



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APP. NO. 11 OF 2017

(Before Hon. Justice Mathews N. Nduma)

KENYA COUNCIL OF EMPLOYMENT

AND MIGRATION AGENCIES APPLICANT- EX-PARTE

VERSUS

THE NATIONAL POLICE SERVICE

COMMISSION 1ST RESPONDENT

JOHNSTON MAFENYI KAVULUDI 2ND RESPONDENT

PETER KILONZO KAVILA 3RD RESPONDENT

ALHAJI OMAR ABDI SHURIF 4TH RESPONDENT

THE DEPUTY INSPECTOR

GENERAL POLICE SERVICE 5TH RESPONDENT

DEPUTY INSPECTOR GENERAL

ADMINISTRATION POLICE SERVICE 6TH RESPONDENT

INSPECTOR GENERAL NATIONAL

POLICE SERVICE COMMISSION 7TH RESPONDENT

THE ATTORNEY GENERAL 8TH RESPONDENT

THE PRINCIPAL SECRETARY

NATIONAL TREASURY 9TH RESPONDENT

J U D G M E N T

1. Application to commence Judicial Review was granted by the court on 7th April, 2017.
2. The Applicant sought to have the matter placed before Hon. Justice D. K. Njagi Marete for final consent judgment based upon his ruling dated 17th March, 2014 and the Court of Appeal orders dated 30th March, 2017.
3. I have perused the Ruling by the Hon. Justice E. M. Githinji in Court of Appeal at Nairobi. Civil Application No. Nairobi 76 of 2014 in which the appellant sought the Court of Appeal to settle the terms of an order by Hon. D. K. Njagi Marete recorded on 23rd October, 2014.

4. The Court of appeal observed and ruled that there was no dispute as to the terms of the order given by D.K. Marete – Judge on 23rd April, 2014 nor was it ambiguous.
5. The Court of Appeal further ruled that the application to the Court of appeal for settlement of the terms of the order is misconceived and was dismissed.
6. Following this decision by the Court of Appeal, Judicial Review application was brought on 6th April, 2017 in which is sought orders compelling the adoption on an oral consent between the applicant and state counsel Peter Ngumi.
7. That the oral consent was followed by a draft amended consent dated 29th March, 2014.
8. That the court deems the draft consent as binding in law on the parties on the principal sum of Kshs.91,500,000 plus interest at 12% since 9th February, 2014 until payment in full.
9. That the draft consent dated 23rd October, 2014 and 29th March, 2014 is not appealable in law and concludes cause No. 212 of 2014.
10. That the court grants cost of this application and all other proceedings in this dispute.
11. The purported draft consent is not annexed to this application.
12. The 1st and 2nd Respondents filed vide counsel Paul Ojwang grounds of opposition to the application dated 4th April, 2017 as follows –
 - i) That the suit is frivolous, vexatious and bad in law and an abuse of the court process.
 - ii) That the suit is brought in bad faith without disclosure of all material facts.
 - iii) That the applicant has not proved that his human rights and fundamental freedoms have been violated nor has he proved that there is any consent between them.
 - iv) That the applicant is not entitled to the orders sought and should be dismissed with costs to the Respondents.
13. The state law office opposes the application vide Odhiambo State Counsel for the 5th to 9th Respondents.

Facts not in Dispute

14. In 2014, the applicant filed **cause no. 212 of 2014, Kenya council of Employment & Migration Agency v National Police Service Commission & 8 Others.**
15. The court issued interim orders stopping the passing out parade of police recruits in various training school. The Respondent appealed the orders of Judge Marete in civil Appeal No. 76 of 2014, filed by state counsel Peter Ngumi. The Court of Appeal issued stay orders stopping the proceedings in the Industrial Court. The said Appeal is still pending.

Dispute

16. What remains in dispute is existence of a consent order between the office of the Attorney General through Mr. Peter Ngumi that the applicant would be paid Kshs.91, 500,000. The application states that this was an oral agreement reduced into draft.
17. It is not alleged that the stated draft agreement was even executed by the parties. No such concluded agreement has been produced in this application.
18. The stay order allowed the passing out parade to proceed as scheduled.

Determination

19. The issues for determination are as follows:-
 - (i) Whether the applicant has proved existence of a consent/agreement in which the office of Attorney General and the Applicant agreed to settle cause no. 212 of 2014 and pay the applicant Kshs.91,500,000.
20. Sections 107, 108, 109 of the evidence Act, Cap 80 laws of Kenya places the burden of proof on he who asserts a fact. This party is described as one who stands to loose if no evidence was tendered at all.
21. The burden of proof in civil cases, like this one, is on a balance of probabilities. The Respondent only bears evidential burden of rebuttal once sufficient evidence has been adduced by the Plaintiff.

22. I have carefully considered the facts deposed to in this application, the entire record in cause no. 212 of 2014, especially the orders of Judge Marete issued on 17th March, 2014 and subsequent proceedings in this court and the Court of Appeal.

23. The court is satisfied that there is not in existence any consent agreement adopted by the parties for payment of monies to the applicant or at all.

24. The court has also noted the disparaging depositions and submissions made against the officers of the office of the Attorney General without any factual or legal basis by the applicant.

25. The conduct of this matter by the applicant leaves a lot to be desired. Public litigation ought not to be personalized and reduced to unmerited attacks on the dignity of the counsel and other officers of the court. This is a worrying trend emerging in our courts and should be discouraged by all who believe in fair administration of justice and the rule of law.

26. In conclusion, the applicant has completely failed to prove on a balance of probabilities, any aspect of the application to warrant the orders of mandamus sought.

27. Accordingly, the Judicial Review application dated 4th April, 2017 and filed on 6th April, 2017 is dismissed with costs to the Respondents as a deterrence to many unwarranted applications made in this matter.

Dated and Signed in Kisumu this 2nd day of May, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 30th day of May, 2018

Maureen Onyango

Judge

Appearances

Mr. Evans Nyambega Akuma – Chairman of Ex-parte /Applicant

Mr. Paul Ojwang – Litigation counsel for 1st & 2nd Respondent

L. Odhiambo – State Counsel for 5th – 9th Respondent

Anne Njung'e – Court Clerk