



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 407 OF 2013

THOMAS JOSEPH ONYANGO.....APPLICANT

-VERSUS-

THE STATE.....RESPONDENT

THE TEACHER SERVICE COMMISSION.....INTERESTED PARTY

RULING

1. This ruling is in respect of the applicant's application dated 27th January, 2021 filed under certificate of urgency seeking the following orders;

1) THAT the court satisfies this application as urgent and be dealt with in priority.

2) THAT this honorable court upholds, retains and sustains its own order dated 28th April 2014; in particular that the claimant was illegally kept off work with effect from 01.06.2013 when his salary and allowances were also withheld.

3) THAT this honorable court upholds, retains and sustains its own orders in its judgement dated 13th June, 2014 (see last 3 lines on page14) and reaffirms that the claimant is entitled to salaries and allowances from 01.06.2013 to 28.04.2014 (Kshs. 118,000/-,plus interest of 14% p.a compounded annually) when the claimant was ordered to resume duty by court order and at the prevailing pay for the period and thereafter to continue earning at the prevailing monthly pay (see last and first paragraphs of page 14 and 15 respectively of judgment by ELRC/ Industrial Court Cause No. 407 of 2013).

4) THAT this honorable court is pleased to uphold, retain and maintain its own orders dated 18th December, 2014 declaring that the claimant be paid the fixed amount of Kshs, 1,118,000 together with the Court compound interest rate of 14% with effect from 13th June, 2014, the date of industrial/ ELRC Judgment.

5) THAT this honorable court is pleased to uphold, retain and maintain its own judgment that the claimant resumes duty with full benefits

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Applicant, Thomas Joseph O. Onyango on 27th January, 2021 on the following grounds: -

a) THAT, this matter risks being rendered very complicated to implement given the already elapsed time and updating of signed CBA by the TSC.

b) THAT this court cannot vacate/ resile from its own orders.

c) That the Applicant herein moved this Court in 2014 seeking for various wards and resumption of duit which orders were granted to him.

d) That, the Interested Party herein aggrieved by the decision of this Court appealed against the orders of this Court and further sought for stay pending appeal by his application number 122 of 2015 which orders were granted

e) That the appeal succeeded partly in that the cost awarded was reviewed and the order of posting and deployment at mama Ngina

secondary school was declined. But that the Court of Appeal upheld the ELRC decision that his employment was unfairly and illegally terminated

f) He avers that the Court of Appeal did not in its decision revoke the orders that the applicant herein be paid his award by 1.08.2014 which gave a proviso that in case of failure to pay then the same award was to attract interest at Court rate.

g) THAT the Interested Party did not pay the awards by 01.08.2014 as Ordered by the court under the excuse of having appealed which appeal on the said prayer was eventually lost.

h) That it is therefore imperative that this Court allows the application as prayed as the applicant has not been paid his dues as ordered by the ELRC Court.

i) THAT unless this matter is settled as soon as possible the applicant who is approaching retirement age risks going to retirement without pension and other job benefits despite serving the Respondent for very many years.

3. In opposing the application, the Respondent through its legal Counsel **Stella Chemtai Rutto**, swore a replying affidavit on 2nd March, 2021 and filed in this Court on even date on the following grounds;

a) THAT the Applicant moved this Honourable vide a Memorandum of Claim filed on 20th November, 2013 through which he sought 13 prayers which this Court (Justice Byram Ongaya) delivered its judgment on June 2014 in favour of the Applicant and Ordered that;

i) The declaration that the deductions from the Claimant's salary for the months of October, 2010, November 2010, February 2013 and May 2013 were illegal.

ii) The declaration that the act of putting the Claimant in indefinite suspense without a station and any payment of salaries and allowances as the one on 5th May, 2013 was illegal.

iii) The Respondent (Teachers Service Commission) to pay the claimant Kshs 1,389,539.60 plus the salary and allowances from 1st June 2013 to 28th April, 2014 when he resumed duty.

iv) The claimant to compute the salaries and allowances above (from 1st June, 2013 to 28th April, 2014) at the prevailing pay at the material time.

v) The Respondent (Teaches Service Commission) will pay the amounts above by 1st August, 2014 and in default, interest at court rates.

vi) The claimant to continue teaching at Mama Ngina Secondary school with full pay and benefits and to remain so deployed to a school or institution within Nairobi area as per his initial desires or deployed on promotion or otherwise in his best interests.

vii) The declaration that the claimant be stationed in a position and status commensurate to his rank and grade.

viii) A declaration that the interested party by itself or by its employees or agents is hereby restrained from harassing, intimidating or duly interrupting the services of the claimant.

b) THAT the Interested party being aggrieved by the foregoing orders, appealed against the said entire decision to the Court of Appeal hence lodged a Notice of Appeal to that effect on 24th June, 2014.

c) Similarly, the Applicant was also aggrieved by the Judgement hence lodged a cross Appeal dated 27th May, 2016.

d) Judgment in the Court of Appeal was delivered on 4th October, 2019 that partially allowed the Appeal and dismissed the Appellant's Cross Appeal, thus finding as follows;

i) The award of Kshs 1,389,539.60 is sustained but reduced to Kshs 1,220,439.60.

ii) The Respondent's payment from 1st June, 2013 to 28th April, 2014 pursuant to the court order to be agreed upon between the parties and in default of the agreement, leave is granted to apply to the trial court for settlement of that issue;

iii) The order on posting, deployment and stationing of the Respondent is hereby set aside in its entirety;

iv) The cross appeal is dismissed in its entirety;

v) Each party to bear its own costs.

e) It is stated that pursuant to the Court of Appeal decision the interested party herein paid the applicant Kshs. 1,220,439.60 and a further Kshs. 751,191.95 in satisfaction of order ii of the Court of Appeal Orders therefore settling the decretal sum owed to the Applicant herein in full.

f) It was further stated that the prayers sought by the applicant are irrelevant since at the time judgment was delivered by the Court on 13th June, 2014, the applicant was already rendering teaching service at Mama Ngina secondary school.

g) The Respondent contends that prayer 3 and 4 of the application herein is superfluous as the Court of Appeal directed parties to negotiate on a figure which parties agreed on Kshs 751,191.95 and the applicant herein accepted the same without any objections.

h) That the Orders of this Court were varied by the Court of Appeal and the interested party herein has fully complied with the said Appeal Orders.

i) That the applicant herein deserted duty and his whereabouts remain unknown despite efforts carried out by the principal of Mama Ngina secondary school by her letter of 22nd July, 2014 requesting him to report to work which he failed and eventually he was dismissed from service which decision he has never challenged to date.

4. The application herein was disposed of via written submissions with the Applicant filing on 29th March, 2021 and the Respondent filing on 16th April, 2021.

Applicant's submissions

5. The applicant herein submits that the essence of this application is to satisfy order ii of the Court of Appeal Orders that states that *"The Respondent's payment from 1st June, 2013 to 28th April, 2014 pursuant to the court order to be agreed upon between the parties and in default of the agreement, leave is granted to apply to the trial court for settlement of that issue"*. He argues therefore that according to that Order the Court of Appeal intended that the applicant herein be paid Kshs. 1, 118,000 as earlier ordered by this Court and the said payment be made by 1st August, 2014 failure to which the said sum of money would accrue interest at Court rate. Accordingly, he argues that since the said money was never paid to him as was directed by the Court the same accumulated interest and is now at Kshs. 1,960,847. Additionally, the Claimant submitted that contrary to the interested party's averments, there was no consent between the parties.

6. He submitted also that when the Court of Appeal rejected the issue of posting, any issue touching on Mama Ngina secondary school ceased to have any relevance therefore the issue raised of desertion from work has no basis.

7. The applicant further submitted that the court of Appeal in its decision at page 11 line 17 states that *"we too cannot interfere with the award of pay from 1st June, 2013 when there was a valid Court Order, which had not been stayed or overturned"* therefore he argued that the said pronouncement meant that the claimant ought to be paid his salary together with all other entitlements from May 2014 to date which currently stands at Kshs. 13, 988,899.905/-.

Interested Party's Submissions

8. Counsel for the interested party on the other hand maintains that the interested party has fully complied with the Court of Appeal Orders and has no pending dues owing to the Applicant.

9. Counsel submitted that the decision of this Court (Justice Byram Ongaya) was overturned by the Court of Appeal and the said Court of Appeal issued other Orders which the interested party has duly complied therefore Counsel argues that this Honourable Court lack jurisdiction to interfere with the Court of Appeal Orders as it is functus officio in all orders save to only decide whether the interested party has complied with prayer ii of the Court of Appeal decision on payment of salary with effect from 1st June, 2013 to 28th April, 2014, which he argues that it has fully complied with.

10. On compliance with the said Order ii of Court of Appeal decision, Counsel submitted that the parties herein negotiated on the said issue as directed by Court of Appeal and arrived at Kshs. 1,041, 344.15 which after taxation was settled at Kshs. 751, 191.95/- which monies were paid to the Applicant herein.

11. It was therefore submitted that the interested party has duly complied with the Court orders and urged this Court to dismiss the application herein for lacking merit.

12. I have examined the submissions of the parties herein. This matter after proceeding before the Court of Appeal, the appeal partially succeeded but the Court of Appeal also directed some payments to be made to the claimant. The respondents contend that they have since settled payment as directed by the Court of Appeal hence there is nothing pending for this court for action.

13. The Court of Appeal in its Judgment, ordered payment to the claimant for 1st June 2013 to 28th April 2014 as agreed by the parties but in default, the claimant was free to apply to the trial court for settlement of that issue alone. Issue is whether the payment was done after an agreement by the parties or the payment remains outstanding. The respondents referred court to their annexure SR4 – in their replying affidavit which is a payment voucher to the claimant of kshs.1,220,436.60.

14. Annexure SR 6 is an invitation to negotiate on order No.2 on 31/1/2020. It is not clear whether this negotiation occurred or not because there is nothing submitted by the respondents that the intended meeting took off. There is annexed evidence on payment voucher to the claimant in the sum of kshs.751,191.95 but it is also not clear whether this is what was paid to the applicant after a negotiation or was

unilaterally decided by the respondents to be paid to the claimant pursuant to order No. (ii) above.

15. In the circumstances the issue of whether the amount payable to claimant was duly paid as per the Court of Appeal order is a matter which must be subjected to further evidence for this court to fully appraise itself of it and determine. I will therefore invite the parties to make further submissions on this issue alone before a final determination of this court on the matter.

RULING DELIVERED VIRTUALLY THIS 17TH DAY OF JUNE, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Applicant – present

TSC Legal AAST Simwa – present

Court Assistants – Fred and Wanyoike