



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 610 OF 2017

WILFRED MBITHI JASON.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. **Wilson Mbithi Jason**, the petitioner, is an Assistant Commissioner of Police. He filed this petition against the **National Police Service Commission**, the respondent, claiming violation of rights and fundamental freedoms guaranteed under Articles 41, 47(1) and 50(1) of the Constitution.

2. The petitioner avers that pursuant to a decree of this court in constitutional petition No 409 of 2015 **Wilfred Mbithi Jason v National Police Service Commission and the Attorney General**, the court reviewed and set aside the respondent's decision to terminate the petitioner's service following his earlier vetting. The court ordered the respondent to consider and if interested, conduct vetting *de novo* within 60 days, which however, the respondent did not do.

3. The petitioner further avers that the respondent having failed to vet the petitioner within the said sixty days purported to vet the petitioner outside the period ordered by the court. In violation of the court order. The petitioner states that by letter dated 4th April 2017, the respondent invited the petitioner for vetting on 7th April 2017 but the respondent adjourned that vetting indefinitely without any further reference to the petitioner.

4. It is the petitioner's case that he filed a motion on 17th October 2017 seeking a finding that the order to vet him had lapsed but the motion jolted the respondent into action and invited the petitioner for vetting on 9th November 2017 and commended vetting on 16th November 2017 despite the petitioner's protest on the legality of the process. Vetting was adjourned to 28th November owing to the fact that the petitioner had not been supplied with witness statements.

5. The petitioner's contention is that had the respondent been desirous of vetting him, it should have done so within the 60 days allowed by the court. The petitioner states that the fact that the respondent embarked on the process of vetting the petitioner only after being served with the application showed an element of bad faith, malice and ill will on the part of the respondent, an action the petitioner contends is unreasonable, oppressive and high handed.

6. The petitioner sought the following reliefs:-

i. A declaration that the petitioners Fundamental rights and Freedoms have been violated.

ii. An Order of Certiorari do issue to quash the entire proceedings and the decision of the 1st Respondent declaring that the Petitioner had failed vetting and had been discontinued from the Kenya Police Service.

iii. An order substituting the 1st respondent's decision with a declaration that there exist no materials to find that the Petitioner has failed vetting.

iv. Compensation to the petitioner for the violation of his fundamental rights and freedoms.

v. Costs of this petition.

vi. Any other relief that this Honourable court may deem just to grant.

Response

7. The respondent filed both grounds of opposition and replying affidavit in opposition to the petition. In the grounds of opposition dated 29th January 2018, the respondent contended that the petition as framed is *res judicata*; that it is fatally defective and incurable and that it is an abuse of the court process and meritless.

8. In the replying affidavit by **Johnston Kavulundi**, the chairperson of the respondent, sworn on 8th March 2018, he deposed that the petitioner was vetted on 5th March 2014 and re vetted on 22nd June 2015 when he was found unsuitable to serve; that the petitioner challenged that decision and the court allowed the petition, set aside the decision and ordered that the respondent vet the petitioner de novo within 60 days.

9. Mr. Kavuludi further deposed that the respondent was not able to vet the petitioner within the 60 days due to administrative and financial constraints but later invited the petitioner for vetting and that the petitioner subject himself to vetting after the respondent had clarified to him that in the absence of an order stopping the vetting, it would proceed. He denied the contention that the petitioner was vetted under duress.

10. Mr. Kavuludi contended that the vetting was adjourned on the respondent's recognition of the petitioner's right to fair administrative process and natural justice when the petitioner requested for more time to peruse the complaint submitted against him. He argued the court having annulled the previous vetting, the subsequent vetting, though done outside the period set by the court, was being done in good faith. He contended that the order the petitioner seeks to be reinstated without being vetted is not in line with section 7 of the Police Service Act.

Petitioner's submissions

11. Mr Thuita, learned counsel for the petitioner, submitted highlighting their written submissions dated 6th November 2018, that the petitioner underwent vetting leading to his removal from the service; that the petitioner successfully challenged that decision in **Petition No 409 of 2015** and the court quashed it on 31st October 2016. Counsel submitted that following that decision, the court directed the respondent to consider and if so wishes vet the petitioner a fresh within 60 days which the respondent did not do.

12. According to counsel, the respondent purported to vet the petitioner after expiry of the 60 days without reference to court in violation of the decision of the court. He therefore contended that the respondent could not act as it desired in disregard of the court's directions. He argued that the respondent was acting in violation of the decision of the court and that is why the petitioner seeks the court's protection and a finding that the respondent cannot not act in the manner it is purporting to do.

Respondent's submission

13. Miss Opiyo, learned counsel for the respondent, also submitted highlighting their written submissions dated 20th July 2018, that the petitioner was indeed vetted on 16th November 2017; that the respondent had not been able to vet the petitioner within the sixty days as it had been directed by the court; and that the respondent had however sought to vet the petitioner on 16th November 2017, but the vetting was adjourned and the petitioner seized that opportunity to come to court.

14. It is counsel's contention that this petition is unjustified because the petitioner faces serious accusations which can only be proved or disproved during vetting. Miss Opiyo went on to contend that the court directed in its judgment in **Petition No 409 of 2014**, that vetting be done a fresh which mean the petitioner remains unvetted to this ends; that the petitioner's vetting is done in accordance with the law and that only vetting can determine the petitioner's suitability to serve.

15. Learned counsel submitted, therefore, that the petitioner filed this petition with a view to frustrating his vetting. In counsel view, although the petitioner's vetting is being done outside the sixty days directed by the court, it is being done in accordance with the law hence the court should allow the respondent to continue and finalize the petitioner's vetting.

Determination

16. I have carefully considered this the Petition; the response; submissions and the authorities relied on. The issue raised in this petition is whether the respondent is acting properly in purporting to vet the petitioner after the expiry of the sixty days allowed by the court. The petitioner is a police officer of the rank of Assistant commissioner of Police. He was a serving officer at the commencement of the National Police Service Act. Section 7(2) of the Act requires the respondent to vet all officers serving then and determine their suitability to continue serving. In that regard, the respondent vetted the petitioner in 2014 and 2015 and in both instances the petitioner was found unsuitable to serve and was removed from the service.

17. The petitioner challenged the decision to remove him from the service and in its decision of October 2016; the court set aside the respondent's decision to remove the petitioner from the service. The court made an order to the effect that the respondent was free to vet the petitioner but the respondent was to decide whether or not to vet the petitioner and vet him within sixty days from the date of that decision. That is the respondent had sixty days to decide and if it had to, vet him within the 60 days.

18. It is not disputed that the respondent did not vet the petitioner within the period of sixty days set by the court. According to the petitioner, the respondent invited him for vetting in April 2017 but adjourned the vetting indefinitely. The petitioner then filed a motion seeking the court's determination that having failed to vet him within the 60 days, the respondent should reinstate him. That is when the respondent summoned the petition for vetting in November 2017 and although the petitioner appeared before the panel, vetting was adjourned and the petitioner filed this petition.

19. The petitioner has contended that the respondent is acting in violation of the decision of the court decision in attempting to vet him more than one year after that decision. The respondent has on its part argued that it has a legal duty to vet the petitioner and that it is acting in accordance to its mandate under the law, namely section 7(2) of the National Police Service Act. The section requires the respondent to vet and assess suitability and competence of all police officers serving at the commencement of the Act. In order to fulfil this mandate, the respondent came up with the **National Police Service (Vetting) Regulations 2013**. Regulation 3 is on the general objectives.

20. The key regulation 14(1) requires the respondent to consider, assess and determine suitability and competence of the officer. In order to determine suitability. Under regulation 14(2) the respondent is to consider among other things; whether the office meets constitutional or other criteria required by law for recruitment and appointment as an officer; his past record including conduct, discipline and diligence; integrity and financial probity as well as the human rights record of the officer.

