



Onyando v Teachers Service Commission & another (Cause E226 of 2023) [2024] KEELRC 367 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 367 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E226 OF 2023
L NDOLO, J
FEBRUARY 28, 2024**

BETWEEN

JAPHETH N. ONYANDO CLAIMANT

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

DIRECTOR OF PENSIONS 2ND RESPONDENT

RULING

1. By his Notice of Motion dated 16th March 2023, the Claimant seeks the following orders:
 - a. A declaration that he is entitled to his terminal benefits and an order compelling the Respondents to release his pension;
 - b. A declaration that the 1st Respondent has no mandate to deduct or interfere with the Claimant's retirement benefits.
2. The Motion is supported by the Claimant's own affidavit and is based on the following grounds:
 - a. The Claimant was employed by the 1st Respondent in 1979 as a P1 teacher;
 - b. The Claimant served without any disciplinary issues until 2018 when he retired at a monthly salary of Kshs. 77,000;
 - c. By its letter dated 28th February 2019, the 1st Respondent falsely accused the Claimant of misappropriating funds amounting to Kshs. 3,353,189 adding that the said amount would be recovered from the Claimant's pension;
 - d. The 2nd Respondent, in consideration of the 1st Respondent's claim, has unlawfully withheld the Claimant's pension to his detriment;



- e. The Claimant has demanded from the Respondents, the unequivocal release of his pension but no response has been forthcoming;
 - f. The Claimant, being a retired senior citizen, wholly relies on his pension and the action by the Respondents denying him his dues is unjust, unwarranted and exposes him to hardship and suffering.
3. In his affidavit in support of the application, the Claimant depones that he wrote a letter dated 9th February 2023, denying the allegations of misappropriation and requesting the immediate release of his dues.
 4. The 1st respondent's response is by way of a replying affidavit sworn by its Director, Human Resource Management and Development, Dr. Julius Olayo.
 5. Dr. Olayo depones that the Claimant was employed by the 1st Respondent on 1st May 1984 as a P1 teacher and that at the time of retirement, he was the Principal at Gekongo DEB Secondary School.
 6. Dr. Olayo further depones that shortly after the Claimant's retirement, the 1st Respondent received information that the Claimant had misappropriated school funds amounting to Kshs. 4,972,996. He adds that the Claimant was invited to appear before the Board of Management on 9th October 2018 to respond to audit queries regarding audit reports for 2015-2018 during his tenure as the School Principal.
 7. The Claimant is said to have failed to account for the following:
 - a. Kshs. 2,292,389 being money paid to suppliers;
 - b. Kshs. 860,800 on account of unauthorised KSSHA meeting;
 - c. Kshs. 200,000 being unutilised CDF money.
 8. Dr. Olayo states that upon considering the Claimant's response, the Board of Management concluded that he could not account for the funds amounting to Kshs. 3,353,189 and recommended that the funds be recovered as a government liability.
 9. He asserts that the 1st Respondent is under an obligation to recover government liability.
 10. The 2nd Respondent's response is contained in a replying affidavit sworn by Michael A. Kagika on 20th December 2023.
 11. Kagika, who describes himself as the Director of Pensions at the National Treasury and Economic Planning depones that on 18th December 2019, the 1st Respondent forwarded the Claimant's pension claim together with a claim for recovery of government liability amounting to Kshs. 3,353,189 from the Claimant's pension.
 12. Kagika further depones that the Pensions Department wrote to the 1st Respondent on 1st July 2020, 13th May 2022 and March 2023 seeking to be furnished with authority from the Claimant for recovery of the government liability from his pension dues.
 13. He adds that the 1st Respondent wrote to the Claimant vide letter Ref. No TSC/144841/146 dated 23rd September 2020 seeking his authority to recover government liability from his pension. However, the Claimant contested the liability through an affidavit.



14. Kagika states that Section 13 of the *Pensions Act* provides that pension dues, gratuity or other allowance granted under the Act shall not be assignable or transferable except for the purposes of satisfying a debt due to the government.
15. He further states that Section 202 of the *Public Finance Management Act* provides that a public officer is personally liable for any loss sustained by the National Government that is attributable to the fraudulent or corrupt conduct or negligence of the officer.
16. According to Kagika, the application is bad and incompetent in law as the Claimant seeks final orders that cannot be granted at the interlocutory stage.
17. The orders sought by the Claimant fall within the purview of interlocutory injunctions and the conditions under which such orders may be granted were set in *Giella v Cassman Brown Co. Ltd* [1973] EA 358 as follows:
 - a. That the applicant has established a prima facie case with a probability of success;
 - b. That if the orders sought are not granted, the applicant stands to suffer irreparable harm, which cannot be compensated by an award of damages; and
 - c. If the court is in doubt, it will determine the application on the balance of convenience.
18. A prima facie case was defined by the Court of Appeal in *Mrao v First American Bank Kenya Limited & 2 others* [2003] KLR, 123 in the following terms:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
19. The dispute in this case is not whether the Claimant is entitled to his pension but whether the sum of Kshs. 3,353,189 said to be government liability ought to be recovered from the Claimant’s pension dues.
20. The Court was referred to Section 13 of the *Pensions Act* which provides as follows:
 13. Pensions, etc., not assignable

A pension, gratuity or other allowance granted under this Act shall not be assignable or transferable except for the purposes of satisfying—

 - a. a debt due to the Government; or
 - b. an order of any court for the payment of periodical sums of money towards the maintenance of the wife, or former wife, or minor child, of the officer to whom the pension, gratuity or other allowance has been granted, and shall not be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatever except a debt due to the Government.
21. According to the pleadings and supporting documents filed by the Respondents, it is evident that there is an alleged government liability due from the Claimant. It is also manifest that the Claimant has disputed the alleged liability.



22. This therefore is a matter on which the Court will be called upon to make a determination at full trial. For this reason, I find and hold that the Claimant’s Notice of Motion does not disclose a prima facie case as defined in law.
23. As held by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the three conditions established in *Giella v Cassman Brown* (supra) are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. It follows therefore that if an applicant fails the first hurdle, as in this case, that marks the end of the road for their interlocutory application.
24. Moreover, were the Court to grant the prayer sought in the application, the entire claim would be determined at the interlocutory stage.
25. In the submissions filed on behalf of the 2nd Respondent, reference was made to the decision in *Kenya Deposit Insurance Corporation v Richardson & David Limited* [2017] eKLR where it was held:

“It is wrong for a judge to grant at an interlocutory stage of proceedings final orders, thus disposing of the suit before the parties are heard. The right to be heard is fundamental and only in extremely rare circumstances will a court of law issue orders the effect of which is to determine the suit with finality or render the suit superfluous.”
26. No special circumstances have been established to cause the Court to depart from this well-established principle of law.
27. For the foregoing reasons the Claimant’s application dated 16th March 2023 is declined with costs in the cause.
28. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF FEBRUARY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Wachakana for the Claimant

Ms. Njau for the 1st Respondent

Ms. Mochoge for the 2nd Respondent

