMBER 2023.

MOHOCHI S.M

JUDGE

