



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Civil Appeal 273 of 2006

#### Editorial Summary

1. *Civil Appeal*
2. *Review*
3. *Finalized case.*
4. *Subject of main appeal*

#### RETRENCHMENT

- 4.1 *Retrenchment of civil servants in year 2000.*
- 4.2 *Subordinate court case CMCC 4525/04 declared  
retrenchment lawful  
(12<sup>th</sup> April 2006)*
- 4.3 *Appeal judgment declared retrenchment unlawful,  
null and void (26<sup>th</sup> October 2010) (Sitati J)*
- 4.4 *Appellant/original plaintiff awarded salary and  
house allowance not paid between October 2000  
and December 2007 in the judgment  
Ksh. 1,312,960/-*

#### REVIEW

*Application Notice of Motion 16<sup>th</sup> July 2012*

- i) *Hon. Judge failed to take into consideration the upward  
reviews and upgrade to the salary.*

- ii) *Sum that ought to be awarded was Ksh. 2,650,897/-*
- iii) *Appellant had already been paid Ksh. 1,312,960/-*  
*Balance left 1,347,919/-*

#### **OPPOSITION**

*State opposes application on grounds:*

- i) *The appellant had already been paid and matter closed.*
- ii) *Delay in bringing the application was inordinate*
- iii) *Documents to prove upward rise in salary are  
not authenticated.*
- iv) *No error or the judgment which is self evidence.*

#### **5. Held:**

- 5.1 *Application granted.*
- 5.2 *Further payments be awarded.*
- 5.3 *Parties given time to calculate the exact further  
sums due.*

#### **6. Case Law:**

##### **By applicant/appellant**

- a) *High way Furniture Mart Ltd*  
Vs  
*Permanent Secretary Office of the President*  
*CA 52/05 (Omolo, O’Kubasu, Githinga JJA)*
- b) *Kenya Ports Authority – Vs – Silas Obengele*  
*CA 38/05 (O’Kubasu JA)*

##### **By respondent/respondent**

- a) *Ndungu Njau – Vs – National Bank of Kenya Ltd*  
*CA 257/02*  
*(Tunoi, Onyango-Otieno, Aganyanya JJA)*
- b) *Mulembe Farm Ltd & Another*  
Vs

John B Masika & Others

Eldoret CA 230/04

(Omolo, Bosire, Visram JJA)

c) Jeremiah M. Kobaai  
Vs

Tina M Kuklenshkiva

HCC 1314/99

(Kuloba J)

d) Felistus Gathoni Ng'ang'a  
Vs

Zablon Ngotho Thiongo & Others

ELC 1874/07

(Kimondo J)

e) John Ongwaro Nyawara  
Vs

Joseph Owala & Another

HCC 432/97

(Emukule J)

7. *Advocates* :

i) *M. Okoth instructed by M/s Tom Ojienda & Co Advocates for appellant*

ii) *M. Munene instructed by M/s State Law Office for respondent*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CIVIL APPEAL NO. 273 OF 2006**

JOSEPH C. MUSYOKI ..... APPELLANT/

ORIGINAL PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL ..... RESPONDENT/

## ORIGINAL DEFENDANT

(Being an appeal from the judgment of Hon. N.A. Ongeru – Senior Principal Magistrate in CMCC 4525/04 delivered on 12<sup>th</sup> April 2006 at Milimani Commercial Courts)

### RULING

#### I. PROCEDURE

1. The appeal herein is finalized. It was determined by Sitati J who has since been transferred out of the station of this High Court. Under Order 45 of the Civil Procedure Rules, where an application for review is made, it should go to the same judge who heard the matter. The rules provide that the judge who is in the station has jurisdiction to review the judgment order or decree (Order 45 rule 4(1) & (2)

Civil Procedure Rules 2010).

2. This review was heard and determined on the basis that the Hon. Judge who heard the original matter is out of the station.

#### II INTRODUCTION

3. The main appeal involved the issue of a civil servant. The subordinate court had passed judgment and declared that the retrenchment of the appellant/applicant as lawful (CMCC 4525/04) (12<sup>th</sup> April 2006. Being dissatisfied with the decision, the appellant appealed to this

High Court. The judgment given on appeal, by Sitati J, was that the retrenchment was unlawful, null and void (26<sup>th</sup> October 2010.)

4. The appellant/applicant was aware his salary and house allowance that had not been paid between the year 2000 October and

2007 December, when he would have retired at the age of 55 years old. The total sum awarded was Ksh. 1,313,960/-. This has since been paid in full to the appellant/applicant.

5. The appellant applicant then discovered that he was in fact entitled to more than what had been paid. He filed an application

Notice of Motion dated 16<sup>th</sup> July 2012 to review the orders of the judgment of the court. This is the subject of this ruling.

#### III NOTICE OF MOTION

16<sup>TH</sup> JULY 2012

6. The prayers in the motion seeks orders that:

***“The Hon. Court be pleased to review its decree herein arising from the judgment of the court (Hon. Lady Justice Sitati) on 26<sup>th</sup> October 2010 to reflect the appellant’s true salary scale together with allowances that were affected by the government (from 1<sup>st</sup> October 2006 to December 2007.)”***

7. The arguments put forward by the appellant/applicant was that the

Hon. Court in taking account the calculation of his entitlement, did so based on a payslip of February 2000 that would be Ksh. 1,312,960/-. He was then in job group L.

8. What the court did not take into account was the upward review on account of progressions and

harmonization during the years and alongside other civil servants.

9. (He was awarded a salary of Ksh. 12,890/- house allowance of Ksh. 3,825/- per medical allowance, Ksh. 1500/- for 88 months.

10. He prayed that he be awarded the shortfall that had been left out in error.

11. In reply, the state opposed the application on the grounds that the appellant/applicant had already been paid his dues in full. He would therefore not be entitled to come to court for further payments. The matter was closed.

12. Further, the application had been brought late. The delay in bringing the application was inordinate. The respondent went on to rely on two authorities on this point. One being

Felistus Gathoni Nganga – versus – Zablon Ngotho Thiongo

CA 1874/07

The other John Ongwao Nyawara – Vs – Joseph Owala & another

CA 432/97

whereby a review application was declined due to the delay it took to be brought to court.

Other two cases being the case law of

Mulembe Farm Ltd & Another – Vs – John B. Masika & Others

Eldoret CA 230/04  
and the case law of

Jeremiah M. Kobaai – Vs – Tina M. Kuklenshki & Another

HCC 1314/99

That took up the same issue of delay.

13. A review should be brought where there is an error. In the case law of

Ndirangu Njau – Vs – National Bank of Kenya

CA 257/02

It was held that no error on the judgment had been made.

14. The state counsel prayed that this application be dismissed.

#### IV OPINION

15. The issue herein is whether first and foremost there was a delay in bringing this application to court? The applicant herein stated that once the judgment was delivered on the 26<sup>th</sup> October 2010, and once the matter went for execution, the ministry concerned had to obtain an opinion from the Attorney General. This opinion was delayed and had not been obtained until 27<sup>th</sup> January 2012 where the Attorney General replied to the letter from Permanent Secretary Ministry of Education dated the 3<sup>rd</sup> November 2011.

16. The opinion given stated that the payments to be paid by the ministry should be as per the court judgment unless the said court varied the amount or sets the orders of the court's judgment; aside. The issue of recalculation of the salary and allowance was not then yet before the court.
17. The issue of interest and costs, they stated should await taxation and the issue of entitlement of pension was that the appellant was entitled to pension.
18. The application was filed on 16<sup>th</sup> July 2012. It therefore appears that the period seeking review was actually 6 months and not two years. Once the applicant became aware that he was entitled to a recalculation of his salary and once he was aware he needed to make application to court for a review, the time lapse was not inordinate.
19. The case law referred me covered two years or more where delay was encountered.
20. The second issue is that there was no error in the judgment. The case law relied on by the respondent was of Ndirangu Njau – Vs – National Bank of Kenya CA 257/02. In this case the court held there was no error of the judgment. The error was on the decree that had been drawn that included an interest rate of 34% when the judgment never actually stated that.
21. This said case law did not cover the judgment per se. In this case, the judgment had an error which the Hon. Judge would not have envisaged as the evidence required was not before the court. At the time the hearing before the trial magistrate and the appeal court was being heard.
22. The documents not before the court and or not considered on its full import was the various salary conversion table. This was per a letter dated 27<sup>th</sup> June 2011 issued to all permanent secretaries and accounting officers of payment of commuter allowance: Second and final phase Harmonization of Terms and Conditions of Service in the Public Service: Housing Allowance for Public Service: Service Review of Salary for Civil Service.
23. The respondent argued that the said conversion tables and indeed the said documents were not certified as a true copy of the original.
24. Under Section 66 of the Evidence Act, secondary evidence is admissible, more so under sub clause (b) where copies made from the original by mechanical processes which, in themselves ensure the accuracy of the copy and copies copied with such copies.
25. The documents were produced to all and or several permanent secretaries and accounting officers. They were made in a mechanical means to be read by the mentioned persons and had several copies.
26. I would reject the arguments put forward by the respondents on this point.
27. In conclusion, I would come to the following findings that the appellant/applicant had a right to the progressive upward review and upgrades to his salary. This is more so when indeed the said retrenchment was unlawful. If he had not been retrenched from employment, he would indeed be entitled to the sum given.
28. The court is permitted to take into account a discount to the sum due.
29. The application was not brought in an inordinate delay.
30. I would herein rule that the application be and is hereby allowed. That there be a review of this

court's decree arising from the judgment of 26<sup>th</sup> October 2010 to reflect the appellant/applicant's true salary scale together with allowances that were effected by the government from 1<sup>st</sup> October 2006 to December 2007.

31. I would further order that the actual calculation be worked out and confirmed with the parties and deputy registrar of this High Court. This court would therefore adopt the actual figure correctly calculated by the parties on a date convenient to all.

32. The costs of this application in any events is awarded to the appellant/applicant.

DATED THIS 2<sup>nd</sup> DAY OF OCTOBER 2012 AT NAIROBI

M.A. ANG'AWA  
JUDGE

*Advocates* :

- i) *M. Okoth instructed by M/s Tom Ojienda & Co Advocates for appellant*
- ii) *M. Munene instructed by M/s State Law Office for respondent*