



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPL. NO. 288 OF 2012

**IN THE MATTER OF AN FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND
PROHIBITION**

AND

IN THE MATTER OF CONSTITUTION OF KENYA, 1963

AND

PARLIAMENTARY PENSION ACT, 1983

AND

THE NATIONAL ASSEMBLY REMUNERATION ACT, 1975

AND

PARLIAMENTARY SERVICE COMMISSION ACT, 2000

AND

**THE TRIBUNAL TO REVIEW THE TERM & CONDITIONS OF SERVICE OF MEMBERS
AND EMPLOYEES OF THE KENYA NATIONAL ASSEMBLY, 2010 (*THE AKIWUMI
TRIBUNAL*)**

AND

IN THE SALARIES & REMUNERATION COMMISSION ACT, 2011

BETWEEN

REPUBLIC APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE PARLIAMENTARY SERVICE COMMISSION..... 2ND RESPONDENT

EX-PARTE

HON. WANYIRI KIHORO

HON. ANDREW KIPTOON

HON. MOHAMMED ABDI GALGALO

HON. MARK MWITHAGA

HON. ADAM WAKO BONAYA

HON. ROBERT KIPTOO KIPKORIR

JUDGMENT

Introduction

1. The ex-parte applicants (“the applicants”) in this matter are former Members of Parliament who served between the years 1963 to 2007. Their grievance is that despite serving the Nation in that capacity they continue to suffer financial neglect and indignity as they are denied a living pension. It is not in dispute that some of the former members of National Assembly are paid a pensions amounting to as little as Kshs 2,700.00 per month.
2. Under the umbrella of the Former Parliamentarians Association, they have written several petitions calling upon the President, the Treasury, the Attorney General and the Clerk of the National Assembly to consider their right to earn a living pension. These efforts, evidenced by several letters and memoranda, have not borne fruit and hence their resolve to seek the court’s intervention.

The Application

3. Following leave obtained on 17th July 2012, the applicants filed the Notice of Motion dated 27th July 2012 seeking:
 - a. *An order of prohibition do issue prohibiting the respondents by themselves, employees, servants or agents or any other person acting on their behalf from paying gratuity and pension to the current members of parliament, or the retiring commissioners, parliamentary office-bearers until budgetary arrangements and payments are made to former members of parliament in respect of requisite pension and gratuity as will be determined in this judicial review proceedings.*
 - b. *An order of mandamus do issue directed at the respondents to make arrangements to pay due living pension and gratuity to all former Members of Parliament either directly by themselves, employees and agents through the Director of Pensions as is provided for by the report of the Tribunal to Review the Terms and Conditions of Service of Members and Employees of the Kenya National Assembly also known as Akiwumi Report, a pension of Kshs. 100,000/- per month with effect from 1st July, 2010 or Kshs. 744,000/- per annum, as is due to be paid to the current members under the National Assembly (Remuneration) Act, 1975 as amended.*
4. The applicants rely on the filed a statutory statement and the verifying affidavit of Hon. Wanyiri Kihoro sworn 12th July 2012. They have also filed written submissions.
5. The application is opposed by the 1st and 2nd respondents who filed grounds of opposition dated 15th October 2012 and notice of preliminary objection dated 24th September 2012 respectively. They also filed written submissions to support the oral submissions made in court.

6. The applicants conceded that prayer (a) of the Motion has been overtaken by events as the 10th Parliament had been dissolved at the time of hearing.

Issue for Determination

7. The issue for determination, as is evident from prayer (b), is whether the Court should direct the respondents through an order of mandamus to implement the recommendations of the ***Tribunal to Review the Terms and Conditions of Service of Members and Employees of the Kenya National Assembly also known as Akiwumi Report***.
8. To put the matter in context, I think it is important to understand the nature of the mandamus. In ***Kenya National Examinations Council v Republic ex-parte Gathenji and Others CA Civil Appeal No.266 of 1996 [1997]eKLR***, the Court of Appeal addressed scope of the remedy of mandamus, “*What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says: “The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.” At paragraph 90 headed “the mandate” it is stated: “The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.” What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.*”
9. An order of mandamus will not issue as a matter of course. In order for the applicants to succeed in this matter they must demonstrate that the respondents failed to perform a constitutional or statutory duty. Mandamus issues to compel a person to perform a particular duty imposed on him by the Constitution or statute and which duty he has refused to perform to the detriment of the applicant (See ***Jotham Mulati Welamondi v The Electoral Commission of Kenya, [2002] 1KLR 486***). It cannot be issued to compel the exercise of discretionary power let alone the exercise of such a power with a view to arriving at a particular result.

The Akiwumi Tribunal and Report

10. The applicants’ case is founded on the recommendation of the ***Akiwumi Report***. On 23rd January 2009 pursuant to **section 23** of the ***Parliamentary Service Commission Act***, the Speaker of the National Assembly as the Chairman of the Parliamentary Service Commission (“PSC”) appointed Hon Akilano Akiwumi (Justice)(Rtd) and eight members to the Tribunal to Review the Terms and Conditions of Members and Employees of the National Assembly (“the ***Akiwumi Tribunal***”).
11. The ***Akiwumi Tribunal*** reported its findings to the Speaker on 12th November 2009. On the germane issue concerning a living pension for former parliamentarians, it made the following findings and recommendation;

Living Pension for Former Parliamentarians

285. *The Tribunal received presentations from many Kenyans in all the provinces as well as*

presentation from officials of the Former Parliamentarians Association of Kenya recommending very strongly, that all former Members of Parliament be granted pension due to the fact that most of them cannot afford basic livelihoods. Because of this, the Tribunal has, even though this is not a specific part of its Terms of Reference, considered the presentations made.

286. Former Members of Parliament are part of the face of the Kenyan leadership landscape outside Parliament, more so at the grassroots levels, where people look up to them for all manner of support, guidance, leadership and just about everything. They bear the burden of social responsibility, meeting the many challenges of basic needs of local people, which are imposed on them by circumstances beyond their control. When a former Member of Parliament leaves Parliament, it is next to impossible for him to get gainful employment. The foregoing, and a host of other considerations, make a powerful case for the payment of a LIVING PENSION for former Members of Parliament as a pension is the only source of livelihood, available for a majority them.

287. There are only about 500 former Members of Parliament who “Me either not on pension, and if on pension, only get a monthly pension of between KSh.2,000 and KSh.14,000. Therefore, an increment in their pension benefits, will not put a very heavy burden on the Exchequer. Many countries including those in the Commonwealth, pay their former Members of Parliament a token tax free pension, equivalent to US\$1000 per month.

Recommendation

288. The Tribunal recommends that a minimum living pension equivalent to US\$1000 per month, be paid to all former Members of Parliament whose current pension is either none, or less than US\$1000.

12. Following the submission of the **Akiwumi Report** to the Speaker of the National Assembly, the PSC made comments and recommendations in a paper dated June 2010. The PSC agreed with the Tribunal’s recommendation on former Parliamentarians as follows, “*The Commission agrees with the recommendation of the Tribunal on former Members of Parliament but recommends that living former Members of Parliament currently receiving a pension that is below Kshs. 100,000/- should receive a taxable pension of Kshs. 100,000/- per month. Former Members of Parliament not on pension have already been assisted with an ex-gratia payment of Kshs. 1,000,000.00.*” The PSC urged the then Minister for Finance to publish and bring to the National Assembly bills necessary to give legal effect to the recommendations contained in the **Akiwumi Report**.

Submissions

13. Mr Kihoro, counsel for the applicants and a former parliamentarian, prosecuted the case for the applicants. He submitted that the respondents failed to take steps to implement the recommendations of the **Akiwumi Report** and that even where some of these were implemented; it was done selectively and in a discriminatory manner. The applicants accuse the National Assembly of amending the **National Assembly Remuneration Act** and enhancing their salaries and allowances in 2011 and 2012 without dealing with the plight of the applicants per recommendation of the **Akiwumi Report**. This, they contend is discriminatory and contrary to the Constitution as there is no basis for differentiation between persons who have served as Members of Parliament in the past and serving members. The applicants point to the fact the **National Assembly Remuneration Act** was amended in 2011 to enhance salaries and allowances without regard to the interests of applicants.

14. The applicants argue that a Tribunal is a court of law within the meaning of **Article 170** of the Constitution and its decisions must be respected and given effect and hence an order of mandamus would properly issue in the circumstances.

15. Counsel for the Attorney General, Mr Odhiambo, submitted that the **Akiwumi Report** recommendations are not binding upon the respondents and have no legal effect and that by dint of

the doctrine of separation of powers, the orders sought cannot be issued. Counsel argued that under the Constitution, the power to legislate is donated to Parliament by **Article 94(5)** which provides that, ‘no person or body, other than parliament, has the power to make provision having the force of the law in Kenya except under authority conferred by this Constitution or by legislation.’ It is therefore urged that the court cannot direct Parliament on how to legislate by issuing an order of mandamus. Counsel relied on **Kenya National Examinations Council v Republic (Supra)** to support this position.

16. The 1st respondent submits that the applicants have not established any discrimination. It contends, on the basis of **Anarita Karimi Njeru v. Attorney General (1979) KLR 154**, the applicants have not demonstrated by evidence how they have been subjected to discrimination. Counsel submits that even if there is discrimination in the manner in which pensioners are treated, it is justified and serves a legitimate aim. The case of **R.M. (suing through next friend) Josephine Kavinda & Another v. Attorney General, Nairobi HCCC No. 1351 of 2002** was cited to support this proposition.
17. Ms Lumallas, counsel for the 2nd respondent, echoed the submission of the 1st respondent as regards the doctrine of separation of powers as legislation is required to vary or enhance the pensions received by the applicants. Learned counsel contended that the court has no jurisdiction to hear and determine what is in effect a claim for an enhanced parliamentary pension as such a power is vested in the Management Committee and the Appeals Tribunal established under **section 19** and **section 20** of **Parliamentary Pensions Act (Chapter 196 of the Laws of Kenya)** respectively.
18. Ms Lumallas submitted that the order of mandamus is not available to the applicants considering that the respondents have not failed to perform their statutory duty of making payments as provided by the statute.
19. In response to the respondents, Mr Kihoro submitted that the Court has jurisdiction under **Article 165** of the Constitution to resolve the dispute between the parties and organs of State and that it should determine the matter without undue regard to technicalities as required by **Article 159** of the Constitution.

Determination

20. This case must be determined on the basis known legal principles governing the grant of orders of mandamus which I have outlined in the earlier part of this judgment.
21. As the applicants’ case is predicated on the **Akiwumi Report**, it is important to establish its status. The **Akiwumi Tribunal** was appointed under the provisions of **section 23** of the **Parliamentary Service Commission Act** which provides as follows;

23. Review of terms and conditions of service of members and employees of the Assembly

(1) The Commission shall, from time to time, appoint an independent body of experts to review the terms and conditions of service of members and employees of the National Assembly.

(2) The Commission shall upon receipt of the report of experts appointed under subsection (1), transmit the report together with its comments thereon, if any, to the National Assembly.

22. Though styled as a Tribunal, the purpose of the body established was to review the terms and conditions of members and employees of the National Assembly and report to the PSC which then reports to the National Assembly. It is clear that the Tribunal has no power to determine remuneration of any nature but only make recommendations. Under the former Constitution, the

remuneration of Members of the National Assembly was governed by the **National Assembly Remuneration Act** hence the recommendation of the Tribunal remains just that; a recommendation.

23. The argument that the Tribunal is in the nature of a court under **Article 170** of the Constitution does not find support in the Constitution and the law. Although the body is styled “Tribunal”, it is the, “*independent body of experts to review the terms and conditions of service of members and employees of the National Assembly*” appointed under **section 23** of the **Parliamentary Service Commission Act**. It is not a court of law or tribunal empowered to determine disputed claims of parties’ rights. Its duty is to make recommendations on the terms and conditions of members and employees of the National Assembly. It does not make any binding decisions.
24. The findings of the Tribunal are in the form of recommendations. The PSC and the National Assembly may or may not accept the recommendations. In such circumstances, an order of mandamus cannot be issued to compel the respondents to implement the recommendations of the **Akiwumi Tribunal**.
25. Parliamentary pensions are regulated by the **Parliamentary Pensions Act**. It is not in doubt that the applicants, as former parliamentarians, are earning a pension calculated and paid in accordance with the statute where applicable. Their claim, distilled to its essence, is that they wish to be paid an enhanced pension in accordance with the recommendations of the **Akiwumi Report**. This begs the question whether a duty to pay such a pension can be located within the provisions of the statute.
26. The right to pension of former members of the National Assembly is to be found at **section 8** of the **Parliamentary Pensions Act** which provides as follows;

8. Pensions to former members

(1) Subject to the provisions of this Act, a person shall after the date of commencement thereof be entitled to receive a pension under this section as from the time when the following conditions are fulfilled in respect of him—

(a) he has ceased to be a member of the National Assembly by reason of the dissolution of Parliament; and

(b) his aggregate period of reckonable service is two terms of Parliament; and

(c) he has attained the age of forty-five years.

(2) The annual amount of pension payable to a person under this section shall be a sum equal to one three-hundredth of his pensionable emoluments for each completed month of his aggregate period of reckonable service: but if section 8(1)(b), (ii) applies, the annual amount of pension payable shall be reduced by five per cent for each complete year or part of a year by which his aggregate period of reckonable service is less than ten years.

27. It is clear from the **section 8** that the quantum of the pension is clearly provided by **sub-section (8)(2)** of the Act and for a change to be effected in the manner in which it calculated the legislature must intervene to amend the statute. There is no duty imposed on any person in the statute to effect an amendment in order to implement the recommendation of the **Akiwumi Tribunal**.
28. The **Parliamentary Pension Act** establishes a Management Committee to administer the provisions of the Act. The Committee comprises the Speaker as the Chairman, the Attorney General or his representative, three members of the National Assembly, the Permanent Secretary

of the Treasury or his representative, the Accounts Controller of the Treasury and the Clerk of the National Assembly as the Secretary. Under **section 19(5)** of the Act, “*Pensions, gratuities, refund of contributions and other allowances payable under the Act may be granted by the Committee through the Treasury, to persons who have been members of the National Assembly or to their dependants, in accordance of this Act.*” [Emphasis mine] A decision of the Management Committee is appealable to an Appeals Tribunal established under **section 20(1)** and whose function is to, “*hear and decide appeals made to it by any person who is aggrieved by a decision made by the Committee.*”

