



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 547 OF 2018

ERASTUS K. GITONGA.....1ST CLAIMANT
 EDWARD K. WABWOTO.....2ND CLAIMANT
 CICILIA W. GITHAIGA.....3RD CLAIMANT
 JUDITH N. KITHINJI.....4TH CLAIMANT
 SIMON NGARA.....5TH RESPONDENT

-VERSUS-

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT

-AND-

LAW SOCIETY OF KENYA.....INTERESTED PARTY
SALARIES REMUNERATION COMMISSION....PROPOSED 2ND INTERESTED PARTY
HON. ATTORNEY GENERAL.....PROPOSED 3RD INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 13th March, 2020)

RULING

The Court delivered judgment in the case on 10.04.2019. The judgment was in favour of the claimants against the respondent for:

- a. The declaration that the respondent’s action of not paying the 1st to 5th claimants a non-practice allowance is unlawful, wrongful and unfair.
- b. The declaration that the respondent’s action of not paying the 1st to 5th claimants a prosecutorial allowance is unlawful, wrongful and unfair.
- c. The declaration that the respondent subjected the claimants to unequal treatment amounting to discriminatory and unlawful labour practice by denying them the subject allowances.
- d. In regard to non-practice allowance the respondent to pay the claimants thus 1st claimant **Kshs.2, 060, 000.00**; 2nd claimant **Kshs. 1, 760, 000.00**; 3rd claimant **Kshs.1, 900, 000.00**; 4th claimant **Kshs.860, 000.00**; and 5th claimant **Kshs. 540, 000.00**.
- e. The respondent to pay non practice allowance accruing to the claimants from the date of filing this claim and for the duration of service of the claimants. The rate of practice allowance shall be as issued by applicable government circulars or otherwise as may be set by a lawful competent authority.

f. In regard to prosecutorial allowance the respondent to pay the 1st to 4th claimants thus the 1st claimant **Kshs.1, 830, 000.00**; the 2nd claimant **Kshs.1, 470, 000.00**; the 3rd claimant **Kshs.1, 470, 000.00**; and 4th claimant **Kshs. 1, 440, 000.00**.

g. The respondent to pay prosecutorial allowances accruing to the 1st to 3rd claimants from the date of filing the claim and for the duration of their service. The rate of prosecutorial allowance shall be as issued by applicable government circulars or otherwise as may be set by a lawful competent authority.

h. The amount already due to the claimants will be paid by the respondent to the claimants not later than 01.08.2019 failing, interest at Court rates will apply thereon from the date of this judgment until full payment.

i. The claimants shall serve this judgment upon the Public Service Commission, within 7 days from the date of this judgment, towards the Commission's consideration of issuing the relevant gazette notice under section 98 of the Public Service Commission Act, 2017 to harmonize prevailing grading levels and to provide for equivalency of job groups, grades, and ranks applicable in the public service or bodies under its constitutional and statutory functions and powers - and in view of the serious issues which have emerged in the present case, the Commission to consider publishing the gazette notice not later than 01.02.2020.

j. The respondent to pay the claimants' costs of the suit.

The respondent has since preferred an appeal against the judgment and decree. For that purpose the respondent filed in this Court an application for stay of execution of the decree pending the hearing and determination of the proposed appeal. That application has largely been compromised between the claimant and the respondent.

The proposed 2nd interested party has filed a notice of motion on 08.11.2019 under Rules 17 (1) and 18(1) of the Rules of this Court, 2016, section 1A, 1B, and 3A of the Civil Procedure Act, Article 159, 230 and 259(11) of the Constitution of Kenya 2010 and all enabling laws. The application is for joinder as the 2nd interest party. It is urged that the judgment has far reaching consequences on the statutory and constitutional mandate of the applicant and yet it was not given an opportunity to be heard prior to the delivery of judgment. The applicant learnt about the judgment after it was delivered and the applicant wishes to participate in assisting the Court to determine the pending application dated 24.05.2019 for stay of execution pending hearing and determination of the proposed appeal. The application was filed through James Sitienei Advocate.

The 3rd proposed interested party filed an application on 04.11.2019 through Mercy G. Kinyua, Senior Litigation Counsel, for Attorney General. The application is supported by the affidavit of Simon K. Rotich, the Secretary and Chief Executive Officer of the Public Service Commission. The application invokes Article 159 (2) of the Constitution of Kenya 2010, section 1A, 1B, and 3A of the Civil Procedure Act, Order 1 Rule 10(2) of the Civil Procedure Rules, Rule 17(1) and 18(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all enabling laws. The application seeks joinder of the Attorney General as an interested party. The applicant urges that in the judgment an order is directed at the Public Service Commission and the applicant wishes to participate in the pending application for stay of execution pending the hearing and determination of the proposed appeal. The applicant should therefore be enjoined to protect the Commission's interest and the public interest at large.

The 1st respondent filed a replying affidavits for the claimants on 19.11.2019 through Gathara Mahinda & Company Advocates. It is urged that once the judgment was rendered, the Court became *functus officio*. Further the order made in favour of the claimants cannot be said to be prejudicial to the government or any agency or department of government. The applicants have not adequately demonstrated their role at this stage because joinder is not for seeking review but challenging merits of the judgment which can best be done at appeal stage.

The interested party the Law Society of Kenya filed grounds of opposition on 19.11.2019 to oppose the applications and through Macharia-Mwangi & Njuru Advocates. It is urged that the Court is *functus officio* after it delivered the judgment and the proper path for the applicants is rule 77 of the Court of Appeal Rules.

The Court has carefully considered the parties' submissions and respective cases. The Court finds as follows:

1. As submitted for the respondent and the interested party, after judgment the Court became *functus officio* and lacks jurisdiction to entertain matters of merits in view of the judgment on record. That is the case especially that there is no application for review and the respondent has already preferred an appeal. The proper action is for the applicants to invoke rule 77 of the Court of Appeal Rules to address any emerging dissatisfaction with the judgement and the decree herein.

2. In so far as no order was directed at the proposed 2nd interested party, the Court returns that the applicant, the Salaries and Remuneration Commission, has failed to establish its stakes in the pending application for stay of execution of the decree pending the hearing and determination of the proposed appeal against the judgment. Its application will therefore be declined.

3. In so far as the proposed 3rd interested party, the Attorney General seeks to protect the stakes of the Public Service Commission against which an order in the judgment is expressly directed at, the application for joinder will be allowed but limited to participation in the application for stay of execution of the judgment and the decree pending the proposed appeal.

4. For avoidance of doubt, the respondent having preferred an appeal, it is inconceivable that the applicants would be enjoined for purposes of review of the judgment.

5. The Court has considered all the circumstances of the case and the public interest involved in the case and returns that there will be no orders on the costs of the two applications.

In conclusion the two applications for joinder are hereby determined with orders:

1. The application by the Salaries and Remuneration Commission is declined as is hereby dismissed.
2. The application by the Attorney General is allowed to the extent that the Attorney General is hereby enjoined as the 2nd interested party and joinder is limited to participation in the pending application for stay of execution of the decree herein pending the hearing and determination of the proposed appeal.
3. No orders on costs of the two applications.

Signed, dated and delivered in court at **Nairobi** this **Friday, 13th March, 2020**.

BYRAM ONGAYA

JUDGE