REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW 368 OF 2009

IN THE MATTER OF: SECTION 84 OF THE CONSTITUION

IN THE MATTER OF: AN APPLICATION BY CAPTAIN J. N. WAFUBWA TO APPLY FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF: PENSIONS ACT, CHAPTER 189 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC………………………………………………………….APPLICANT

AND

1.THE MINISTER FOR FINANCE……..........……………1ST RESPONDENT

2.THE PERMANENT SECRETARY,

TREASURY……………………………………………2ND RESPONDENT

EXPARTE
CAPT. J. N. WAFUBWA

R U L I N G

The Exparte Applicant herein Capt. J. N. Wafubwa has once again moved this court by way of a chamber summons application filed on 10th February 2012 urging this court to set aside the ruling delivered by Musinga, J on 13th April 2011 and to thereafter enter judgment as prayed in the substantive application for judicial review dated 28th June 2009.

The application is supported by an affidavit sworn by the Applicant on 9th February 2012 and a further affidavit sworn on 7th March 2012. The application is expressed to be premised on the following grounds:

(a) **THAT** the said ruling dated 13th April 2011 given by the Honourable Justice Musinga be set aside

since it is an abuse of Court's hierarchy as the findings therein and orders thereto have already been determined by the Court of Appeal in C.A. 278 of 2003.

(b) **THAT** in addition to the above, the High Court determines military terminal benefits under the provisions of the unwritten rules of natural justice where civil procedure rules are not applicable to the disciplined forces.

(c) **THAT** in the absence of the civil procedure rules, the High Court is at liberty to correct or amend its decisions over military terminal benefits at any stage.

(d) **THAT** further to the aforesaid paragraph there is no provision in law for any party to appeal to the Court of Appeal on military terminal benefits.

The application is opposed through grounds of opposition filed by the Attorney General on 23rd February 2012 on behalf of the Respondents.

The Attorney General has raised five grounds in opposition to the Applicant's application which are the following:

1. That the application is an abuse of the court process and in breach of mandatory provisions of the law and particularly *Sections 8 and 9* of the *Law Reform Act*.

2. That the Honourable Court has no jurisdiction to entertain this application as it is *functus officio*.

3. That Judicial Review remedies are discretionary in nature.

4. That the Applicant has failed and or ignored to pursue other remedies available in law.

5. That application has no legal basis hence the prayer by the Respondent for its dismissal with costs.

Before delving into the merits or otherwise of the application, I must express my utter disappointment and surprise to see what appears to be a veiled threat directed at me or Musinga, J expressed by the Applicant in the grounds supporting the certificate of urgency dated 9th February 2012 used to file the application under consideration suggesting that if corrective measures were not put in place to rectify errors allegedly made in our respective rulings possibly by granting the Applicant the orders sought in the instant application, serious repercussions wouldl befall us including filing a petition to the Judicial Service Commission. It is also important to disclose that when this matter was pending ruling, the Applicant quite unprocedurally corresponded with me directly vide a letter copied to me dated 29th of June 2012 in which he purported to direct me on what decision to make in this matter. I must state that I take great exception to the Applicant's conduct and to his veiled threats as aforesaid.

I wish to take this opportunity to advise or inform members of the public including the Applicant that there is a concept known as judicial independence and one of the basic principles of this concept is that courts of law, in making their decisions are independent of any person or authority. They make their decisions based only on the facts before them and the law applicable without fear or favour. I take the liberty to observe that there is a trend currently developing of intimidating judicial officers in the exercise of their duties which is an affront to the rule of law and the due process. It needs to be nipped in the bud before it negatively affects the administration of justice in this country.

Having said that, I wish to assure the Applicant that this court firmly believes in the rule of law and the due process and that in making a decision on his application, it will be guided only by the facts before it and the Law governing the issues raised in the application. That is all I need to say on that unfortunate occurrence in these proceedings.

Turning now to the prayers in the instant application, after considering the rival submissions made by the Applicant in person and M/s Mbilo, State Counsel instructed by the Attorney General appearing for the

Respondents in this case, I wholly concur with M/s Mbilo's submission that this court has no jurisdiction to grant the orders sought by the Applicant herein namely to set aside J. Musinga's ruling dated 13th April 2011 and to enter judgment as prayed in the notice of motion dated 18th June 2009. The Ruling dated 13th April 2011 made final orders in respect of the notice of motion dated 18th June 2009 in which the Applicant had commenced Judicial Review Proceedings seeking orders of mandamus to compel the Respondents to appoint and delegate a Principal Pensions Officer to compute his terminal benefits after he was retired from the Military Service.

In his aforesaid Ruling, J. Musinga dismissed the Applicant's Notice of Motion on grounds *inter alia* that it was *resjudicata* since the issues raised in the said motion had been conclusively dealt with and determined by J. Nyamu and J. Dulu in HCC.674 of 1993 and Petition No.715 of 2006.

Having dismissed the Applicant's motion, J. Musinga's ruling which the Applicant now invites this court to set aside conclusively determined the Judicial Review proceedings instituted by the Applicant. The spirit and objective of Section 8(3) of the Law Reform Act ***(hereinafter referred to as the Act)*** is that orders made by the High Court in determining judicial review proceedings are final and should not be the subject of any other litigation before the same court. They can only be the subject of litigation in the Court of Appeal. In order to fully appreciate the meaning of Section 8(3) of the Act, I think it is important to reproduce it in full.

Section 8(3) states -

"No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section"

It is clear from the above provisions of the Law that the orders made by J. Musinga were final and can only be challenged by way of an appeal to the Court of Appeal under Section 8(5) of the Law Reform Act.

Since the Applicant was clearly aggrieved by the decision of J. Musinga in the ruling delivered on 13th April 2011 given the multiple applications he has filed since the said ruling was delivered, he ought to have exercised his right of appeal and appealed against that decision to the Court of Appeal as this was the only legal remedy available to him besides presenting his claim for terminal benefits to the relevant government organ and/or authority to be computed in accordance with the Law that was applied to terminate his services. The fact that the court of appeal had determined appeals related to other cases concerning the applicant did not preclude him from lodging a fresh appeal against J. Musinga's ruling in the exercise of his right under Section 8(5) of the Act. The Applicant's claim that there was no right of appeal to the court of appeal on decisions regarding military terminal benefits does not hold any water since what was before Musinga, J in this case were judicial review proceedings for an order of mandamus not proceedings under any military law . A final decision made at the end of such proceedings was subject to an appeal to the court of appeal.

I fully appreciate the Applicant's submission that the court should ensure that justice is done in this case but I beg to differ with his view that justice can only be done if the court grants him the orders that he desires in this case. However much the court may sympathise with the Applicant's quest to claim for his terminal benefits, it can only do justice in accordance with the law and the law in this case does not allow the court to vacate final orders made by another judge of concurrent jurisdiction and substitute them with its own orders.

Granting the orders sought by the Applicant would be tantamount to sitting on appeal over the decision made by my brother J. Musinga which is not permissible in law.

As far as this case is concerned, it is my decision that this court is now ***functus*** official. Let the Applicant pursue any other legal remedy that may be available to him which does not include filing any other application in this case.

For the foregoing reasons, I find that the application dated 9th February 2012 lacks merit and it is hereby dismissed with no orders as to costs.

DATED, **SIGNED**and DELIVERED by me at Nairobi this 17th day of July, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence -Court Clerk

Applicant in person

N/A for 1st Respondents

N/A for 2nd Respondents