



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 892 OF 2017

Before Hon. Lady Justice Hellen S. Wasilwa on 27th February 2018

RASHID MUSUNGU MANGO & 42 OTHERS.....APPLICANTS

VERSUS

THE DIRECTOR GENERAL,

NATIONAL YOUTH SERVICE.....1ST RESPONDENT

MINISTRY OF PUBLIC SERVICE,

YOUTH & GENDER AFFAIRS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The Application before Court is the one dated 12th May 2017. This application was initially filed by 42 Applicants out of which 10 withdrew their claim leaving 32. The Applicants who withdrew were the initial 1st, 6th, 9th, 11th, 13th, 18, 19, 21st, 28th, and 30th Claimants. At the onset of this claim the above Claimants gave authority to their co-Claimants Rashid Musungu Mango, Paul A. Owino, Carolyne N. Njeru and Priscilla Andeyo to execute documents on their behalf and prosecute this case accordingly.

2. The Application was filed through a Notice of Motion filed under Section 20 of the Employment and Labour Relations Court Act, Section 17 of Employment And Labour Relations Court (Rules) 2016, Section 13 A(3) and 16 of the Government Proceedings Act and all other enabling provisions of law .

3. The Applicants sought the following orders:-

1. That this application be certified as urgent and heard ex-parte in the first instance, service thereof be dispensed with.

2. That pending hearing and determination of this application and or suit a declaratory order be issued directing the Respondents jointly and severally to immediately adjust and pay the Claimants salaries and emoluments complying with their new ranks of Senior Sergeant, Pay Group 4 and the same be effected from 19th August 2010 to date.

3. That pending hearing and determination of this suit, any further promotions and or indiscriminate adjustment of emoluments by the Respondents to other officers be stayed/suspended until prayer 2 herein is complied with in order to harmonize all the promotions effected since 2010.

4. That the Court be pleased to issue any other order/declaration as it may deem fit under the circumstances.

4. The Application is based on the following grounds:

1. That vide letters dated 23rd August 2010, the Claimants herein were promoted to a rank of Senior Sergeants after successful completion of Senior Sergeant course No. 1/2010 training in Gilgil, whereby they were issued with completion certificates to confirm the same.

2. That the said letter of 23rd August 2010 was categorical and as required by law that the Claimants salaries and emoluments were to be adjusted with effect from 19th August 2010 to conform to their new rank and as per Scheme of Service for National Youth Service, 2009.

3. That the Claimants new ranks fall under PAY GROUP 4 of the aforesaid scheme and despite their successful completion, no action has been taken by the Respondents to adjust the same, demoralizing and compromising their legitimate expectations.

4. That to further perpetuate their illegalities, the Respondents have gone ahead and promoted other officers upon successful training, ignoring the Claimants herein who came first.

5. That the said skewed promotions and discriminate adjustment of salaries is inequitable and contrary to the National Youth Service Act, the constitution, the Public Service Act and Code of Regulations thereof, the Employment Act and the Fair Administrative of Actions Act.

6. That the said skewed and deliberate promotions are also causing a mix up and confusion and affecting the Claimants entitlements to further promotions and opportunities.

7. That there has been no sufficient reasons or cause given by the Respondents as to why the Claimants should not be granted what they are entitled to upon promotion and the same defeats the essence of the training they underwent that the tax-prayer pays for.

5. The application is also supported by the supporting affidavit of Rashid Musungu Mango the 1st Claimant herein. He avers in this affidavit deponed to on 12th May 2017, that he has the authority of his co-claimants to swear this affidavit on their behalf.

6. He reiterates the averments in the grounds in support of this application. The affidavits have annexure RMM 2 – which are the completion certificates issued to the Applicants on completion of their training course for promotion to the rank of Senior Sergeant Course No. 1/2010 and a copy of the certificates.

7. The deponent avers that the letters recognized their superior professional qualifications and as such their salaries and emoluments were to be adjusted with effect from 19th August 2010 as per the scheme of service for NYS 2009. Appendix RMM3 if the NYS Scheme of Service booklet of April 2009.

8. The deponent has deponed that the Respondent have gone ahead and promoted other officers upon interview ignoring those who trained and passed out earlier. RMM4 are letters and correspondence confirming the same.

9. The Applicants contend that these promotions were skewed and discriminate adjustment of salaries was inequitable and contrary to the National Youth Service Act, the Constitution, the Public Service Act and Code of Regulations thereof, the Employment Act and Fair Administrative Action Act.

10. The Respondents opposed the application. They filed their Replying affidavit deponed to on 19th July 2017 by one Samuel Kaloki the Director for Human Resource Management and Department in the Ministry of Public Service, Youth and Gender Affairs.

11. The deponent avers that the Applicants' salaries and emoluments were not adjusted to reflect their purported new ranks because the purported promotions were to catapult the Claimants from their previous ranks to that of Senior Sargent and in the process by pass two ranks – this was contrary to paragraph 3(a) of the uniformed Subordinate Officers Scheme of Service – SK1. That according to this Scheme, it was unprocedural for the Claimants to bypass two ranks.

12. They submit that the Claimants entered the service in 2007 and the scheme stipulates that one has to serve in one job group for a minimum of 3 years.

13. They aver that the Claimants were eligible for promotion to the next rank upon competition of the course and satisfactory work performance. However, for them to bypass two ranks, the Public Service Commission would have to give as written waiver of the requirements set forth in the scheme of service. That no such waiver was given.

14. In respect of prayer 2, the Respondents have submitted that it is untenable and is meant to cause confusion within a respected Institution established by law. The Respondents want this application rejected.

15. The Respondents filed a supplementary affidavit deponed to on 22nd September 2017 and they reiterated their averments in the replying affidavit. They aver that they sought authority from the Public Service Commission to promote the Applicants herein to the rank of Senior Sergeant and the request was rejected (Appendix SK1).

16. They aver that the Public Service Commission is the only body that has the mandate to employ and promote civil servants and once the commission rejected the Respondent's request m the Respondent could not enforce the envisaged promotions and attendant adjustment of the salaries and benefits of the Applicants.

17. In their further affidavit filed in Court on 2nd October 2017 the 4th Claimant for the Applicants aver that the Respondents in Appendix PAO1 confirmed the number of section officers approved in the year 2009 before undergoing the training.

18. The Applicants in their response paragraph 6 of the supplementary affidavit, state that the Respondents have acted in a discriminatory manner by promoting one Anganyo A. Rosalyn one of the officers employed under similar circumstances with them in 2009 who was then promoted to the rank of PG 6 by the 1st Respondent by-passing four ranks in the year 2010.

19. They also contend that the Respondents through acts of coercion and intimidation have forced some of their colleagues to withdraw this case which attempts have been strongly declined by the Applicants leading some of them to be transferred to far flung areas where their training and expertise is not required (PAO 2).

20. This application proceeded by way of written submissions. I have considered the submissions of both parties. The issues for determination by this Court is whether the Claimant Applicants have established a prima facie case to warrant issuance of orders sought.

21. I note that the orders sought by the Applicants in their application are similar to those sought in the main claim. If this Court was to grant orders sought in this application, the entire suit will be determined. The issues being raised in this application are triable issues. I will therefore decline to grant issues sought given the nature of the claim.

22. I order that the case be set down for hearing of the main claim on priority basis.

Read in open Court this 27th day of February, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Barasa holding brief Mandala for Claimant – Present

No appearance for Respondent