29. Mr Kihoro, in his submissions, referred the Court to the decision of ***Francis Bobi Tuva and Others v Parliamentary Pensions Management Committee Parliamentary Pensions Appeal No. 1 of 2000***. This was appeal from a decision of the Parliamentary Pensions Management Committee which determined that the amendments contained in the ***Parliamentary Pensions (Amendment) Act, 1999*** were not retrospective and only applied to sitting members of the National Assembly. The Appeal Tribunal chaired by the Chief Justice reversed the decision and held that in view of **section 2** of the ***Act*** which applied to members of National Assembly after commencement of the Act on 1st July 1984, the Committee had no authority to recommend that the amendments be applied only to sitting members. The implication of **section 2** of the ***Parliamentary Pensions Act*** is that unless it is amended to provide for persons who were members of the National Assembly before the commencement date, any further amendments to the Act may not be beneficial to legislators who served in the 1st, 2nd, 3rd and 4th Parliaments.
30. What is clear from the provisions I have cited and the case of ***Francis Bobi Tuva***, is that the pensions, and gratuities must be paid out in accordance with the ***Parliamentary Pensions Act***. As I understand, it is not the applicants’ position that their pensions are not being paid out in accordance with the law, otherwise they would have to invoke the dispute resolutions procedures stated in the ***Act***. Their case is that they should be paid more than what the law permits. These provisions and the case cited leave no doubt that in order to vary the applicants’ pension the law must be amended to effect the recommendation of the ***Akiwumi Tribunal***. For those members not covered by the ***Act***, the grant of any pensions, gratuity or other like benefit must be founded on a legislative enactment.
31. Can the Court issue an order of mandamus whose effect is to direct the legislature to amend an Act of Parliament in these circumstances? **Article 94(5)** of the ***Constitution*** reposes the law making authority of the State in Parliament and it is the responsibility of the Parliament to pass the necessary legislation to implement the recommendation of the ***Akiwumi Report***. An order of mandamus cannot be issued in the circumstances.
32. Another reason an order of mandamus cannot be issued is that the ***Akiwumi Tribunal*** at para. 285 of its report, which I have set out above, noted that the issue of a living pension was outside its terms of reference but nevertheless it proceeded to make the recommendation upon which the applicants peg their case. The body of independent experts appointed under **section 23** of the ***Parliamentary Service Commission Act*** is limited to making recommendations on, “*the terms and conditions of service of members and employees of the National Assembly.*” The legislature cannot therefore be accused of discrimination by enacting recommendations based on the authority granted by statute by failing to make pension provisions for former parliamentarians.
33. The applicants’ case based on discrimination is not well founded. The law, as it existed, permitted the legislature to review the remuneration and benefits of the members of the National Assembly by amendment of the ***National Assembly Remuneration Act***. The obvious result is that at each amendment sitting members of the National Assembly would benefit from better remuneration than former members. This distinction based on current and sitting membership does not amount to discrimination as former members, like the applicants, are not the subject of the legislation. In ***R.M. (suing through next friend) Josephine Kavinda & Another v. Attorney General (Supra)***, the Court noted that “*We further hold that the principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence*

lawful provided they satisfy the following:- 1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and 2) Are reasonable in the light of their legitimate aim.” The distinction urged by the applicants is between sitting members of the National Assembly and former legislators. This distinction grounded in law, is a legitimate distinction and cannot, in the circumstances, found a claim for discrimination.

34. Finally, since the promulgation of the Constitution and the establishment of the Salaries and Remuneration Commission (“SRC”) under **Article 230** of the Constitution to set remuneration and benefits of all State Officers has changed the contours of the law governing the salaries and other benefits for State officers. As a result, the High Court in the case of ***Okiya Omtatah Okiiti v Attorney General and Others Nairobi Petition No. 227 of 2013 [2014]eKLR***, declared the ***National Assembly and Remuneration Act*** unconstitutional. The issue whether the ***Parliamentary Pensions Act*** can be amended without regard to the authority of the SRC is an open question and so is the issue whether the court can grant the order of mandamus in light of this development.

Conclusion and Disposition

35. This case evokes great sympathy and I add my voice to the applicants’ plea. They have served their country and it is only fair that due consideration is given to their plight to enable them live in dignity. Sitting Members of Parliament must realise membership of the House is through the grace and favour of the people and once the people exercise their ultimate authority to remove them they will find themselves in the shoes of the applicants. It is for this reason that I will not condemn the applicants to pay costs.

36. For the reasons I have outlined, I regret that I am constrained to dismiss the Notice of Motion dated 27th July 2012.

DATED and DELIVERED at NAIROBI this 12th May 2014.

D.S. MAJANJA

JUDGE

Mr Kihoro instructed by Wanyiri Kihoro and Company Advocates for the applicant

Mr Odhiambo, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Ms Lumallas, Advocate, instructed by the Parliamentary Service Commission.