



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2501 OF 2016

(Formerly Civil Case No. 1816 of 1996)

(Before Hon. Justice Hellen S. Wasilwa on 1st October, 2018)

MAJOR HENRY MWITARI.....CLAIMANT

VERSUS

HON. ATTORNEY GENERAL (for and on

behalf of the DEPARTMENT OF DEFENCE

OFFICE OF THE PRESIDENT.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Complaint on 24th July, 1996 and later an Amended Complaint on 3rd November 2004, which was further amended on 31st March 2006 through the firm of Kamunyu & Company Advocates.
2. He is seeking damages for wrongful termination of commission, restoration of commission and reinstatement into the Kenya Army, payment of salary and all other consequential entitlement from 6th December 1995 to date of judgment herein, trespass, malicious damages to property and cash lost, wrongful and malicious eviction, exemplary damages and an order directing the Department of Defence to vacate L.R No. 20780 (formerly 27/34) Ridgeway Estate Nairobi.
3. He avers that at all material times he was an officer in the Kenya Army and his terms and conditions of office governed by the Armed Forces Act, Cap 199 Laws of Kenya.
4. He states that he served the Armed Forces diligently, effectively and obeyed all lawful orders and regulations for 17 years until 27th July 1995 when the department of Defence, unlawfully, maliciously and without any legal basis purported to terminate his commission with the Armed Forces.
5. He further avers that the purported termination of the commission was malicious and illegal, did not comply with the Armed Forces Act and was motivated by extraneous matters and interests that did not fall within the Act as appears hereafter and was therefore null and void.
6. He avers that as a result he was rendered destitute and his reputation badly damaged and he suffered loss of salary, employment, terminal benefits, loss and damage. He states that at all material time he had been allocated a married staff Quarters/Residence being L.R No. 20780 where he lived with his wife and children upto 30th April 1995 (which had been approved for allocation to him in his capacity). But on 11th April 1995, the title thereto was fraudulently transferred to one Rose Muthoni Mathenge.
7. He further states that it is his contention that from April 1995 that the suit premises ceased to be government property and became individual/private property to him and he continued to occupy the same as personal property and the same was no longer under the jurisdiction of the Department of Defence.
8. He also avers that he filed H.C.C.C No. 1758 of 1995 against both the Commissioner of Lands and one Rose Muthoni Mathenge regarding the suit pending in Court.

9. He further avers that on 5th June 1996, the Department of Defence wrongfully and without any or reasonable cause, and out of outright malice and in collusion with Co-Defendants in H.C.C.C. No. 1758 of 1995 and with the complete knowledge of the matters pleaded, invaded his private property under the guise of recovering Government property and ruthlessly evicted him therefrom and its constabulary soldiers stole cash and damaged his property.
10. He states that as a result of the illegal and brutal eviction his family were further rendered destitute and homeless and have suffered further humiliation, loss and damage and inspite of notification of the fact that the suit property is no longer their property, the Department of Defence has denied him re-entry thereunto and he continues to suffer loss and damages as well as loss of shelter.
11. He states that inspite of Notice of intention to sue, the Department of Defence has failed and/or refused to reinstate him either in his job or residence/property and continues to block his re-entry to the suit property.
12. The defendants filed their defence, which they later amended where they denied each and every allegation of fact and law stated in the amended planit. They also deny that the plaintiff is an officer of the Kenya Army and put him to strict proof and that the termination was unlawfully, maliciously and without any legal basis.
13. They aver that he was terminated as a result of his indiscipline behavior actuated by his drinking habits which rendered him unfit for continued service which was against the Armed Forces Act Cap 199. They deny that he suffered any damages and/or loss or at all as well as the allegations that they invaded the Plaintiff's property and ruthlessly evicted him, there was also nothing stolen and/or damaged during the eviction.
14. They further state that the Plaintiff filed this suit in bad taste and dishonestly and all his allegations stated in his Amended Complaint are false. They state that the Complaint is defective and the same should be dismissed with costs.
15. The Respondent failed to attend this case on dates set for hearing on 26/6/2018 and thus this case proceed undefended.

