



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.401 OF 2013

DAVID WANYONYI CLAIMANT

VERSUS

HON. ATTORNEY GENERAL 1ST RESPONDENT

CHIEF OF DEFENCE FORCES 2ND RESPONDENT

ARMY COMMANDER KENYA ARMY 3RD RESPONDENT

RULING

The claimant filed application and Notice of Motion dated 6th June, 2019 and seeking for orders against the respondents that;

1. The court should issue directions on its judgement delivered on 17th October, 2014 and the subsequent decree issued on 11th November, 2014 with respect to the orders of reinstatement as if the orders are not observed by the respondent the court ought to avail to the claimant/decree holder quantifiable damages for unfair termination.

2. The court be pleased to direct that the matter proceeds for assessment of damages as follows;

i. Pension lump sum Ksh.1,184,801/-

ii. Monthly pension for 35 years Ksh.6,260,200/-

iii. Unpaid leave terminal Ksh.90,000.00/-

iv. Unlawful termination of employee Ksh.8,153,720/-

v. Unpaid salary from 17th may 2013 to 30 May 2019 ksh.3,075,453.36 Total Ksh.18, 764,173.36

3. In the alternative the court be pleased to order such steps as are necessary to effectuate and realise the fruits of the judgement on liability entered in favour of the claimant

4. The costs of this application be provided for.

The application by the claimant is supported by his affidavit and on the grounds that on 17th October, 2014 there was judgement herein on liability in favour of the claimant but the court did not quantify the same with the consequence of noncompliance by the respondents. The respondents have therefore failed to perform as directed by the court and the claimant as the decree holder is unable to realise the fruits of his judgement...

The claimant avers in his affidavit that in the judgement of the court I tis incapable of being executed as it did not conclusively avail the remedy sought. The decree issued on 11th November, 2014 lacks clarity on the obligations of the respondents towards the claimant and there is need for the court to avail quantifiable damages for unlawful termination of employment.

In reply the 1st respondent filed a Notice of Objections and the on the grounds that the motion filed by the claimant is opposed on the grounds that;

The court lacks the jurisdiction to entertain the application as it became functus officio upon the delivery of its judgement on 17th October, 2014 and subsequent decree issued on 11th November, 2014.

There is also Replying Affidavit of Major Damaris Agnetta Apondi and with the Kenya Defence Headquarters and who avers that the court is functus officio since delivery of judgement on 17th October, 2014 and which judgement is clear and does not require clarification or interpretation. The application to have the matter reopened for the assessment of damages is erroneous.

The claimant then filed his response to the response by the 2nd respondent avers that judgement herein was delivered on 11th November, 2014 and despite sending several letters to the respondents seeking compliance with the judgement there is no positive response. The court is thus not functus officio as its orders have not been complied with.

The claimant also avers that the respondents have deliberately ignored the orders issued herein for his reinstatement or payments set out in the judgement of the court. With the wilful disobedience of the court the claimant is thus seeking directions in the matter on how to execute the judgement.

The parties made oral arguments in court.

On 17th October, 2014 the court delivered judgement herein and issued the following orders that;

a) The respondents to pay the claimant for 17 days worked and not paid for;

b) The respondents to re-engage the claimant in the service of the Kenya Defence Forces at the rank of Sargent and the due prevailing and other benefits and to assign the claimant duties with effect from 1.11.2014; and the period between the date of dismissal 17.05.2013 to the date of reengagement 1.11.2014 be treated as leave without pay for the purpose of pension so that there shall be no break in the claimant's service.

c) In the alternative to (b) above, the claimant is retired from the service of the Kenya Defence Forces with effect from the date of dismissal 17.05.2013 with full pension benefits payable by 1/12.2014 in default interest at court rates to be payable therefrom from 17.05.2013.

d) The respondent to pay costs.

Subsequent to the judgement herein a decree was issued on 11th November, 2014. There was no compliance and on 3rd December, 2014 the claimant filed his motion seeking for the summon of the respondent officer to show cause why they have failed to comply with the decree.

Pending the hearing of the Motion, the respondents filed their motion dated 24th February, 2015 seeking to stay of execution of the judgement pending hearing of the intended appeal.

The court considered the motions of 3rd December, 2014 and 24th February, 2015 and delivered ruling on 17th April, 2015 and dismissed the application seeking stay of execution and that the respondents had not complied with the orders to re-engage the claimant but no order was issued as to whether the respondents should be summoned to show cause why they had failed to comply with the court decree.

The respondents then filed application dated 17th June, 2015 and seeking for the setting aside of the judgement of the court and for a review of the same and on 6th November, 2015 there was ruling and dismissed the application.

As things stand, the decree of the court is not executed.

The objection that the court is *functus officio* in these circumstances is lost. The subject of the judgement is yet to be realised.

However, on the orders set out in the judgement of the court order (a) is still alive as it required the respondents to pay the claimant for 17 days worked and not paid for.

Order (b) is overtaken in time as there was no re-engagement of the claimant within the timelines directed.

On order (c) the alternative to the re-engagement the respondents were directed to treat the claimant retired from the Kenya Defence Force with effect from 17th May, 2013 with full pension benefits and which should be paid by 1st December, 2014 and in default such be paid with interest therefrom. Save for the order to pay the pension dues with interests and which must be addressed within the provisions of the Kenya Defence Force Act read together with the Pension Act, the respondents have not complied with the alternative orders issued to pay the claimant the retirement pension benefits due as at 1st December, 2014.

The claimant in his application as done a tabulation of what his pension are, the monthly pension for 35 years, unpaid leave terminal, unlawful termination and unpaid salary from 17th May, 2013 to 20th May, 2019. And now seeking clarification and interpretation of the court judgement to allow for clarity so as to be able to execute the decree; the orders of the court issued on 17th October, 2014 the extracted decree therefrom on 11th November, 2014 upon the respondents' failure to abide the substantive orders to re-engage the claimant, the alternative orders issued came into play and being;

The respondents to pay the claimant for 17 days worked and not paid for;

In the alternative to (b) above, the claimant is retired from the service of the Kenya Defence Forces with effect from the date of dismissal 17.05.2013 with full pension benefits payable by 1.12.2014 in default interest at court rates to be payable therefrom from 17.05.2013.

The respondent to pay costs.

In this regard, the only matter for the court to address is not to reassess the claims made but to address the alternative orders on the face of the respondents' failure to abide the orders on re-engagement.

As set out above, the respondents shall proceed and within the next 30 days tabulate the following dues owing to the claimant;

(a) Pay for 17 days worked and not paid;

(b) Full Pension due with effect from 17th May, 2013 for a retired officer of the Kenya Defence Forces;

(c) File the tabulation with the court for the issuance and processing of the Certificate of order in accordance with the Government Proceedings;

(d) Mention of the matter on 17th December, 2019.

Orders accordingly.

Delivered at Nakuru this 24th day of October, 2019.

M. MBARU

JUDGE

In the presence of: