



**Republic v Samson Mwathethe, Chief Defence Forces, Department of Defence & another; Kazungu (Exparte) (Judicial Review Application 21 of 2020) [2022] KEELRC 1462 (KLR) (17 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1462 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW APPLICATION 21 OF 2020  
MA ONYANGO, J  
JUNE 17, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**SAMSON MWATHETHE, CHIEF DEFENCE FORCES, DEPARTMENT OF DEFENCE ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SAMSON KAZUNGU ..... EXPARTE**

**RULING**

1. Vide an application dated 12<sup>th</sup> March 2020, the Applicant seeks the following orders
  - i) That the court be pleased to review, stay and or set aside the ruling dated the 7<sup>th</sup> November 2019.
  - ii) That the court be pleased to order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in contempt of court orders dated 22<sup>nd</sup> October 2015 and 3<sup>rd</sup> March 2016 and compel them to reinstate the applicant and or pay him monthly salaries for the entire period of reinstatement.
  - iii) That costs of this application be in the cause.
2. The grounds in support of the application as set out on the face thereof are that: –
  - a) That the judge never considered the evidence on record that the applicant’s dismissal had been cancelled but never reinstated.



- b) That the Reinstatement if any was never communicated to the Applicant.
  - c) That the computation of colour service for 2 years was never complied as per the court order.
  - d) That unless the court intervenes by setting aside its orders, the applicant stand to be decimated.
  - e) That it is therefore in the interest of justice that the reliefs sought are granted to protect the interests of the said Applicant.
3. The application is supported by the affidavit of Sergeant Samson Kazungu, the Applicant in which he states that this Court's orders reinstating him and backdating his salary arrears and benefits on 22<sup>nd</sup> October 2015 has never been challenged through an appeal and that the Respondent is still in contempt of the Court order issued on 3<sup>rd</sup> March 2017.
  4. The Applicant further states that he signed a discharge hoping to be reinstated, only for his discharge to be cancelled by letter dated 27<sup>th</sup> August 2017 without reinstatement.
  5. That having been aggrieved, he filed a contempt application against the Respondent and a ruling in respect thereof was delivered on 7<sup>th</sup> November 2019 in favour of the Respondent.
  6. It is his position that the ruling was in error as evidence on record shows that the Applicant's dismissal was cancelled but he was never reinstated, that the reinstatement if any, was not communicated to him. That the computation of colour service for two years was not complied with as per the Court order.
  7. The Respondent did not file any response to the application and has also not filed any submissions.
  8. In the brief submissions filed on behalf of the Applicant, it is intimated that the Applicant relies on the grounds on the face of the application and the averments in the supporting affidavit. He states that he has never been reinstated to duty in terms of the Court's order dated 3<sup>rd</sup> March 2017, but was paid his backdated salaries.
  9. The Respondents on the other hand submitted that it reinstated the Applicant back to service on his previous rank as ordered by the Court. That thereafter he was discharged with full benefits which he continues to enjoy to date. That having fully complied with the orders of this Court, there is nothing further to litigate.
  10. The Respondent submits that it is trite law that litigation must come to an end to save parties from the attendant fatigue and costs. That the Applicant is having a second bite at his cherry as his earlier application had been declined by the Court.
  11. The Respondent submits that that contempt proceedings as purported by the Applicant do not and cannot arise. The applicant is simply trying to reopen the matter after the gates were long closed. The best that the present application can be is it is res judicata and should not be entertained. There has not been cogent proof or evidence to show that the respondents are contemptuous of the orders of this court. Contempt proceedings are criminal in nature and the standard of proof is beyond reasonable doubt. This standard in our view has not been achieved. In the case of Bramblevale Ltd (1970) CH 128 at P. 137, Lord Denning Master of Rolls stated: -  
  
"A contempt of court is an offence of criminal character. A man may be absent sent to prison for it. It must be satisfactorily proved showing that the man was asked about it, he told lies. There must be some further evidence to incriminate him."
  12. It is further the Respondent's submission that the matter is res judicata, having been adjudicated by this Court before. That the same orders sought by the Applicant are a duplication of the orders sought



in his notice of motion dated 165<sup>th</sup> August 2016 and the judgment delivered on 3<sup>rd</sup> march 2017. That the object of res judicata is to bar multiplicity of suits and guarantee the finality of litigation. That an individual should not be harassed twice in the same amount of litigation as was held in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR.

13. The Respondent also relied on *Accredo AG & 3 others v Steffano Uccelli & another* [2019] eKLR where the Court cited with approval the elements expounded by the Supreme Court in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR and *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR.
14. The Respondents submit that this Court has inherent powers to terminate proceedings where the same amounts to an abuse of its process. For emphasis the Respondents cited the case of *Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 others* Nairobi (Milimani) HCCC No. 363 of 2009.
15. The Respondents pray that the application be dismissed with costs for being baseless, res judicata, the Court being functus officio and the application being an abuse of Court process.

### **Determination**

16. Review of orders of this court is provided for under rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* as follows –
  - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
    - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
    - (b) on account of some mistake or error apparent on the face of the record;
    - (c) if the judgment or ruling requires clarification; or
    - (d) for any other sufficient reason.
  - (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
  - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or ruling or order to be reviewed.
  - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
  - (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
  - (6) An order made for a review of a decree or order shall not be subject to further review.
17. In the application, the Applicant seeks review and stay or setting aside of this Court's ruling dated 7<sup>th</sup> November 2019. He however does not state the grounds for review. He further prays that the Court



finds the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in contempt of this Court's orders dated 22<sup>nd</sup> October 2015 and 3<sup>rd</sup> March 2016 which compelled the Respondent to reinstate him.

18. In the grounds, the Applicant states that the Judge never considered the evidence on record that the Applicant's dismissal had been cancelled. That he was never reinstated and that the reinstatement if any, was never communicated to the Applicant. Further, that the computation of Colour Service for two years was never complied with as ordered by the Court.
19. Among the documents attached by the Applicant in support of his application is a letter dated 28<sup>th</sup> August 2017 which is reproduced below –

“Cancellation of Discharge - Service Member

55274 EX-SSGT Samson Kazungu(DVR I)

References: A: Our letter KA/55274/PERS/RECS dated 29 Sep 14.

B: HQ KA Legal IOM KA/2205/Legal dated 18 Aug 17.

1. Cancel dismissal instructions in respect of the above named Service Member entirely. Please note that this is after a successful appeal against the dismissal at the Labour Court by the Service Member.
2. Attached herewith please find fresh discharge instructions forwarded to you for your further necessary action.
3. Please note.

Signed

E M Githinji

Maj

For Comd”

20. The Applicant further attached a copy of “Clearance Certificate Camp Admin Unit – DOD” for Samson Kazungu the Applicant which gives reason as “completion of Colour Service”.
21. Also attached to the application is “Authority for Discharge from Service – Service Member” which indicates that the Applicant was discharged from service on 15<sup>th</sup> November 2015. The reason for discharge is given as “Completion of Colour Service”.
22. The Applicant has in his affidavit in support of the application stated that he was paid pension.
23. It is clear from the foregoing that the Applicant did not understand the reasons given in the ruling of this Court delivered on 7<sup>th</sup> November 2019 for dismissing his application for contempt, or he is abusing the Court process.
24. From the letter dated 28<sup>th</sup> August 2017 reproduced above, it is clear that the dismissal of the Claimant which was through a judgment and sentence in the Court Martial Case No. 5 of 2014 delivered at Kahawa Garrison, Nairobi on 15<sup>th</sup> September 2014, was discharged pursuant to the decision of the



Court. This is what is communicated at paragraph 1 of the letter dated 28<sup>th</sup> August 2017 reproduced above to the effect that:

“Cancel dismissal instructions in respect to of the above named service member entirely. Please note this is after a successful appeal against the dismissal at the Labour Court by the service member.”

25. The retirement of the applicant was on the basis that by the time the dismissal was cancelled, he had already reached the age of discharge according to his terms of service. That is why he was paid all salary from the date of dismissal being 15<sup>th</sup> September 2014, then discharged from the date of the letter cancelling the dismissal instructions.
26. It is clear from the application that the Applicant’s assumption was that the court order required him to be physically reinstated even if he was past the date of discharge under his terms of engagement. The order did not change the terms of his service which are clearly set out in law. The court order only affected his dismissal.
27. As held in the ruling that the applicant seeks to be reviewed, at the time the applicant’s dismissal was cancelled he was already overdue for discharge. This means that his date of discharge had already passed.
28. The Respondents complied with the order for reinstatement by paying the Applicant’s salary from the date of dismissal to the date of discharge.
29. The foregoing notwithstanding, the Applicant is required to demonstrate that he is entitled to review of the order in terms of Ruel 33 of the *Employment and Labour Relations Court (Procedure) Rules*. He has not pleaded or demonstrated discovery of any new evidence, or mistake on the face of the Court record, or any other sufficient reason to justify review of the orders he seeks to be reviewed.
30. The prayer for contempt is res judicata as it was the subject of this Court’s ruling that the Applicant seeks to be reviewed and set aside.
31. From the foregoing, I find no merit in the application by the applicant herein. I find the application to be an abuse of court process.
32. The application dated 12<sup>th</sup> March 2020 is therefore accordingly dismissed with costs.
33. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JUNE 2022.**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the



duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

