



Republic v Principal Secretary, Ministry of Defence & 2 others (Judicial Review Application E011 of 2020) [2022] KEELRC 1380 (KLR) (4 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1380 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E011 OF 2020**

MA ONYANGO, J

JULY 4, 2022

IN THE MATTER OF AN APPLICATION BY BORU HALAKHE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 AND THE EMPLOYMENT ACT, 2007 AND IN THE MATTER OF THE DECISION OF THE HIGH COURT BY JUSTICE HON. MATHEM N. NDUMA ISSUED ON THE 16TH OCTOBER, 2013 IN NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT IN PETITION NO. 7 OF 2012 BORU HALAKHE -VS- MINISTRY OF DEFENCE & THE ATTORNEY GENERAL

BETWEEN

REPUBLIC APPLICANT

AND

PRINCIPAL SECRETARY, MINISTRY OF DEFENCE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

BORU HALAKHE EXPARTE

JUDGMENT

1. The Ex Parte Applicant is a former officer of the Kenya Defence Forces where he worked for 23 years. His last rank was Corporal. He was discharged from the service on medical grounds upon recommendation of a medical board sitting on 23rd February 2009.
2. The Ex Parte Applicant contested his discharge and by a judgment dated and delivered on 16th October 2013, was awarded the following which the Court directed to be paid within 30 days.
 - i. Gratuity in the sum of Kshs.1,714,435/= with adjustments (if applicable) in terms and conditions of service of the Kenya Defence Forces;



- ii. Compensation assessed at 40% disability;
 - iii. Payment in lieu of 90 days terminal leave.
3. The Court made no orders for costs and observed that this was because “this petition need not have been filed.”
4. In the instant application, the Ex Parte Applicant seeks the following orders:
- i. That an order of mandamus to issue commanding and/or directing the Principal Secretary in the Ministry of Defence, Department of Defence to comply with the orders issued by the Honourable Court in Nairobi Employment and Labour Relations Court Petition No. 7 of 2012 Bore Halake -vs- Attorney General & Another on the 16th October 2013 to pay a gratuity in the sum of Kshs.1,714,435.00, compensation assessed at 40% disability, payment in lieu of 90 days of terminal leave, to facilitate the ex-parte applicant to collect his household goods, pension and 40% disability pension in addition to normal pension plus the sum of Kshs.1,523,942.40 assessed by the Ministry of Labour and Social Protection on 5th May 2016.
 - ii. That an order of mandamus to issue commanding and/or directing the Principal Secretary, Ministry of Defence, Department of Defence to calculate the ex-parte applicant compensation assessed at 40% disability to reach the sum due in terms of Limb (ii) of the judgement rendered in Employment and Labour Relations Court Petition No. 7 of 2012 rendered on the 16th October, 2013.
 - iii. That an order of mandamus to issue commanding and/or directing that in default of compliance with the order of mandamus and failure to pay the judgement debt in the terms of a gratuity in the sum of Kshs.1,14,435.00, compensation assessed at 40% disability, payment in lieu of 90 days of terminal leave together with all the accrued interests and to facilitate the ex-parte applicant to collect his household goods, pension and 40% disability pension in addition to normal pension thirty (30) days after service, plus the sum of Kshs.1.523.942.40 assessed by the Ministry of Labour and Social Protection on the 5th May 2016 then a warrant of arrest be issued to the Inspector General of Police to arrest and bring before Court the Principal Secretary, Ministry of defence for sentencing and punishment to serve in Civil jail for a period not less than six months or to pay fine or both.
 - iv. That the costs of this application be provided for.
5. The Ex Parte Applicant states that as at 31st July 2016 the Office of the Attorney General assessed the outstanding decretal sum payable to the Ex-Parte Applicant as below –Principal amount Kshs.1,714.435.00 Interest @ 12% with effect from 16th October 2013 to 13th July 2016 Kshs.565.763.53
- Total Kshs.2,280,198.53
6. The Ex Parte Applicant avers that the 1st Respondent has been served with the following:
- i. Copy of the judgment
 - ii. Certificate of order against government under Order 29 Rule 3 of the Civil Procedure Rules for Kshs.1,1714,415/- compensation for 40% liability and payment in lieu of 90 days terminal leave.
 - iii. Certificate of taxation.



7. That a certificate of order against the Government under Order 29 Rule 3 of the Civil Procedure Rules issued on the 5th May 2016 stating that the Ex Parte Applicant was entitled to the compensation of Kshs.1,523,942.40 under the Work Injury Compensation. This is the other limb of the claim assessed by the Director, Directorate of Occupational Safety and Health Services, Ministry of Labour and Social Protection.
8. It is the Ex Parte Applicant's averment that the above payments have not been made to date and therefore attracts interests from the 5th day of May 2016 until payment in full.
9. That the 1st Respondent has been advised by the Attorney General severally and by the Office of the Ombudsman to honour the judgement and award but all in vain.
10. The Ex Parte Applicant avers that the continued failure of the Respondents to comply with the judgment is an affront to Articles 10, 47 and 159(2) of *the Constitution* as well as Section 7(2) of the *Fair Administrative Actions Act*.
11. The application is supported by a verifying affidavit, a statement and supporting affidavit of the Applicant all dated 29th September 2020.
12. In response to the application the Respondents filed a replying affidavit of Major John Dickson Nzauka, a Staff Officer II Records Department at the Kenya Defence Forces Headquarters Nairobi in which he states that the application herein is an abuse of Court process, misleading and vexatious. That the application is pre-mature as it is premised on a condition precedent being that the Ex Parte Applicant must clear from public service before processing of payment.
13. The affiant states that the 1st Respondent has always been ready and willing to pay the Ex Parte Applicant his dues and the instant application was unnecessary and a waste of Court's precious time.
14. That the prayers sought in the application are based on the Judgment of Court dated 16th October 2013, where the Court observed at page 11 that the entire Petition ought not to have been filed in the first place as no litigious issue was apparent from the face of the proceedings.
15. That the Court further observed that the prayers sought for terminal benefits and disability pension were never disputed, only that the Petitioner, who was bound to clear with the Kenya Defence Forces, had failed to do so.
16. That despite several correspondences and specific invitations for clearance, the Ex-Parte Applicant failed and adamantly continues in his obstinacy to clear with the Kenya Defence Forces, a pre-condition to payment of his dues.
17. The affiant further states that Regulation 69(6) of the Public Service Commission Regulations, 2020 contemplates that a public officer ought to clear with whichever Government Agency upon exit from employment.
18. That clearance, as has been observed in numerous decisions of this Court including *Linsey Atieno Ojwang v Fusion Capital Limited* [2017] eKLR, *Anthony Nyaberi Moturi v Gilani's Supermarket Limited* [2019] eKLR and *Zachary Ochako v Kenya Broadcasting Corporation* [2014] eKLR, is a good practice for an employee to undertake with the employer before terminal dues are paid.
19. That it is not enough for the Ex-Parte Applicant to state that he has no Government liability as this is a decision to be rendered by his former employer, who upon satisfactory clearance will issue a Certificate to pave way for processing of dues owed.



20. That mandamus is an equitable remedy, dictating that he who comes to equity must come with clean hands and must do equity.
21. That the Ex-Parte Applicant's hands are tainted with ill will for unnecessarily instituting the present application in Court with the intent of circumventing due process, in spite of the judgment of Court dated 16th October 2013, which advised him as much.
22. That the purpose of mandamus is to remedy the defects of justice and only issues to the end that justice may be done. The order, the Courts have held, must command no more than the party against whom the application is made and is legally bound to perform.
23. That the application by the Ex-Parte Applicant has not met the threshold required for the issuance of the Order of mandamus as contemplated under Article 41 of *the Constitution* and Order 53 of the Civil Procedure Rules, 2010 and should therefore be dismissed without further prejudice.
24. That in the current case, the Ministry of Defence can only process the dues of the Ex-Parte Applicant upon clearance as required in public service and rendering of military stores issued to the Ex-Parte Applicant, who has severally been invited by KDF to clear from service but remains adamant for reasons best known to him.
25. The Respondents pray that this Court do order the Ex-Parte Applicant to clear with his Unit prior to processing of any payment due to him.
26. In a supplementary affidavit sworn on 25th January 2022, the Ex Parte Applicant states the averments in the replying affidavit are baseless, that he has a judgment whose fruits he has not enjoyed, that the requirements for clearance came in force in 2020 and he has responded to the same vide his lawyer's letter dated 16th August 2021. The annexed letter however does not make any reference to date of coming in force of the requirement for clearance.
27. The suit was disposed of by way of written submissions. The Ex Parte Applicant filed submissions dated 23rd December 2021. The Respondents filed theirs dated 5th May 2022. The Ex Parte Applicant filed supplementary submissions dated 16th May 2022.
28. I have considered the pleadings and the submissions. I have further perused the judgment that is the subject matter of this suit, and the authorities cited by the parties.
29. It is not in dispute that the Ex Parte Applicant is the beneficiary of this Court's judgment dated and delivered on 16th October 2013. In the judgment the Court observed as follows:

“The Court finds that the discharge of the Petitioner on medical grounds was lawful and warranted and the Respondent did not violate the Petitioner's right to fair labour practices, fair administrative action and therefore, the Petitioner has not proved that any infringement of Article 41 and 47 of *the Constitution* of Kenya 2010, took place in respect of the Petitioner or at all.”

It is not in dispute that the Petitioner was entitled to retirement benefits upon discharge. According to the Authority for discharge document, dated 3rd April, 2009, these terminal benefits include:

- i. Terminal leave of 90 days from 16th April, 2009 to 15th July, 2009 and;
- ii. Pension/gratuity.



It is not in dispute, that the Petitioner was bound to clear with the Respondent before payment of his terminal benefits but had not done so.

It is for that reason that his terminal benefits were not paid as at the time of coming to Court. This position is indicated by a letter dated 26th May, 2011 written by Lt. Col. F.G. Ahmed to the Base Commander MAB.

The Petitioner claims payment of gratuity in the sum of Kshs.1,714,435/- as simulated in the terms and condition of service for the Kenya Defence Force.

According to the letter of discharge the pension for the Petitioner is to be made by Military Pension Branch of the Treasury through the Petitioner's Bank account.

The Claimant was also recommended for payment of compensation for 40% disability pension in addition to normal pension which the court finds should be paid to him forthwith.

With regard to the issue of the household goods held by the Respondent because the Petitioner failed to collect them, the court directs that the Petitioner be facilitated by the Respondent to collect the same though this is not a specific prayer in this petition.

In the final analysis, the court directs the Respondent to pay the Petitioner within 30 days from the date of this judgment;

- i. Gratuity in the sum of Kshs.1,714,435/= with adjustments (if applicable) in terms and conditions of service of the Kenya Defence Forces;
- ii. Compensation assessed at 40% disability;
- iii. Payment in lieu of 90 days terminal leave.

As the Court has found that this petition need not have been filed, there will be no order as to costs.

It is so ordered.”

30. In the replying affidavit of John Dickson Nzaukahe states that the 1st Respondent has been ready and willing to pay the decretal sum, and has not done so only because the Ex Parte Applicant has not cleared. This fact is acknowledged by the Ex Parte Applicant in his supplementary affidavit sworn on 2nd March 2022 at paragraphs 7, 8, 9, 10, 11, 12, 14 and 20. Specifically at paragraph 20 of the supplementary affidavit the Ex Parte Applicant deposes:

“20. That whereas paragraph 18 is admitted in part in that clearance from employment is a condition precedent for all employees leaving the service of the government, the same stipulation came into effect in the year 2020 way after court orders were given in the year 2013 hence the same does not apply in this instance and does not apply retrospectively.”

31. It is thus common ground that the Ex Parte Applicant has not been paid because he has not cleared. The Ex Parte Applicant appears to be mistaken about the requirement for clearance and has not submitted any evidence as proof of his averment that the requirement for clearance was introduced after the judgement. As is evident from excerpts of the judgment reproduced above, the Court expressly directed in the judgment at page 10 that the Ex Parte Applicant was bound to clear with the Respondent before payment of his terminal benefits. Regulation 69(6) of the Public Service Commission Regulations which the Ex Parte Applicant refers to was not in force at the time of judgment and does not aid him at all.



32. As was observed in the judgment and as is still the case here, the Ex Parte Applicant's misfortunes are of his own creation. He has been the cause of the delay in accessing the fruits of his judgment. He is well advised to go and clear with the 1st Respondent so that his terminal dues can be processed.
33. For the foregoing reasons I find no merit in the suit herein and accordingly dismiss the same. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF JULY 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 15th March 2020 and subsequent directions of 21st 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, the 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 the 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

