



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 68 OF 2018

GODWIN BARASA BARECHI.....PETITIONER

VERSUS

KENYA TRADE NETWORK AGENCY.....RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa 27th February, 2020)

RULING

1. The Application before Court is the Respondent/ Applicant's Notice of Motion filed on 28th March, 2019. The application seeks the following orders:

1. Spent

2. There be a temporary stay of execution of the ruling delivered on 5th February 2019 pending the hearing and determination of this application.

3. The ruling delivered on 5th February 2019 be reviewed and varied as follows:-

a. The order directing the Respondent to pay all allowances (other than medical benefits and house allowance) be set aside.

b. A finding be made that the Respondent paid all the applicable allowances to the Petitioner in line with the HR Manual and the Public Service Commission Act.

4. This Court does issue any other order that it deems fit and just to issue in the circumstances.

5. The costs of this application be costs in the cause.

2. The application is premised on grounds that:

1. On 5th February, 2019 this Court dismissed some of the orders sought by the Petitioner, in his Notice of Motion dated 18th July, 2018, but granted the order for payment of allowances to the Petitioner during the period he was on suspension.

2. The Court's finding is in error since the Clause 11.22.2 of the Respondent's Human Resource (HR) Manual does not provide for payment of all allowances during the suspension period. The

Clause provides:

“where the officer is suspended from the exercise of the functions of his public office, he shall be entitled to only allowances and medical benefits but not basic salary.”

3. The HR Manual should be considered and read together with section 71 of the Public Service Commission Act 2017 which provides that an employee on suspension is only entitled to full house allowance and medical benefits and no other allowances.

4. There is an error apparent on the face of the record within the meaning of Rule 33 (1) (b) of the Employment and Labour Relations Court (Procedure) Rules. Further there are sufficient reasons for review of the ruling within the meaning of Rule 33 (1) (d) of the Rules.

5. Paying the allowances amounting to Kshs. 637,000 being telephone allowance, commuter allowance, house allowance and leave allowance is tantamount to breaching statutory provisions in addition to the legal principle that facilitative allowances are not payable during the suspension period.

3. The application is supported by the affidavit of Bernard Milewa the Applicant’s Company Secretary and Legal Affairs Manager. He depones that it is vital for the Ruling to be reviewed and interpreted to find that the Applicant has paid all allowances payable in line with the HR Manual and section 71 of the Public Service Act.

Petitioner/Respondent’s case

4. The Respondent filed a Replying Affidavit sworn on 1st April 2019. He avers that the Applicant is abusing the process of this Honourable Court as it seeks to deny him the fruits of litigation, which are just and legally due to him.

5. He avers that at all material time the Applicant’s position is that they were guided by Clause 11.22.2 of the Human Resource Manual.

6. He contends that the Applicant has failed to pay him his allowances in accordance with the Human Resource Manual save for house allowance, which is also in arrears. He further contends that the Applicant has failed to factor the annual increments, which he is entitled to as an employee of the Respondent.

7. He contends that there is no error apparent on the face of the record or sufficient reason as alleged by the Applicant to warrant review of the Ruling. He contends that the Applicant selectively and discriminately seeks refuge under section 71 of the Public Service Commission Act.

8. He avers that the Applicant’s application to have the Court interpret its HR Manual and section 71 of the Public Service Act amounts to a violation of his right to equal protection and equal benefits under Article 27 of the Constitution.

9. He avers that the Applicant is not entitled to stay of execution as it has not met the mandatory statutory requirement for grant of orders for stay of execution.

Applicant’s submissions

10. The Applicant submits that the Court’s finding on allowances was in error since Clause 11.22.2 of the Human Resource Manual does not provide for payment of all allowances during the suspension period. It is therefore its submission that the existence of the error on the face of the record constitutes a good ground for this Court to review its orders and Ruling of 5th February, 2019. In support of this, it relies on the decision in **Muriel Ogoudjobi v Mara Ison Technologies (K) Limited [2016] eKLR.**

11. It submits that Clause 11.22.2 of the Human Resource Manual should be considered with Section 71 of the Public Service Commission Act. It relies on the case of **Alfred Odongo Amombo v Lake Victoria North Water Services Board & Another [2018] eKLR** where the Court held:-

“The Human Resource Policy and procedures manual is to be strictly followed during the pendency of the Appeal and continued suspension of the Claimant/ Applicant. Section 71 (3) of the Public service Commission Act 2017, provides that a Public Officer who is suspended shall receive half basic salary, full house allowance and medical allowance. The directives by public service commission in their circulars are to supplement gaps in all public service bodies’ human resource and procedure manuals.”

12. It submits that the allowances sought by the Petitioner in his letter dated 26th March, 2019 are not payable and that paying them will amount to breaching of statutory provisions in addition to the legal principle that facilitative allowances are not payable during the suspension period. It relies on the case of **Alex Muriuki Bundi v Kakuzi Limited [2012] eKLR** which cited the Court of Appeal decision in **Kenya Ports Authority v Silas Obengele, Civil Appeal No. 38 of 2000**, and urges the Court to be persuaded by the Court of Appeal ‘s decision.

Respondent’s submissions

13. The Respondent submits that an error apparent or omission on the part of the court must be self-evident and should not require an elaborate argument to be established. In support of this, he relies on the case of **National Bank of Kenya v Ndungu Njau [1997] eKLR**.

14. He therefore submits that in the instant case the Applicant is calling upon the Honourable Court to determine a purported erroneous conclusion of the law which cannot form the basis of a review since it would amount to asking the Court to sit on appeal of its own judgment. He submits that the Court has no jurisdiction to entertain the matter as it was rendered *functus officio* after delivering the Ruling.

15. He submits that in the event this Court finds that it has jurisdiction to entertain the application it ought to give full effect to the provisions of section 71 (3) of the Public Service Act. He also relies on **Alfred Odongo Amombo v Lake Victoria North Water Services Board & Another [2018]** cited by the Applicant.

16. He submits that the protection and the benefit of Section 71 (3) of the Public Service Commission Act what the Respondent seeks can be extended to him in accordance with Article 27 of the Constitution.

17. I have considered the averments of both Parties herein. The Applicants want his Court to stay its orders and review the same on the ground that there is an error on the face of the record.

18. I have considered the ruling granted by this Court which this Court granted based on the Applicants own Human Resource Manual. I do not find any error on the record as indicated.

19. I therefore find the application without merit and I dismiss it accordingly.

20. Costs in the Petition.

21. The main Petition to proceed accordingly.

Dated and delivered in open Court this 27th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kalume holding brief Kshindi for Respondent – Present

Mageto holding brief Nyarago for – Petitioner – Present