



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO. 189 OF 2013

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY MR. PATRICK
KILONZO MUNARA FOR JUDICIAL REVIEW ORDERS FOR MANDAMUS AGAINST THE
TEACHERS SERVICE COMMISSION**

AND

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF THE
LAWS OF KENYA**

AND

**IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT CAP 212 OF THE
LAWS OF KENYA**

BETWEEN

REPUBLIC APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION RESPONDENT

EX-PARTE: PATRICK KILONZO MUNARA

JUDGEMENT

1. By a Notice of Motion filed on 4th July, 2013, the *ex parte* applicant herein, **PATRICK KILONZO MUNARA**, seeks the following orders:
 - a. **THAT** Judicial Review Orders of Mandamus do issue compelling and/or directing the Teachers Service Commission, to pay the Applicant the decretal sum arising out of Civil Appeal 302 of 2008 between the Applicant and the Respondents.
 - b. **THAT** Judicial Review orders of Mandamus do issue compelling and/or directing the Teachers Service Commission, to pay the interest accrued on the decretal sum arising out of Civil Appeal No. 302 of 2008 between the Applicant and the Respondents.
 - c. **THAT** Judicial Review orders of Mandamus do issue compelling and/or directing the Teachers Service Commission, to pay the costs of the Suit (Civil Appeal 302 of 2008).
 - d. **THAT** costs of this application be awarded to the Applicant
 - e. **THAT** this Honourable Court be pleased to give such further orders and or directions as it

may deem fit.

Ex Parte Applicant's Case

2. The Motion is supported by a verifying affidavit sworn by the applicant on 4th May, 2013,
3. According to the applicant, he was awarded Kshs. 331,760/- being accrued salaries, payment of one months salary in lieu of notice for termination and gratuity at the rate of 25% of basic salary earned from the day of permanent employment till the date of filing of the suit. According to the applicant he was also awarded the costs of the suit which was taxed in the sum of Kshs 205,656.50. By a decree passed on 13th March, 2012, the Respondents were therefore ordered to pay the sum of Kshs 1,818,201.30.
4. It was deposed that despite several correspondences, the Respondents have neglected, refused and/or failed to honour the decretal sum and the balance of Kshs 2,026,307.80 remains unsettled. By virtue of section 21 of the **Teachers Service Commission Act** No. 20 of 2012 which deems the proceedings against the Respondent proceedings against the Government and subjects the same to the **Government Proceedings Act** as read with section 25 of the **Government Proceedings Act**, Cap 40 Laws of Kenya which bars execution of the decree, the applicant averred that he has no other means of enforcing his legal rights.
5. In the applicant's view the failure to settle the said decree is unlawful, illegal and blatant disregard of the law hence the Court ought to grant the orders sought herein.

Respondent's Case

6. In response to the application the Respondent filed a replying affidavit sworn by **Josephine Maundu**, the Respondent's Director in charge of Human Resource Management and Development on 10th October, 2013.
7. According to the deponent, the *ex parte* Applicant hereinafter was employed on contract terms of service by the Respondent as a Clerical Officer on or about 23rd October, 1991 at an annual salary of K£ 1200 p.a. which terms and conditions of service were later changed to Permanent and Pensionable terms of service with effect from 1st January 1993. However, on 27th May, 2004, the Applicant was interdicted on grounds of conspiracy to defraud the Respondent of Kshs. 149,012,300.80 and was subjected to a disciplinary process and subsequently dismissed from the Respondent's employment.
8. The applicant filed a suit vide a plaint dated 27th April 2005 against the Respondent for alleged wrongful termination claiming payment of outstanding dues and reinstatement among other reliefs at the Chief Magistrate's Civil Suit No. 4605 of 2005 which suit was dismissed. The Applicant filed a Civil Appeal No. 302 of 2008 at the High Court which appeal was determined on 13th day of March, 2008 in favour of the Applicant. In the said appeal the court issued the following Orders:-

(a) Payment of Kshs 331,760 being "accrued" salaries

(b) Payment of one month's salary in lieu of Notice of termination of employment and in the alternative, the Respondent to reinstate the *ex parte* Applicant to his former employment.

(c) Gratuity to the Applicant at a rate of 25% of basic salary earned from the day of Permanent employment until the date of filing of this suit.

9. Thereafter, the Applicant filed a Party and Party Bill of Costs which was taxed by consent at an all inclusive sum of Kshs 205,656.50 which was paid in full satisfaction of the Bill of Costs. The Respondent made a further payment of Kshs 352,894.20 in further satisfaction of the Judgment dated 13th day of March 2013 in respect of:-

(a) Accrued salaries of Kshs 331,760

(b) One month's salary in lieu of Notice Kshs 9,985

(c) Gratuity of 24,712.85 @ 25% of Kshs 9,985 with effect from 1st July 2004 to 27th April 2005. Annexed hereto and marked "JM-6" is a copy of a payment voucher from the Respondent.

10. According to the deponent, the amount of Kshs. 30,160 presented by the Applicant as salary is grossly erroneous as the same was based on salary arrears earned in the month of February 2004 a fact that the Applicant was aware of and that the correct monthly salary ought to have been Kshs 9,985. In the month of February 2004, the Applicant received Kshs 30,160 an amount that was above his basic salary of Kshs. 9,985/- as salary arrears effective from 1st January, 2002 to 31st January 2004. The Applicant's salary has never been Kshs 30,160 at any time from the time he was employed to the time of his dismissal. However, in his pleadings and during the prosecution of the High Court Civil Appeal aforementioned in which the Respondent was not adequately represented, the Applicant misdirected the court by alleging that his salary per month was Kshs 30,160/- instead of Kshs 9,985. To the deponent, the Respondent is and was obliged to compute all monies on fulfilment of the aforementioned decree in favour of the Applicant based on a gross monthly salary of Kshs 9,985/- per month and not Kshs 30,160/- per month.
11. It was further deposed that in respect of accrued salary, the court ordered that the Applicant be paid accrued salary from the date of interdiction i.e. 1st June 2004 up to 27th April 2004 when the Applicant filed his suit in the sum of Kshs 331,760/- yet the correct amount under the head of accrued salaries would have been monthly salary Kshs 9,985/- X 11 months (period between 1st June 2004 to 27th April 2005) which amounts to Kshs 109,835/- and not 331,760/- as per the decree. On the gratuity the letter of employment clearly indicates that an employee shall make compulsory contribution to the Teachers Service Commission superannuation pension scheme and shall be eligible to terminal benefits in accordance with the scheme. The Applicant was to contribute 5% of the basic salary and the Respondent was to contribute 25% on a monthly basis. The gratuity payable to the Applicant was released by AON Minet Insurance Company amounting to Kshs 348,937.00 who are the Administrators of the Respondent's Secretarial Staff Pension Scheme and has been calculated at a rate of 30% of the Applicant's monthly salary effective from the date of permanent and pensionable employment up to date of dismissal. The Respondent's Board of Trustees has remitted the said amount of Kshs 348,937.00 to the Applicant as received from the scheme Administrators. The Respondent in compliance with the court order paid the balance of the gratuity with effect from 1st July 2004 to 27th April 2005 when the matter was filed amounting to Kshs 24,712.85 as per the payment voucher referred to in the replying affidavit.
12. According to the deponent, the Applicant has miscalculated the gratuity payable to him by literally basing it on the erroneous salary of Kshs 30,160 which calculation is grossly erroneous as it offends the judgment which directed that gratuity be based on basic salary earned from the date of permanent and pensionable employment to the date of filing Chief Magistrate's Civil Suit No. 4605 of 2005 for the following reasons:-

(a) Salary earned by the Applicant was not static but kept on progressing from year to year as evidence by the salary progression sheet aforementioned.

(b) The Applicants date of permanent employment was 1st January 1993 and not 17th October 1991 as shown in the decree.

(c) The alleged salary of Kshs 30,160 was not earned by the Applicant and does not exist in the Respondent's salary scales for employees holding similar positions as that held by the Respondent prior to his dismissal.

13. In the deponent's view, the Applicant is entitled to the following dues:-

- (a) Accrued salary @ Kshs 9,985 X 11 months.....Kshs 109,835.00
- (b) One month's salary in lieu of notice.....Kshs 9,985.00
- (c) Gratuity from date of permanent employment up to

date if filing suit

- (i) From permanent and pensionable employment

up to date of Dismissal i.e. 1/1/93 to 30/6/2004.....Kshs 348,937.00

- (ii) From 1/7/2004 to 27/4/2005 i.e. from date of

Interdiction to date of filing suit.....Kshs 24,712.85

- (d) Cost of the suit at Kshs.....Kshs 205,656.50

Total

Kshs 699,126.35

14.Out of the above, the Respondent has made the following payments:-

- (a) Accrued salaries..... Kshs 331,760.00

- (b) One month's salary in lieu of notice..... Kshs 9,985.00

- (c) Gratuity from 1/7/2004 to 27/4/2005..... Kshs 24,712.85

- (d) Less tax..... Kshs 13,508.65

Total

Kshs 352,949.20

- (e) Costs (add).....Kshs 205,656.50

- (f) Gratuity.....Kshs 348,937.00

Total amount paid to the Applicant..... Kshs 907,542.70

15.The Respondent's case was therefore that it has fully satisfied the Decree of this Honourable Court.

16.According to the deponent, the Respondent being a Constitutional Commission established under Article 237 of the Constitution is now a Government institution capable of representing itself in the conduct of this matter and has filed an application seeking for rectification of the decree pursuant to the judgment dated 13th March 2013. Further the Respondent as presently constituted is a Government institution capable of satisfying the Applicant's decree should the Application for Rectification of Decree be unsuccessful. In case there was delay in making payments to the Applicant, the same was caused by the internal processes neither of the Respondent which was not intended nor in bad faith. To her, the Respondent has demonstrated good faith by substantially satisfying the judgment of this honourable court, hence the Applicant has therefore made this application in bad faith and prematurely with the intention to embarrass the Respondent.

17.To the Respondent, in the event that the prayers sought by the Applicant are granted, the Respondent will suffer prejudice, loss injury and injustice hence it is in the interest of fairness and justice that the Applicant's application be dismissed with costs to the Respondent.

Applicant's Submissions

18. In the submissions filed on behalf of the applicant, it was submitted that since there is neither evidence of an appeal nor an application for review of the judgement neither this Court nor the Court which awarded the judgement can alter the judgement and reopen the matter for retrial. It was therefore submitted that the Respondent's application was not brought in good faith but to defeat these proceedings and ought not to be allowed to defeat these proceedings. In support of his submissions, the applicant relied on **Joseph Baariu Imiamba and Another vs. Attorney General**.
19. Accordingly, the fact that part of the decree to the tune of Kshs 558,492/- has been satisfied by the Respondent, the entire decision and decree remain valid, and any unliquidated/satisfied portion thereof together with accrued interest and costs incurred herein, is enforceable by way of the mandamus sought herein. In support of the submissions the applicant relied on **Republic vs. Attorney General & 2 Others ex parte Mwikali Muindi Katunga & Another, Judicial Review Misc. Civil Application 187 of 2012** and **Republic vs. The Attorney General & Another ex parte James Alfred Koroso Misc. Appl. No. 44 of 2012**.

Respondent's Submissions

20. On behalf of the Respondent, the contents of the replying affidavit were reiterated and it was submitted that the Respondent has filed an application in High Court Civil Appeal No. 302 of 2008 to rectify the judgement/decree delivered on 13th March, 2008 in which application the Respondent is seeking to stay this suit pending the hearing of the said application. Whereas the Respondent is not challenging the judgement, it was submitted it wishes to rectify the same to enable the Court come to a fair and just decision.
21. On proper calculation, it was submitted that the Respondent has settled the decretal sum.

Determination

22. It is the respondents' public duty to satisfy the applicant's decree and failure to do so attracts the court's discretion to issue an order of *mandamus* commanding them to do so. In **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996**. The Court of Appeal cited, with approval, *Halsbury's Law of England*, 4th Edn. Vol. 7 p. 111 para 89 thus:

"The order of mandamus is of 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."

23. As submitted by the applicant, by virtue of section 21 of the *Teachers Service Commission Act* No. 20 of 2012 as read with section 25 of the *Government Proceedings Act*, Cap 40 Laws of Kenya, the applicant has no other appropriate remedy except *mandamus*. That was the position in the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J. said -**

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

See also Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441.

24. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso, this court expressed itself as hereunder:

“...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

25. The respondent contends that it has applied for review or variation of the judgement which gave rise to the instant application. The judgement from which these proceedings arise was delivered on 13th March, 2012. These proceedings were instituted on 5th June, 2013, more than a year ago. An application for review, it is trite, ought to be made without unreasonable delay. The reason for that requirement is obvious. A delay in making such application may lead to certain rights being acquired pursuant to the decision sought to be reviewed which may complicate the decision sought to be granted in review hence the application ought to be

made while the judgement is still “fresh” before it gathers moss.
26. Suffice it to say that there is no order staying these proceedings. Accordingly, there is no basis upon which this Court can decline to grant the orders sought herein. The Respondent is of course at liberty to pursue its application seeking to review or vary the judgement and if it succeeds, I am sure it will not be left without a remedy notwithstanding the grant of the orders sought herein since the Court always retains an inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Order

27. Therefore taking into account the foregoing the order that commends itself to me and which I hereby grant is that Judicial Review Orders of Mandamus are issued compelling and/or directing the Teachers Service Commission, to pay the Applicant the decretal sum arising out of Civil Appeal 302 of 2008 between the Applicant and the Respondents. In my view since decretal sum encompasses costs and interests it is unnecessary to grant the other orders sought in the Motion.
28. The Applicant will have the costs of this application.

Dated at Nairobi this day 7th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Makovu for the Applicant

Cc Kevin