



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION CAUSE NO. 51 OF 2012
(Formerly Misc. 586 of 2006 (High Court))

(Before Hon. Justice Hellen S. Wasilwa on 21st March, 2018)

MAJOR MANZI LUU MUSYONA.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL ON BEHALF OF THE MINISTER

FOR DEFENCE AND CHAIRMAN, DEFENCE COUNCIL.....RESPONDENT

RULING

1. The Application before the Court is dated 24.5.2017, brought under Section 5 of the Judicature Act Cap 8 Laws of Kenya, Order 52 Rule 2(2) of the Rules of the Supreme Court of England 1965, Sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of law seeking orders:-

1) That this Application be certified urgent, service be dispensed with and it be heard ex parte in the first instance.

2) That the Respondent's principal secretaries TOROME SAITOTI and KIRIMI KABERIA be jointly and severally committed to prison for 6 months for contempt of the Court Orders and Judgment made on 4th April, 2016 and Decree dated 4th August, 2016.

3) That the Respondent be condemned to pay costs of this Application.

2. The Application is premised on the grounds that:

a. The Respondents have despite repeated service and follow up blatantly and fragrantly refused and failed to comply with the Court Orders and Judgment made on 4.4.2016 and decree dated 4.8.2016 which directed that:-

1. A declaration that the termination of the Petitioners presidential commission was unlawful.

2. Denial of Petitioners terminal benefits constituted a cruel, degrading and inhuman

treatment as provided for under Section 74 of the repealed Constitution.

3. That the Petitioner be forthwith paid his terminal benefits as an employee retired from service in the normal course of duty.

4. That the Petitioner be further paid salary amounting to 12 months salary as compensation for unlawful termination based on what would have been his salary at retirement.

5. The Order for reinstatement is not tenable at the moment given the long time lapse.

6. The Respondent meet the costs of the Petition.

b. The Applicant has no other way of enforcing the Court Order and the dignity of the Court is at stake and it is of paramount importance that the Respondents be cited for contempt for disregarding and disrespecting Court Orders.

3. The Application is supported by the petitioner's Affidavit wherein he reiterates the grounds on the face of the Application and adds that the Order was served on the Respondent personally and in the presence of village elders and yet the Respondents have failed to comply with the Court order.

4. The Petitioner avers that as a result of non-compliance with the Court Order he has suffered mental anguish, extreme hardship and he has been rendered destitute as his children have been unable to attend school or meet basic needs as they await the fruits of the judgment. He prays or the Application be granted.

5. The Respondents have filed a replying affidavit in opposition of the Application sworn by one Saitoti Torome the Principal Secretary in the Ministry of Defence. He avers that the Ministry of Defence has not failed to carry out its statutory and/or legal obligation by refusing to pay any amounts found owing to the Petitioner. He states that the Petitioner did not at any time forward a copy of the judgment or the Certificate of Order which by virtue of Section 21 of the Government Proceedings Act is mandatory for attachment of liability.

6. He also contends that the Application is premature as the Petitioner should have first filed a Judicial Review application for an order of mandamus to compel payment of the decretal sum.

7. The Respondents also state that the decree attached by the Petitioner does not indicate the exact amount which the Respondent should pay the Petitioner. Further that sometimes on 28.3.2017, they wrote to the office of the Attorney General seeking to know the position of the matter and they were informed that upon perusal of the Court file in petition No. 51 of 2012 it was discovered that the parties were different and they were unable to proceed further.

8. He further contends that it would be contrary to the provisions of section 21 of the Government proceedings Act to be held individually liable for sums owed by the government. He states that there is a constitutional and statutory legal regime that governs the appropriation and utilization of funds from the Ex-chequer which involves an annual budgetary cycle which the Court ought to take judicial notice of. That it would not be possible for the Petitioner to expect funds so soon after the commencement of a new financial year. He prays for the Application to be dismissed with costs.

9. The Petitioner submits the Court's contempt jurisdiction has been invoked meritoriously and the Petitioner has established non-compliance and as such pray for the Application to be allowed as drawn.

10. I have examined the averments of the parties herein. This application is being sought in view of the non-payment of the terminal dues of the Applicant herein and the payment of his salary of 12 months as damages for unfair termination.

11. I note that the Applicants have extracted a decree, the decree extracted does not set out the monetary amounts payable by the Respondent in terms of terminal benefits and damages.

12. The Respondent have submitted that this application is premature. I do agree with the Respondents that the decree extracted is incapable of being enforced in the form of in which it appears.

13. I therefore find that this application cannot stand at the moment and I dismiss it accordingly. The Applicant will be free to file another application if and when a proper decree has been extracted and the Respondent fails to adhere to the same.

14. There will be no order as to costs.

Dated and delivered in open Court this 21st day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Petitioner – Present

No appearance for Respondent