IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, G.B.M. KARIUKI & J. MOHAMMED, JJ.A

CIVIL APPEAL NO. 231 OF 2011

BETWEEN

GEORGE NYAKUNDI OMBABA.....................APPELLANT

AND

ATTORNEY GENERAL.................................RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Sitati, J.) dated 16th June, 2011

in

HCCC NO. 4 OF 2008)

****

JUDGMENT OF THE COURT

George Nyakundi Ombaba (the appellant), was an employee of the Government of Kenya, and more particularly, a Mechanical Engineer in the Ministry of Roads and Public Works. Like all civil servants, he was under the Public Service Commission, which is responsible for the recruitment, promotions, discipline, and even dismissal of particular cadres of civil servants.

The appellant was in Job Group 'L' which placed him under the Public Service Commission on issues of promotion and discipline. From the Record of Appeal before us, it comes out clearly that the appellant was appointed into the Public Service on 13th January 1989 as an assistant Engineer (Mechanical) in Job Group 'K'. He was thereafter promoted to a full Engineer on 13th January, 1996 and placed in Job Group 'L'.

For reasons that will become apparent in this judgment hereafter, we shall not delve into the details of his performance during his employment before his dismissal from service, which dismissal saw him moving the High Court vide **HCCC No. 4 of 2008**; by way of a plaint dated 10th January, 2008.

In the plaint, which was later amended on 29th October, 2008, the appellant sued the Attorney General of the Republic of Kenya on behalf of the Ministry of Roads and Public Works, and also on behalf of the Public Service Commission. His grievance was his dismissal from Public Service on or about 17th July, 2007 allegedly, on grounds of misconduct.

For reasons given in the plaint, the appellant urged the court to find that the decision by the Public Service Commission was *ultra vires* and void. He stated that the acts of the Permanent Secretary Ministry of Public Works, and the Public Service Commission were capricious, arbitrary and irrational. He therefore, sought relief from the court, as against the respondents as follows:-

> "***(a) A declaration that the dismissal was wrongful and a nullity. Payment of salary from 17th June, 2003 to his retirement age as provided by law, and all consequential entitlements;***
>
> ***(b) General damages; special damages amounting to Kshs 30,860,475/=; exemplary damages plus costs and interests thereon at court rates."***

By an amended defence filed in court on 25th February, 2009, the respondent denied the appellant's claim and urged the court to dismiss the entire claim.

The suit was heard and fully canvassed before Sitati J, who after considering the evidence adduced before her in its entirety including submissions of learned counsel, and case law cited before her, and the applicable statutory provisions, in a judgment rendered on 2nd October, 2001 found in favour of the appellant and entered judgment against the respondent in the following terms:-

> ***1. I make a declaration that the dismissal of the plaintiff from employment as a Mechanical Engineer in the Public Service was wrongful and nullity.***
>
> ***2. I order that the plaintiff shall be paid his arrears of salary and other benefits for the period dating back to 27/06/2003 less statutory deductions. The exact amounts to be paid shall be assessed by the Registrar or Deputy Registrar of this Court taking into account the applicable time of service of the plaintiff.***
>
> ***3. I order that the costs of this suit shall be paid by the defendant.***

As is clear from '2' above, the learned Judge remitted the matter to the Registrar or Deputy Registrar of the Court to "*assess the exact amounts to be paid, taking into account the applicable time of service of the plaintiff*".

This therefore meant that it was for the Registrar to determine, or calculate not just the amounts payable to the appellant, but also the time of service. We shall revert to this issue later.

Being aggrieved by the judgment, the respondent moved with haste and filed a notice of appeal against the whole judgment on 15th October 2009. The respondent however decided to wait for the assessment as directed by the court to be done first before pursuing the appeal.

In the meantime, from what we can decipher from the record, the matter was placed before the Deputy Registrar of the court, who following an application by the respondent, held that she had no jurisdiction to handle the assessment and so the matter found its way back to Sitati J's docket.

The parties made their submissions before the learned Judge. The appellant had made a tabulation of his salary progression, and annexed several documents to his affidavit sworn on 2nd December, 2010. Having heard the parties, the learned Judge reserved the "Judgment on assessment" on 12th February, 2011.

The Ruling on the assessment was delivered on 16th June, 2011. In a strange twist of events, the learned Judge revisited her earlier judgment, and instead of just doing the assessment of the damages, she reviewed the said judgment and made the following finding, which we quote here *in extenso*, because it forms the fundament of our judgment.

> **"I have now considered the two rival submissions. I have also considered the law cited to me by the defendant. In essence, the cited cases state the correct principles of contracts of**

employment. I note that the plaintiffs computation takes into account the salary payable between 01/05/2003 to 30/10/2009 which totals Kshs. 2,148,164.00/=. He also added payable house, medical and annual leave allowances over the same period which brought the gross figure to Kshs, 3,918,821.00/= less statutory deductions of Kshs. 763,426.30/= leaving a net amount claimed by the plaintiff at Kshs.3,154,794.70/=.

Being persuaded that the relationship between the plaintiff and the defendant was that of employee/employer, this Court must be guided by the terms of the said contract as regards the notice period. The plaintiff was entitled to requisite notice under the contract. Interestingly during the trial, the plaintiff did not produce a copy of his letter of appointment but gave a letter of promotion dated 28/08/1996. As a public officer however, he was not entitled to more than two months' notice or salary in lieu. Accordingly, I assess the damages payable to the plaintiff at Kshs. 32,380/= being two (2) months' salary in lieu of notice. Plaintiff shall also have costs of the suit and interest thereon at court rates until payment in full".

This "assessment" Ruling virtually took away what the appellant had been awarded earlier, which amounted to Kshs 3,154,794.70/= after statutory deductions, to a paltry Kshs 32,380/= being seven months' salary in lieu of notice. It is not even clear where the learned Judge got this figure from because even the pay slips for the month of September 2002, which is in the record shows net salary of Kshs 23,456.20/= which would have given an amount higher than that awarded as two months' salary in lieu of notice, which ought to have been calculated using the appellant's salary.

As would be expected, the appellant felt aggrieved by the said judgment and moved to this Court by way of a notice of appeal filed on 20th June, 2011.In his memorandum of appeal dated 1st November, 2011, the appellant has raised four grounds, which we can aptly summarise as follows:-

That the learned Judge became *functus officio* having made the judgment dated 2nd October, 2009, and she could not therefore change her mind; the appellant had proved the amount of Kshs 3,154,794,70/= with interest at 12% until payment in full; and lastly that **Rule 34 of the Public Service Commission Rules** was applicable to the appellant's case.

Pursuant to this Court's directions given on 7th July, 2015, parties filed written submissions with the appellant filing his, through Michael Owuor & Co. Advocates on record for him, on 20th July, 2015 with a brief reply from the respondent on 6th October, 2016.

When the appeal came before us for highlighting of the submissions on 11th October 2016, both learned counsel informed the Court that they did not wish to highlight their submissions, and asked the Court to determine the matter on the basis of the written submissions.

We have considered the entire record of appeal and the said submissions of counsel, along with the applicable law. We mentioned earlier that we would not begoing into the nitty gritty of the evidence or the circumstances leading to the dismissal of the appellant. The reason for this is that although **Rule 29(1) of the Rules of this Court** mandates us to re-evaluate the entire evidence adduced before the trial court and arrive at our own independent decision, there are exceptions to the said Rule. This is one such exception. We say so because if we find that the impugned judgment was a nullity and ought to be set aside, then the issue of a retrial becomes live. If a retrial is ordered, then any assessment of the evidence and any conclusions drawn from such assessment would embarrass the court that would ultimately rehear the matter.

We note that none of the parties herein supports the judgment in question. As indicated earlier, the respondent had infact filed a Notice of Appeal against the Judgment (we can refer to it as judgment No. 1), but delayed the filing of the appeal itself pending the outcome of the assessment of the damages. This in our view was the prudent thing to do, as judgment No. 1 was inconclusive as assessment of damages had not been done.

Further to this, in written submissions, the respondent expressly admitted that the judgment on dismissal i.e judgment No. 1 was a nullity.

We must point out that judgment No. 1, and the subsequent assessment cannot be severed. You cannot nullify one and retain the other. It is instructive that the trial Judge, deliberately in our view, avoided using the word "Ruling" – or "final judgment" or such other related description. Instead, she just headed the same "Assessment". Of course when one reads the "assessment" it comes out clearly that it was more than an assessment, as the learned Judge did not confine herself to assessing the amount of damages as anticipated but as stated earlier upset and reviewed her earlier judgment. This is the most ludicrous, or preposterous, situation that we have come across in our careers, where a Judge hears a matter, renders a judgment, and then revisits the same two years down the line and vacates the reliefs given in the earlier judgment and substitutes them for others. This has created a rather bizarre situation where we have the appellant appealing against the subsequent Ruling, described by the learned Judge as "Assessment", with the other impugning the entire judgment. We have made a finding to the effect that the judgment is not severable, and so if one part is unsustainable in law, the entire judgment must be set aside.

With profound respect to the learned Judge, it was wrong to purport to write another Ruling two years after delivering her judgment, under the guise of assessing damages, and change the entire judgment. The learned Judge, without specifically saying so and without being moved to do so sat on appeal on her own judgment, set aside the previous orders and replaced them with other orders, which were totally prejudicial to the appellant. This subsequent Ruling has no basis in law and is for setting aside *ex debito justitiae.* Where does that leave judgment No.1? It also crumbles.

Even without the second Ruling which has infected the earlier judgment, the latter cannot stand muster, and we feel that it is important to reiterate here what we have stated in several other cases. It bears repeating that assessment, or computation of damages is a judicial function which cannot be delegated to a Deputy Registrar. In the often cited case of **KENYA REVENUE AUTHORITY VS MENGINYA SALIM MURGANI (2010)** eKLR, this Court pronounced itself as follows:

> "***Both the award and level or quantum of damages is in our view, judicial which the superior court cannot rightfully delegate… a judgment must be complete and conclusive when pronounced and therefore it cannot be left to the deputy registrar to perfect it. Assessment of damages is not a ministerial act as envisaged by order 48(currently Order 49) of the Civil Procedure Rules and a direction to "assess" or "calculate" damages would be contrary to the requirements of Order 20(currently Order 21) of the Civil Procedure Rules and it would be incomplete without assessment and would patently be a nullity."***

See also this Court's decision in **TELCOM KENYA LIMITED VS JOHN OCHANDA** (suing on his behalf and on behalf of 996 former employees of Telcom Kenya Limited) (2014) eKLR.

We have said enough, we think, to demonstrate that this appeal is meritorious. We allow the same and having found that the entire judgment is a nullity, order and hereby remit the matter to the Employment and Labour Relations Court **(ELRC)** for hearing and determination. This order is informed by the fact that the said court is currently the court that has exclusive jurisdiction to hear and determine labour and employment matters and the High Court from which this matter emanated no longer has jurisdiction to rehear it. In view of the circumstances of the case, we find it prudent to order that each party bears its own costs of this appeal.

Finally, the presiding Judge regrets the delay in delivery of this judgment, and apologises to the parties for any inconvenience caused to them.

Dated and delivered at Nairobi this 9th day of June, 2017.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR