



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 24 OF 2016

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 28, 41, 47, 48, 50, 165, 258 OF THE
CONSTITUTION OF KENYA.**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 27, 28 AND 41(1)(2)(A) AND (B), 43, 47 AND 50 OF THE CONSTITUTION
OF KENYA.**

AND

IN THE MATTER OF: THE KENYA DEFENCE FORCES ACT, NO. 25 OF 2012

AND

**IN THE MATTER OF: THE ARMED FORCES (PENSIONS AND GRATUITIES) – (OFFICERS
AND SERVICEMEN) REGULATIONS, 1980.**

AND

IN THE MATTER OF: THE INDUSTRIAL COURT ACT, NO. 20 OF 2011

BETWEEN

JOMO KAMAO MOYA

PETITIONER

AND

THE SERVICE COMMANDER, KENYA ARMY 1ST RESPONDENT

THE DEFENCE COUNCIL 2ND RESPONDENT

THE HONOURABLE ATTORNEY General 3RD RESPONDENT

RULING NO. 2

1. In a ruling delivered on 2 October 2017, the Court deferred delivery of judgment in this Petition in order to await delivery of a judgment by the Court of Appeal in an appeal pending before it in which the decision of this Court sitting in Nyeri declaring that it is unconstitutional/unfair labour practice to deprive a dismissed employee of pension benefits.

2. The ruling of deferment of judgment aggrieved the Petitioner and on 14 November 2017 he moved Court seeking

1. ...

2. THAT this Honourable Court be pleased to review and vary, set aside, vacate, discharge and or rescind its ruling and orders issued in this matter on 2nd October, 2017.

3.

3. The Court directed the application to be served upon the Respondents and arguments were taken on 30 November 2017 (the Respondents did not respond to the application and did not attend Court when oral arguments were taken).

4. In addition to the oral arguments, the Petitioner filed written submissions on 29 November 2017.

5. The Court has considered the material placed before it and come to the conclusion that the application ought to be dismissed because of the following reasons.

6. First, one of the primary remedies sought by the Petitioner herein was a declaration that his dismissal without terminal benefits was unconstitutional, and an order for payment of the benefits.

7. A Court of concurrent jurisdiction sitting in Nyeri declared as unconstitutional, an unfair labour practise and deprivation of property the denial of terminal benefits to a dismissed employee.

8. An appeal on the legal question is still pending before the Court of Appeal.

9. As this Court noted in the ruling of 2 October 2017, the determination by the Court of Appeal of that question will not only implicate this Petition but nearly all unfair termination/dismissal cases in this country.

10. Secondly, legal certainty and constitutional litigation practice dictate that where a law has been declared unconstitutional, a concurrent Court should not *undeclare* the unconstitutionality, especially where an appeal to a higher Court is pending.

11. Three, legal certainty and constitutional validity of a statutory or contractual provision should triumph over procedural timelines/technicalities on when a decision ought to be delivered after close of hearing. The contention that the Court has breached Order 21 of the Civil Procedure Rules therefore ought not to be decisive in this type of case.

12. Four, the contention by the Petitioner that he should have been heard before the direction/order deferring judgment was rendered is misplaced as clear reasons were given for the decision, and further the Court has the authority under the Rules to manage its docket.

13. The application filed in Court on 14 November 2017 is thus dismissed with no order as to costs.

14. This file to be transmitted back to Nakuru registry to await determination of the appeal before the Court of Appeal in Nyeri.

Delivered, dated and signed in Nairobi on this 19th day of January 2018.

Radido Stephen

Judge

Appearances

For Petitioner Ms. Ogame instructed by Konosi & Co. Advocates

For Respondents Hon. Attorney General

Court Assistant Nixon