IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, GATEMBU & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. SUP 18 OF 2013 (UR 10/2013)

BETWEEN

TEACHERS SERVICE COMMISSION ……. APPLICANT

AND

SIMON KAMAU & 19 OTHERS …….. RESPONDENTS

(Application for leave to appeal to the Supreme Court of Kenya from the judgment of the Court of Appeal of Kenya at Nakuru (Keiwua, Onyango Otieno & Nyamu, JJ.A.) delivered on the 12th day of November, 2010

in

CIVIL APPEAL NO. 300 OF 2009)

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RULING OF THE COURT

The history of this matter has its root in the Legal Notice (LN) no. 534 of 1997 which published an agreement between the ***Government of Kenya (GoK)*** and the ***Union of Teachers (KNUT)***, representing the respondents and others who were employed by the applicant Commission.The agreement raised the teachers' salaries and allowances. The allowances were pegged on each individual teacher's salary. The GoK, through the Commission, did not make good its bargain and so the two parties after negotiations entered in another agreement published as LN 16 of 2003. It amended LN 534/1997 whereby the GoK agreed to pay all the dues accruing from 1997 over a period of six years with effect from 2003. Apparently some payments were effected up to 2007 when a further agreement was entered into reducing the period to make payments from six years to five years. Payments were made but there was this group of teachers comprising the respondents who had received only one payment before retiring.They filed NKU HCCC 65/2006 against the applicant claiming to be paid all dues as contained in LN No. 534 of 1997 and ***Maraga J***, as he then was, heard the suit and found for them, in that they were entitled to earn their retirement benefits based on the entire salary increments contained in the agreement dated 11th October, 1997. Included in the decree, and also to be paid were all other teachers, affected by that agreement. The decree also added that on the basis of that increment, the applicant do liaise with the Pensions Department to pay the respondents and all those they represented, the unpaid gratuity and pension dues, based on all their future pension payments and the entire salary increment of 1997, as pleaded.

The applicant being of the mind that pension to be paid to individual teachers was to be based on the last drawn salary pay slip as per ***s.10 of the Pension Act***, the respondents were of a contrary view. That view is that their pension ought to be computed over the whole period in the 1997 agreement as ordered by ***Maraga, J***. That tussle provoked Nakuru C.A. 300 of 2009, by which, in essence, the applicant contended that ***Maraga, J*** did not well and truly comprehend the respondents' claim. It was not for unpaid salaries but pension benefits whose payment is governed by the said ***s.10(1)*** and which the concerned Judge appeared to amend in his judgment. There were nine grounds which this Court considered. Although it disapproved of what appeared as the High Court amending ***S.10*** aforesaid, it concluded thus:

> ***"In the circumstances, the invitation by Mr. Bosire, learned counsel, to disregard the agreement between the parties would give rise to injustice to the respondents. The meaning of the phrase "last salary" should include the effect of the agreement signed by the parties."***

The appeal was dismissed, in essence confirming the decree from ***Maraga, J's*** judgment. The applicant still feels that that decree compels it to pay pension dues even to the teachers who had earned one increment only pursuant to the 1997 agreement and did not work and earn salary for the entire life of the agreement. Such teachers should not get dues over that period. It is the applicant's view that this Court's judgment of 12th November, 2010, still appears to "***amend***" the ***Pensions Act s.10***, because it decreed that *"last salary"* should include all payments as stated in the agreement in issue. That is what gave rise to the present notice of motion dated 12th September, 2013 seeking a certificate for leave to proceed on appeal to the Supreme Court as provided for in ***Article 163(4)(b) of the Constitution and Rules 42 and 43 of the Court of Appeal Rules.***

In the meantime, the applicant prayed that a stay of execution be granted regarding Nakuru JR Application No. 7 of 2012 and Nakuru JR Application no. 18 of 2012 filed against the applicant's Secretary andthe Director of Pensions respectively. The stay to last until the intended appeal to the Supreme Court is determined. The grounds in the body of the motion and the deposition in the supporting affidavit were to the effect that following the judgment of 12th November, 2010, with which the applicant is dissatisfied, it desires to appeal to the Supreme Court. That the implementation of the judgment is fraught with many issues and challenges. Further, that the sum to be paid is so large – computed at KShs.11,438,296,125/75 plus arrears up to July 2013. Defraying it from public coffers is bound to have adverse economic ramifications. That implementation of L.N. no. 534 of 1994 as varied and amended by later notices, created uncertainty in what ought to be the starting point to compute pension payments.

Further, that the implementation of the judgment of the High Court as confirmed by this Court involved other government departments governed by the Constitution and other statutes. Examples were given of ***Art. 228 of the Constitution*** touching on the authority of the Controller of Budget regarding withdrawal of the public funds and ***s.10 of the Pensions Act*** on how to compute pension. That basically, the applicant had not refused to implement the court orders save for the above challenges, yet the Secretary of the applicant and the Director of Pensions had been threatened with citation for contempt. And that all the above constituted a matter of great general public importance - hence the prayer for leave to proceed to the Supreme Court on further appeal.

Mr Mwangi Njoroge, learned Litigation Counsel from the Solicitor-General's office, assisted by ***Mr R. Sekwe***, went over the history of the matter as stated above and emphasized that a teacher who earned only one increment following the 1997 agreement and then retired could only be paid pension based on the last salary earned as shown in the pay slip. That was the law – ***s.10 of the Pension Act***, yet both the High Court and this Court had, in an apparent move to amend that section which states that pension should be pegged on the last salary earned, decreed that payment could cover the entire period of the 1997 agreement. Courts had no mandate to amend legislation as it appeared to be the case here. The contract of 1997, similarly, could not override the statute. That the respondents are not entitled to earn pension for services they did not render, giving as an example, where one earned one increment then retired. He cannot enjoy benefits of the entire contract period. That there was no specific order decreed by the High Court or this one that salaries be paid as the respondents were insisting. That the Constitution

governed withdrawal of public funds to make such payments by the Controller of Budget. Under the Constitution that office was unable to authorize payment of benefits that apparently were not earned. Counsel made reference to cases filed and letters written to the Controller of Budget and the Director of Pensions that they risked being cited for contempt of court if ordered payments were not forthcoming. Quoting cases stating that only Parliament can pass/amend statutes while the courts interpret and apply them, ***Mr Mwangi*** turned to the sum of over KShs.111 billion demanded to be paid. To Counsel, this cannot be afforded considering the public budget. ***Mr. Mwangi*** then said of ***s.10*** (above):

> ***"There is no clarity and we want the Supreme Court to determine the correct position of s.10 ---"***
>
> ***Let us know what the application of s.10 means in the judgments."***

In the meantime counsel prayed that stay orders do issue against any execution and proceedings as pleaded.

Mr Kimata, learned counsel for the respondents started off by deprecating the long time of three years the applicant has taken to file this motion since the judgment was delivered in October 2010. That no explanation had been offered for that lapse. That the applicant started to execute the decree and even ensured that required sums of money were included in the 2011/2012 and 2012/2013 budgets. There was no challenge as to the applicability of s.10 of the Pension Act. Even costs were taxed in favour of the respondents. The applicant filed a reference to challenge the taxed costs but the same was dismissed. In sum, counsel saw the applicant's present move as not having been taken genuinely or in good faith. The matter had gone on for sixteen years, all the time the respondents waiting for their dues as per the 1997 agreement. The payment having been confirmed by the courts the respondents, who are retired teachers were growing older before they were paid. They are entitled to their dues which they did not lose because they retired. There can be no argument that this or that government officer does not agree with the contents of an agreement which falls to be honoured. Whether the respondents retired or not the agreement gave them entitlements of salary and pension. It is no matter that a large sum is involved. ***Mr. Kimata's*** figure was sh.42 b as opposed to more than sh. 111b contended by the applicant. Mr. Kimata drew our attention to the decision in the ***Sup. No. 7 of 2013, Malcom Bell v Moi & Ors*** where the Supreme Court laid down the principles governing issuance of a certification for one to go on appeal to that Court. Counsel was of the view that this case did not warrant the certificate sought. This cause did not qualify as one of great public interest. It simply concerned an employer – employer contract for payments.

Regarding ***s.10*** (above), ***Mr Kimata*** told us that it was a point of law argued in the High Court and not the Act under which the Controller of Budget operates. Implementing a court order could not be said to be unjust. It can only be honoured and, in this case, bring litigation to an end.

In response ***Mr Mwangi*** said that the applicant would not be asking the Supreme Court to compute entitlements due to the respondents. The basic point was that those required to calculate and pay pension dues were unable to interpret and apply the decree because of the operations of ***s.10 of the Pensions Act*** in the light of the fact that some of the respondents retired after receiving only one instalment according to the 1997 pact and yet the decree requires payment of the benefits including the time they were on retirement and not rendering service. Certainty of the law is what the applicant desires to get from the Supreme Court – a matter the High Court as well as this Court did not settle.

On the delay in bringing this application, counsel said that it took long for all involved to make the ordered payment, to each work on the issue, assess the financial impact or the operation of the law, before a decision was taken to bring these proceedings.

In our view there has been sufficient case law touching on the issuance of a certificate to a party wishing to appeal a decision of this Court to the Supreme Court as provided for in ***Article 163(4)(b) of the Constitution and Rules 42 and 43 of our Rules***. We, for example, have the following: ***Hermanus Phillipus Steyn v Giovanini Guecchi – Ruscone***, ***Civ. APP. No. 4 of 2012, Omega Chemical Industries***

***Ltd v Barclays Bank of Kenya Ltd* [2013] eKLR, *Daniel Kimani & Another, Francis Mwangi & Another* Civ. App. No.10 of 2013** and ***Malcom Bell vs Hon. Daniel Arap Moi & Another Supreme Court* APP. No. 1 of 2013**. The general principle enunciated revolves around the meaning and purport of the phrase *"**a matter of general public interest**"*.

For a certification to issue in this regard to a party to move an appeal to the Supreme Court, the matter should be one of law requiring interpretation that indeed a substantial point of law to be determined has a bearing on public interest. That point must have been raised in the Court of Appeal or the Courts below. A matter of general public interest may, for instance, be about the environment where a section or a large part of the population may be affected. Or a large number of people may be affected in their commercial practice. The matter should thus not be personal, private or of such character as may not affect a large section of the populace. Both this Court, and the Supreme Court, have distilled the categories of matters which constitute general public importance. In the ***Malcolm Bell*** case the Supreme Court set down those principles as follows:-

> ***"(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of a particular case, and has a significant bearing on public interest;***
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> ***(ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one the determination of which will have significant bearing on the public interest;***
>
> ***(iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;***
>
> ***(iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradicting precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination.***
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> ***(v) mere apprehension of miscarriage of justice, a matter most apt for resolution [at earlier level of the] Superior Courts, it is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must fall within the terms of Article 163(4) of the Constitution***
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> ***(vi) the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certificate is sought;***
>
> ***(vii) determination of facts in contests between parties are not, by [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;***
>
> ***(viii) issues of law of reported occurrence in the general course of litigation may, in proper context, become "matters of general public importance," so as to be a basis for appeal to the Supreme Court;***
>
> ***(ix) questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become "matters of general public importance" justifying certification for final appeal in the Supreme Court;***
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> ***(x) questions of law that are destined to continually engage the workings of the judicial organs may become "matters of general public importance", justifying certification for final appeal in the Supreme Court;***

> ***(xi) questions with a bearing on the proper conduct of the administration if justice, may become "matters of general public importance" justifying final appeal in the Supreme Court."***

The Supreme Court has outlined eleven principles to govern the course or basis of seeking certification under ***Article 163(4)(b) of the Constitution and Rules 42 and 43 of Court of Appeal Rules*** to go to that Court for a final appeal. Noting that this Court had listed seven principles in the ***Hermann Steyn's*** case, on which the Supreme Court has added four more, perhaps it can be a good guess to remark that as time goes by, quite probably the category of principles will expand.

From the grounds set out in the notice of motion under review and the arguments for and against it, focus was on the point of law, namely ***S.10 of the Pensions Act*** and how the order to make pension payments cannot be easily effected by the Pension Department because even as it is required to compute the benefits with the pay earned as reflected in the last payslip, the respondents hold the position that pension payments be made according to the 1997 agreement. Even those teachers who retired not long into the agreement period, should be paid over all the agreement period.

Principle (iii) in the ***Malcolm Bell*** case (above) mandates that where an intending appellant wishes that the Supreme Court hear him on a point of law that point must have arisen in the Court or Courts below, and must have been the subject of judicial determination.

Section 10(1) of the Pensions Act together with ***Regulation 20(1)*** thereunder, was before the High Court for determination and ***Maraga, J*** said as follows:

> ***"It is true that section 10(1) of the Pensions Act and Regulation 20(1) thereof provide for a retiree's last pay as the basis for the calculation of his gratuity and pension. The section 10(1) of the Pensions Act reads:***
>
> > ***"… A pension granted to an officer under this Act shall not exceed the full pensionable emoluments drawn by him at the date of his retirement."***

Regulation 20(1)(a) thereof reads:

> *"For the purpose of computing the amount of the pension or gratuity of an officer who has had a period of not less than three years' pensionable service before retirement:*
>
> *a. In the case of an officer who has held the same office for a period of three years immediately preceding the date of his retirement, the full annual pensionable emoluments enjoyed by him at the date in respect of that officer shall be taken."*

The learned Judge then continued:

> ***"A superficial perusal of these provisions would give one an impression that the defendant acted within the law by calling for and submitting to the Pension Department, inter alia, the Plaintiffs' last pay slips. That is however, not correct. On the facts of this case these provisions should be given an interpretation that will do justice to both parties."***

The Judge then put forth what, to him, ***s.10(1)*** should have read:

> ***"In this case the relevant part of S.10(1) of the Pensions Act should therefore be interpreted as though it stated that 'the full pensionable emoluments drawn or supposed to be drawn by him at the time of his retirement.' To interpret it otherwise will obviously cause injustice to the plaintiffs."*** (underlining supplied.)

With that, the High Court found in favour of the respondents in terms of the orders of the decree dated

23.10.2008 alluded to earlier.

When the case came before this Court on appeal, the learned Judges, while addressing the fate of ***S.10(1) of the Pensions Act*** as applied by the High Court, said:

> ***"As regards what is to be regarded as the last salary", we repeat that it is up to the Commission to work it out and thereafter ask the plaintiffs and other affected retirees to present the proper working documentation to the Director of Pensions. We must however, point out that it is not the function of a court of law to add additional words to a statute or an Act of Parliament whose provisions are ambiguous. The superior court should not have added the words "or supposed to be drawn by him at the date of his retirement."***

However, even with that the applicant maintains that this Court's last order "***reimposed***" application of Section 10(1) as ***Maraga, J*** had done, in that:

> ***"… to disregard the agreement between the parties would give rise to injustice to the respondents. The meaning of the phrase "last salary" should include the effect of the agreement signed by the parties."***

In our view, and both this and the High Court having judicially determined the operation of ***s.10*** (above) which the applicant desires to argue on a final appeal in the Supreme Court, indeed a matter of general public importance arises. To determine how ***s.10*** ought to be read and applied, particularly as regards the basis from which one's pension should be computed and especially where an industrial agreement, usually referred to as "***Collective Bargaining Agreement***" (CBA) exists, is a matter that warrants a certification to the Supreme Court. It is in our view a matter that transcends the circumstances of this particular case.

Increasingly, public servants are forming more trade unions to add to the existing ones for example the police and the nurses. The disputes which will arise with CBA's signed, will touch on pensions and other matters. Whether the other party will be a Commission or authority or other state organ, they will be signing the CBA's to bind the GoK whose legal framework of paying pension dues is the application of ***S.10(1) of the Pensions Act*** and the ***Regulations*** thereunder. It is increasingly going to be a matter of serious focus as regards the Pensions Act <u>*vis a vis*</u> the CBAs. That constitutes a matter of great public importance.

We are also minded to say that considerable numbers of persons are involved here as litigants. The High Court did not confine its award only to some twenty claimants who were before it. It decreed that the respondent/plaintiffs *"and all the other retired teachers covered by the agreement"* of 1997 would be entitled to salaries, allowances, pension dues as contained in that agreement. So those to be affected should be more, and scattered all over the Republic, (as envisaged under above principle (ix).

Then there is the public as tax payers from whose taxes the sums claimed whether KShs.111 billion or KShs.42 billion will have to be drawn. Any of that sum is quite substantial and drawing any of it from the public coffers cannot be seen as trivial. It is a matter to be considered as important.

Noting, as we have done above that more and more trade unions in the public sector are being formed, they will execute CBAs with the GoK which may be subject of protracted litigation, we add that the questions of law *vis a vis* CBAs will be destined to continually engage the workings of the judicial organs *(see principle (x),* and that is a matter of great public importance.

If that was the only consideration on which the application depended, we would have been happy to allow prayer 4 of the application and to certify the matter for appeal to the Supreme Court under Article 163(4)(b) of the Constitution.

There is however the complaint by the respondents regarding the delay in presenting the present

application. The judgment of this Court was delivered on 12th November, 2010. The present application was not filed until September, 2013. That is a delay of about 3 years.

In the replying affidavit in opposition to the application, the respondents say that the application should have been filed within 14 days of the date of delivery of the judgment by this Court.

There is no provision setting the time limit for applications of this nature. There is need in our view, for rules to be made to spell out the time frame within which applications for level/certification under Article 163(4)(b) of the Constitution must be presented. However, Article 259(8) of the Constitution provides that "if a particular time is not prescribed by this Constitution for performing a required act, the act shall e done without unreasonable delay…"

The applicant sought to explain and to justify the delay in filing the present application on account of the many organs of state involved in the matter who had to be consulted. In short, the delay was attributed to government bureaucracy. In our view, that explanation is not satisfactory and does not explain why it took the applicant about 3 years to make the application. We think the applicant is guilty of unreasonable delay.

For that reason the application fails and is dismissed with costs.

Dated and delivered this 23rd day of May, 2014.

J. W. MWERA

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/jkc