21. The respondent vetted the petitioner and found him unsuitable to serve leading to termination of his service. The petitioner successfully challenged that decision in court. The court set aside the decision and gave the respondent sixty days to decide whether or not to vet the petitioner and if it decided to vet him, do so within the said sixty days. That is., from that point, the respondent was under an obligation to make a decision whichever way within sixty days. This did not happen. The respondent has contended that it had administrative and financial challenges and for that reason it did not vet the petitioner within the time set by the court. The respondent has argued though, that it still has a legal duty to vet the petitioner and that is why it invited him for vetting.

22. The petitioner has contended, which is conceded by the respondent, that the court set timeline within which a decision was to be made and vetting conducted. After the lapse of time and one year on, the respondent summoned the petitioner for vetting in total disregard of the court's decision. The respondent has justified this by contending that it faced both administrative and financial challenges thus failed to comply with the decision of the court.

23. It is possible that the respondent had difficulties and that is perfectly understandable. However, if that was the case, the respondent should have approached the court, explain its difficulty and ask for extension of time to enable it vet the petitioner in compliance with the decision of the court. This it did not do. Instead the respondent decided to act in total disregard of that decision and attempted to vet the petitioner. Such conduct cannot be countenanced in a democracy guided by the rule of law.

24. In the case of *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR, the Court of Appeal stated;

“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

25. Courts exist to settle disputes between parties, state organs and individuals. Where a court has made a clear order that something be done within a specified period, it must be so. If a party has difficulty in complying with the decision of the court, s/he has an option of going back to court and seek the court's indulgence and or extension of time to allow compliance. If, however, for whatever reason the party ignores the court's directive, it will be acting at whims in complete disregard of that decision.

26. In the case of *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another* CCT 19/11(75/2015). **The court** observed that:-

“The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.” (emphasis)

27. And in *Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2)* [1975] 48 D.L.R.(30), the Supreme court of Canada observed;

“To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

28. In the present petition, the respondent did not act as was required by the court's decision. It has not demonstrated that it attempted to seek extension of time within which it could vet the petitioner in compliance with the directions of the court. It has merely stated that it is under a legal obligation to vet the petitioner as required by section 7(2) of the Act. It is instructive to note the respondent's argument that as long as the petitioner did not have an order stopping it, the intended vetting would proceed. This is a clear indication of the respondent's attitude regarding decision of the court.

29. The respondent decided to act at whims instead of following directives of the court. In that regard, it cannot argue that it was acting in good faith. It could not be said to be acting in good faith when it was violating a clear decision of the court. It could not also force the petitioner to attend vetting and contend that the petitioner willfully attended the vetting. Such conduct could not and cannot validate an illegal act done in violation of a decision of the court.

30. Court decisions bind those against whom they are made and everyone has an obligation to obey them. No one should act in disregard of a court's decision yet claim validity of his/her action. The respondent had sixty days to act, but having failed to do so, could not summon power and strength from its own internal will and purport to vet the petitioner, the court's decision notwithstanding.

31. Having, therefore, considered the uncontested facts of this petition, the submissions and the law, I am persuaded that the petition has merit. The respondent squandered the opportunity the court gave it to consider and if found fit, vet the petitioner within a specified period. It failed to do so. It is estopped from taking any other step against the petitioner. It cannot vet him now. The only option is to conclude that the respondent made a decision not to vet the petitioner and, therefore, the petitioner must be treated him as one already vetted and found fit to serve, I see no other way of concluding this matter.

32. Consequently and for the above reasons the petition is allowed as follows;

i. A declaration is hereby issued that the respondent is not entitled to vet the petitioner having failed to do so as directed by the court in its judgment delivered on 31st October 2016 in petition No.409 of 2015

ii. An Order of prohibition is hereby issued prohibiting the respondent from conducting any vetting against the petitioner in any manner whatsoever.

iii. An order of mandamus is hereby issued compelling the respondent to immediately reinstate the petitioner into service

iv. Costs to the petitioner.

Dated, Signed and Delivered at Nairobi this 14th of March 2019

E.C MWITA

JUDGE