



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 19 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

REPUBLIC.....APPLICANT

VERSUS

GENERAL SAMSON MWATHETHE, THE CHIEF DEFENCE FORCES,

DEPARTMENT OF DEFENCE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE

SENIOR SERGEANT SAMSON KAZUNGU

RULING

The Court delivered its Judgment in this matter on 3rd March 2017 granting Judicial Review Orders of Mandamus compelling the 1st Respondent to reinstate the Applicant back into service on his previous rank and to pay back dues owing from the date of dismissal, the 15th September 2014, within 30 days from the date of the order. That in default the Applicant shall be at liberty to institute contempt proceedings to enforce the *mandamus* orders.

The Applicant subsequently filed a Notice of Motion Application dated 25th April 2017 following alleged failure of the 1st Respondents to comply with the Court Orders of 3rd March 2017. The Court in its subsequent ruling delivered on 27th July 2017 directed that the Respondents comply with the Court orders of 3rd March 2017 and further directed that the matter be mentioned in 45 days to confirm compliance.

The matter was thereafter mentioned on 20th December 2017, 17th January 2018, 24th January 2018, 19th April 2018, 27th November 2018, 16th May 2019 and 4th June 2019 to confirm compliance with the Court orders. On all occasions the Respondent was given more time to comply. On 4th June 2019 the Court directed the Respondents who had all along insisted that they had complied with the court orders, file an affidavit of compliance within 14 days.

The Respondent through its Affidavit of Compliance sworn by Major Dickens Kombo on 3rd July 2019 contend that the Ex-parte Applicant was retired from the Kenya Defence Forces on 15th November 2015 and that he was subsequently paid his pension plus all arrears payable to him. The Respondent contends that the Ex parte Applicant received payment after he had cleared with his former unit on 5th March 2018. It is further contended that the Pensions Department duly notified the Ex-parte Applicant of the payment of his pension plus interest vide its letter dated 14th June 2018.

It is the Respondent’s position that the ex-parte applicant has since been paid all his pension dues in compliance with the Court order following his retirement.

The Ex-parte applicant in response to the Affidavit of Compliance states that his purported retirement of 15th November 2015 was null and void as it was done contrary to the Court Order of reinstatement given by the Court. He further contended that the decision to have his pension paid was unilaterally arrived at despite the orders of reinstatement being in force.

The Applicant further contended that the runout date of 15th November 2015 could not apply to him as at the said time he was in custody and could therefore not re-engage as required.

He averred that he is scheduled to retire from the force in the year 2020 based on his age. He contended that he should be reinstated as ordered and be paid his outstanding salary arrears/allowances up to and including his retirement age of 58 years.

The ex-parte applicant urged the Court to cite the Respondents for contempt, having blatantly ignored the Orders of the Court.

Determination

Having considered the Affidavit of Compliance and the Reply thereto, the

issue for determination is whether the respondents have complied with the orders of the court reinstating the Exparte applicant.

The Kenya Defence Forces Terms and Conditions of Service provides as follows under retirement and extension:-

“27. Service Members will normally retire after twenty one (21) years’ service unless their service is prolonged in accordance with Section 254 of the Kenya Defence Forces Act. After this period Service Members may continue to serve on yearly extensions at the discretion of their Service Commander provided they are medically fit and have the ability to perform their duties. Such extensions shall not in any case extend beyond the ages shown as follows:

a) WOI 60 years

b) WOII 58 years

c) Senior Sergeants 57 years

d) Sergeants 56 years

e) Corporals 55 years

f) LCpl 54 years

g) Spte/Pte 53 years

The applicant, well aware of the orders of the court of 27th July 2017, proceeded to clear from service by 17th October 2017 paving way for payment of his pension which according to the letter dated 14th June 2018 from Pensions Department, Ministry of Finance, was paid to the applicant from 1st December 2015 at the rate of Kshs.44,223. The applicant does not deny that he is in receipt of the same. He further does not deny that he was paid Kshs.3,537,850.00/= as pension gratuity, the same having been deposited into the account he submitted for purposes thereof at EQUITY BANK, KILIMANI BRANCH.

The ex-parte Applicant did not approach the court to stop the payment of his pension or apply for extend of his service. The court order did not extend his service beyond the dates upon which he was to retire. It only reinstated him to his former employment which was subject to the retirement provisions. The applicant was by operation of the law, ineligible to be reinstated beyond his retirement date. As reflected in his discharge, the applicant had served for 32 years and 5 days reckonable service and 14 days non-reckonable service as at 15th November 2015.

The foregoing notwithstanding, by communication dated 28th August 2017, the claimant was reinstated into service and thereafter discharged. The communication is reproduced below-

“DHQ CAU (P & L) 28 Aug 17

CANCELLATION OF DISCHARGE – SERVICE MEMBER 55274 EX-SSGT SAMSON KAZUNGU

(DVR 1)

Reference: A: Our letter KA/55274/PERS/RECS dated 29 Sep. 14

B: HQ KA Legal IOM KA/2205/Legal dated 18 Aug 17.

1. Cancel dismissal instructions in respect of the above named Service Member entirely. Please note that this is after a successful appeal against the dismissal at the Labour Court by the Service Member.

2. Attached herewith please find fresh discharge instructions forwarded to you for your further necessary action.

3. Please no.

SIGNED

E. M. GITHINJI

Maj

For Comd.”

A person alleging contempt must prove that there was wilful disobedience of a court order. Contempt was defined in the case of **Robertson - V- Her Majesty's Advocate, 2007 HCA C63**, by Lord Justice Clerk as cited in **Sam Nyamweya and 3 Others -V- Kenya Premier League Limited and 2 Others (2015) eKLR**, thus –

“Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

In the present case, I find that the applicant was indeed reinstated and then discharged in accordance with the provisions of his terms of service. The said terms of service have not been questioned before this court. They were indeed not brought to the attention of all the courts that have previously dealt with this matter so that no court has addressed the same previously. It is my view that had this been done the courts would have made orders that are accommodative of the law.

It is further my finding that the applicant having presented himself for the formalities of clearance and having been discharged and paid his pension gratuity and monthly pensions with effect from 1st December 2015, as paid in arrears on 14th June 2018, the orders of the court are no longer capable of being complied with in the manner stated in the decrees and court orders relied upon by the applicant.

For the foregoing reasons, I find that the respondents have complied with the court orders to the extent possible with the circumstances of this case and that the Ex parte applicant frustrated the further compliance with the orders by accepting his retirement benefits and thus cannot be put back to the position he was in at the time of the making of the orders he avers have not been complied with.

I accordingly declare that the Respondents have complied with the court orders.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE