



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

JUDICIAL REVIEW NO 28 OF 2018

IN THE MATTER OF AN APPLICATION BY JULIUS O. OGUTU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE REPUBLIC

VERSUS

THE HON. ATTORNEY GENERAL

THE REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

EX PARTE

JULIUS O. OGUTU

JUDGMENT

The Ex Parte applicant filed the application herein by way of Judicial Review seeking the following orders –

1. That Orders of *MANDAMUS* directed against The Hon. Attorney General, to compel them to honour the Court Decree and Certificate of Costs in Petition Number 37 of 2012, and pay the Ex Parte Applicant a sum of Kshs.7,171,986.00/= together with interest thereon at the rate of 12% till payment in full with effect from 1st October 2014.
2. Costs be borne by the Respondent.

The application is supported by the grounds on the face thereof and the affidavit of JULIUS O. OGUTU, the Ex Parte Applicant. The Ex Parte applicant states that he is the decree holder in Cause Number 37 of 2012 where judgment was entered in this favour against the Hon. Attorney General in the following terms –

1. *That the dismissal of the Petitioner from the service was unlawful and unfair and the same violated his constitutional and statutory rights enumerated below.*
2. *That the Respondent does pay the Claimant as follows:-*
 - a. *Monthly pension at Kshs.33,000/= from 1st April 2011 to the date the same will lawfully cease to be due and payable. The arrears monthly pension is to be paid as a lump sum with immediate effect.*
 - b. *Lump sum portion of the Pension in the sum for 32 years 8 months in the sum of Kshs.2,500,000/=.*

3. Terminal leave allowance equivalent to 3 months' salary Kshs.207,258/=.
4. The items 2(a) and (b) and 3 above be paid with interest at court rates from 1st April 2014 till payment in full.
5. Damages equivalent to the maximum compensation under Section 49 of the Employment Act being 12 months' salary in the sum Kshs.829,032/=.
6. That the Respondent to provide long service good conduct medal and return to the Petitioner his national Identity Card and Passport within 30 days from the date of this Judgment.
7. That the Respondent does pay the Petitioner costs of the suit.

He states that the Attorney General's office is aware of the decree because the trial was interpartes and the formal decree and certificate of costs against the government has been served upon the Attorney General who has failed, refused or neglected to pay the same to the applicant. The applicant further avers that the Cabinet Secretary being the Chief Officer in the Ministry, should be compelled to honour the decree.

The respondent filed a replying affidavit of SAITOTI TOROME, CBS, Principal Secretary in the Ministry of Defence in opposition to the application. He states that he is the accounting officer of the Ministry of Defence as provided under the Public Finance Management Act, No. 18 of 2012 of the Laws of Kenya, that Parliament has not provided the Ministry of Defence with adequate funds nor allocated any moneys to settle any claims including the applicant's claim herein, and has in fact immensely reduced the its budgetary allocation.

That currently the Ministry has claims from several decrees that in total exceed Kshs.4 billion which it is unable to settle. That should such claims be settled the Ministry would be paralysed. That the Ministry can only be accountable for what is received and there has been no allocation of funds to settle the current claims.

The affidavit deposes that it would be manifestly unjust for the applicant to hold the Ministry liable yet it is not in control of the funds.

At the hearing Mr. Onyango, Counsel for the Ex Parte Applicant submitted that judgment in Cause No. 37 of 2012 was delivered on 1st October 2014 for Kshs.7,171,986/= with interest at 12% per annum. That there was also a non-monetary element in the judgment to the effect that the applicant's identity card, passport and certificate of good conduct that were confiscated when he worked as a soldier be returned to him. That there has been no compliance whatsoever. He agreed with the arguments of the respondent on the monetary allocation, which comes from Parliament but wondered why the respondent had not even attempted to comply with the non-monetary element.

He submitted that the applicant is deserving of the orders having waited for 5 years since the judgment was delivered.

Counsel for the respondent Mr. Tuitoek submitted that the Ministry has not refused or neglected to pay. That this is not the only decree that the Minister has not paid. That it is waiting for funds allocation to settle the huge pending claims of over Kshs.4 billion.

On the return of the applicant's documents Mr. Tuitoek submitted that no evidence has been adduced to show that the applicant has requested for the said documents as per procedure. He submitted that the respondent has not refused to return the same.

Determination

It is not denied that the Ex Parte Applicant is the holder of a decree against the respondent in the sum of Kshs.7,171,986/= plus interest at 12% per annum. The respondent's argument is that the funds are supposed to be provided by Parliament, which has not done so.

The respondent has however not demonstrated that is has taken any steps towards seeking for the allocation of funds to satisfy the applicant's claim. It is not enough for it to sit back and lament about lack of allocation without making any effort to source for the funds.

The applicant is entitled to the fruits of his judgment. No appeal, review or any other objection has been raised against the same.

For the foregoing reasons, I find no reason to deny the applicant the orders sought in the application herein.

I thus make orders that:

An ORDER OF MANDAMUS BE AND IS HEREBY ISSUED directed that the Hon. Attorney General, to compel him to honour the court decree and certificate of costs in Cause No. 37 of 2012 and pay the Ex Parte Applicant a sum of Kshs.7,171,986.00/= together with interest thereon at the rate of 12% per annum from 1st October 2014 till payment in full.

The respondent shall pay the Ex Parte Applicant's costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE