



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

(CIVIL CASE NO. 65 2006)

JUDICIAL REVIEW NUMBER 18 OF 2012

SIMON KAMAU & OTHERS.....APPLICANTS

-VERSUS-

DIRECTOR OF PENSIONS1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

RULING ON THE APPLICATION DATED 3RD NOVEMBER 2018 BY THE TEACHERS SERVICE COMMISSION (TSC)

1. The Applicant Teachers Service Commission (TSC) by its Notice of Motion application dated 3rd November 2018, brought under provisions of **Order 51(1)** of the Civil Procedure Rules (C.P.R) and **Section 34 of the Civil Procedure Act** sought the following orders:

(1) Spent

(2) That this Honourable court be pleased to certify that the Notice of Motion dated 24th September 2018 raises substantial questions of law and forthwith refer the case to the Hon. The Chief Justice for appointment of a bench of an even number of Judges being not less than three (3) pursuant to Article 165(4) of the Constitution.

(3) That the court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing order if granted.

2. The application subject of this present application is dated **24th September 2018** as aforesated.

It was filed by TSC under provisions of **Order 51(1) CPR and Section 34 of the Act** seeking directions and clarification on the following issues

(a) Whether the judgment entered on the 23rd October 2008 required payment of unpaid gratuity and pension dues only and there was no orders whatsoever on salaries.

(b) If the certificate of order against the Respondents was for Kshs.16.7 Billion can the plaintiffs claim anything over and above Kshs.16.7 Billion.

(c) Whether a finding of a court in contempt proceedings can amend and enter judgment and include awards not contained in the original judgment

(d) Whether the purported enforcement of a con-existent judgment violates the Respondents right to fair trial contrary to Article 50 and 159 of the Constitution.

3. The present application is premised on grounds

1. That a judgement in Nakuru HCCC No. 65 of 2006 upon which the Judicial Review Application No. 18 of 2012 arose from dated 23rd October 2008 by the Hon. D.K. Maraga J, (as he then was) granted declarations as prayed in the plaint dated 21st March 2006, and only those declarations.

4. That the judgment was appealed from but the Court of Appeal dismissed the Appeal on the 23rd October 2018 and upheld the judgment of the trial court.

5. That a Certificate of Order against the government was drawn and issued for a sum of Kshs.16.7 Billion together with interest at 14% per annum for the unpaid gratuity and pension dues.

6. That this Judicial Review application was made seeking orders of *mandamus* to compel the Director of Pensions to pay the certified sum of Kshs.16.7 Billion plus costs and interest owed to the applicants (herein after referred to as the **Pensioners**) for the period 1997 -2003 as stated in the judgment in **Nakuru HCCC No. 65 of 2006 and the Court of Appeal in Appeal No. 300 of 2009.**

7. In the Judicial Review application No. 18 of 2012 the Applicants (Pensioners) sought by their application dated 4th March 2012, upon grant of leave to file the application orders that.

(1) That this Honourable court be pleased to issue an order of Mandamus compelling and commanding the Director of Pension to pay the subjects Pensions due to them from the year 1997 to date, which sum of money stand at Kshs.42 Billion together with accrued interest at 14% per annum, as per the judgment of the court in Nakuru HCCC No. 65 of 2006 and Court of Appeal Case No. 300 of 2009.

(2) That this Hon. Court be pleased to issue an order of mandamus compelling and/or commanding the Director of Pensions, the Respondent herein to revise and pay the subjects monthly pensions as decreed in the judgment in Nakuru HCCC No. 65 of 2006 and Court of Appeal case No. 300 of 2009.

8. The present application dated 3rd November 2018 is supported by an affidavit sworn by Macharia Karanja Advocate for the **applicant Teachers Service Commission** in which it is averred that there is an ambiguity and disparity in the terms of the judgment of the Hon. D. K. Maraga J (as he then was) and the prayers sought in the Judicial Review application, wherein a sum of Kshs.16.7 Billion was certified as the order against the Government, and the sum of Kshs.42 Billion sought in the (JR) application by the pensioners.

9. It is further averred by the applicant (TSC) that the claim for **unpaid salaries** by the pensioners is unwarranted and inept as it was not decreed in the judgments of Hon. Maraga J (as he then was) nor the Court of Appeal, and reiterating that the only amount payable thereof are **Kshs.16.7 Billion plus costs and interest, and not kshs.42 Billion stated by the Pensioners.**

10. By the above alleged disparity and ambiguity, the applicant – (TSC) - seeks an order for empanelment of a three judge bench to offer advisory and clarification of the orders issued on the 23rd October 2008, 19th December 2012 and Court of Appeal Judgment as to

(a) Whether the judgment entered on the 23rd October 2008 required payment of unpaid gratuity and pension dues only and that there was no orders whatsoever on salaries.

(b) If the certificate of order entered against the Respondents was for Kshs.16.7 Billion, and whether the plaintiffs can claim anything over and above the said Kshs.16.7 Billion.

(c) Whether a finding of a court in contempt proceedings can amend and enter judgment to include awards not continued in the original judgment.

(d) Whether the purported enforcement of a non-existent judgment violates the Respondents right to fair trial contrary to Article 50 and 159 of the Constitution.

THE RESPONDENTS' RESPONSES

11. Plaintiffs (Pensioners) response:

The pensioners oppose the application by a Replying Affidavit sworn on the 19th November 2018 by Dominic Mukui Kimatta, Advocate for the Pensioners and another by the 3rd respondent (pensioner).

They aver that there is no ambiguity at all in the judgments or in the various rulings thereafter.

12. On the issue of salaries, the Pensioners aver that the issue was dealt with in the Application by the Applicant (TSC) and that the salary component form the basis of the 1997 Agreement citing the various judgments.

It is further averred that a three (3) judge bench cannot be an appeal against the judgment and rulings by the Supreme Court and Court of Appeal.

13. The **Director of Pensions as well as the TSC Chief Executive Officer** (Respondents) support the application with the hope that a three judge bench will reaffirm that the High court Judgment did not have or include a salary component contrary to the pensioners assertion and believe.

14. I have considered the parties affidavits in support and opposition of the application in detail as well as the pensioners written submissions and oral highlights by all the parties.

15. **Issue For Determination**

Whether the application by TSC Dated the 24th September 2018 raises weighty and substantial question of law to merit referral to the Hon. the Chief Justice to constitute a three judge bench to hear it pursuant to Article 165(4) of the Constitution.

16. **Analysis and Determination**

Article 165(4) of the Constitution states that any matter certified by the court as raising a substantial question of law under clause **(3) (b) or (d)** shall be heard by an uneven number of judges being not less than three, assigned by the Chief Justice.

17. A substantial question of law is one that is of great public interest. The Constitution of Kenya is silent on what constitutes a substantial question of law thus it leaves determination to the individual judicial officer to satisfy himself/herself that the matter is substantial to warrant referee to the Hon. The Chief Justice to constitute an uneven bench of judges to hear and determine it. – **High Court Petition No. 243 of 2011 in Community Advocacy Awareness -Trust & Others -versus- Attorney General & Others.**

18. In deciding on the matter, the court ought to consider the following factors

- **Complexity of the case**
- **Issues raised**
- **Nature and weight**
- **Sensitivity if any**
- **Public interest**

I agree with the applicant(TSC) and the Respondents that the application in issue (dated 24th September 2018) raises weighty and complex issues and questions of public interest, all revolving round the interpretation and clarification of the judgment in the primary suit as well as the Court of Appeal decision.

19. In my considered opinion, though complex and weighty I am not persuaded that a single judge may not be able to hear and determine, and give directions on the application, and thus does not merit hearing by a three judge bench.

20. I say so because if parties are not satisfied with a single Judge decision, they have an option to appeal to the Court of Appeal where a three judge bench would hear the application with a further option to move to the Supreme Court – **Gilbert Mwangi Njuguna –vs- AG. Petition No. 267 of 2009 (2012) e KLR.**

21. **A matter of substantial questions of law** was defined in the case **Chinil –vs- Mehta –vs- Century Spinning and Manufacturing Co. AIR 1962 SC 1314** as

“substantial question of law is one which is of great public importance of which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is not settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial.”

22. Thus a single Judge of the High Court is competent and fully clothed with jurisdiction and discretion to determine any issue on interpretation of the law, be it complex, novel, of public interest or raises a substantial question of law. – See **Misc. Application No.648 of 2016 Republic –vs- IEBC & Another Exparte Coalition for Reforms & Democracy (CORD) (2017) e KLR.**

23. A referral to the Chief Justice for Constitution of an uneven bench of judges will no doubt cause prolonged delay. **Section 1A (1) of the Civil Procedure Act** mandates courts to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes.

24. The judgment in this case was rendered in October 2008, eighteen years ago. The High Court’s judgment is being settled in pieces and bits. It would not be in the interest of justice to forestall the ongoing payments by the Respondent by further proceedings as urged by the applicant-TSC.

Thus the substantial questions must be seen against the constitutional provisions and the need to dispense justice without undue delay.

25. I conclude by quoting the following Paragraph cited in the case **Vadag Establishment -vs- YA Shrelta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil suit No. 559 of 2011** where the court, V.C. Odunga J rendered

“It is my considered view that a High Court whether constituted by one judge or more judges exercise the same jurisdiction and neither decision can be said to be superior of to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a court comprised of more judges, their precedential value is the same.

26. The upshot is that I decline to exercise my discretion in favour of the applicant (TSC) to refer this matter to the Chief Justice to constitute a three judge bench to hear and determine the questions raised in the application dated 24th September 2018.

27. I however give directions that the Notice of Motion application dated **24th September 2018** brought by the Teachers Service Commission be listed down for hearing on priority basis.

28. Each party shall bear own costs.

Dated, signed and delivered at Nakuru this 9th Day of May 2019.

J.N. MULWA

JUDGE