Submissions

16. The Plaintiff filed his submissions where he submits that provisions of termination of commission are given in Section 171 and read together with Section 227(1) (a), terms and conditions of service and Section 102 of Chapter 199, conviction by Court Martial. He avers that the said terms and conditions of service of 1983 have no force of law hence invalid making his termination illegal and unlawful.
17. He avers that claims by the military authorities that the eviction was carried out in order to recover military stores was pure lies and a ploy to handover the suit premises to another. He states that the military raid carried on his residence was illegal as it was not carried out according to the requirements of the law and no amount of compensation will fully restore his lost property and treasure including certificates.
18. He further avers that he had to risk his life by getting in the way of General Mohamed and others and he was involved in a planned car crash along Dennis Pritt road on 9th June 1996, a clear sign that anything would be done to him. He also miraculously escaped from the doors of Nyayo House torture chambers and the many times he was hosted in various police stations many times and denied a chance to lead a normal life.
19. He therefore submits that he has proved beyond reasonable doubt that no termination of commission ever took place since the conditions which necessitate such action never existed or happened whatsoever and he has been subjected to untold suffering out of extraneous matters without any basis as to his employment as an officer in Kenya Army. He relied on the case of **Wisniewski Vs Central Manchester Health Authority 1997 PIQR 324.**
20. He also submits that he had been allocated a married staff quarters being L.R. No. 20780 which premises was only property of the Department of Defence until April 1995 since he applied for allotment of the suit property himself and the President approved of the same as provided by law. On 27th July 1995 after a period of eviction threats from officers of the Department of Defence and the Plaintiff's refusal to leave his premises, he was illegally and unlawfully terminated from the services which went against Section 171 of the Armed Forces Act (Repealed).
21. I have examined all the averments of both Parties. The issues for determination by this Court are:-
- 1. Whether the revocation termination of commission of the Claimant from the Armed Forces was ultra vires the Armed Forces Act and therefore null and void.***
 - 2. Whether the claimant's property was damaged by the Respondent or his agents or servants.***
 - 3. What orders this Court can award in the circumstances.***
22. On the 1st issue, the Claimant gave evidence to the effect that he was an employee of the Kenya Army having been employed on 11.5.2987. He served the Respondents for 17 years and then on 27.7.1995, his services were terminated.
23. He gave the reason for his termination as his refusal to vacate the premises he was then residing in being at Ridgeways Nairobi. He avers that his refusal to move out of the premises angered his superiors and the Army raided the premises and evicted him out destroying all his property and household goods.

24. The Claimant filed a witness statement before this Court on 7.8.2013 and attached a list of documents which he sought to rely upon. He also filed his submissions. The Claimant averred that he was terminated unfairly and submitted his commission was terminated.

25. Section 171 of Armed Forces Act (Repealed) provides for termination of commissions. This section gives power for termination to the Commander, President and Defence Council.

26. Section 176 of the said Armed Forces Act provides as follows:-

“A serviceman may be discharged by the competent service authority at any time during his period of colour service:-

a) if, within two years after the date of his attestation, his commanding officer considers that he is unlikely to be an efficient member of the armed forces; or

b) for activities or behaviour likely to be prejudicial to the preservation of public security; or

c) if he is convicted of a civil offence; or

d) if he is pronounced by a medical officer to be mentally or physically unfit for further service; or

e) on reduction of establishment; or

f) at his own request on compassionate grounds; or

g) if for any reason his services are no longer required; or

h) if he is granted a commission; or

i) if he is sentenced by court martial to be dismissed from the armed forces.

27. The above Section provides instances under which a termination of commission can be effected. None of the above conditions apply to the Claimant herein. If in any case, an officer is found in breach, under Part V of the Act, various offences are stipulated with punishment to follow and they include treachery, cowardice, communication with the enemy, neglect of duty offences against morale, being captured through disobedience, or neglect and failure to rejoin forces, looting, offences against civil population, mutiny, disobedience of particular order, obstruction of standing orders etc.

28. The Claimant was not accused of having committed any of the offences listed therein. It is also not clear whether the Claimant was retired or terminated.

29. Clause 9 of the Defence filed herein states that the Claimant was not dismissed but retired from the armed forces in accordance with the relevant regulations.

30. Clause 6 of the Amended Defence dated 27th February 2005 states that the Claimant's commission was terminated as a result of his indisciplined behavior actuated by his drinking habits which rendered him unfit for continued service.

31. However the letter which terminated the Claimant from the service has the heading of Termination of SVC but which in Clause 1 of the said letter states that “the above named officer will retire from service”. The letter dated 13-9-2004 however indicate that the Claimant's commission terminated with benefits by the Defence Council meeting of 15th November 1995.

32. The Claimant submitted and rightly so that he was not involved in any misconduct because if an officer was involved in any misconduct, he would be put through a Court Martial and sentenced thereupon and then his commission terminated under Section 171 of the Armed Forces Act (now repealed).

33. The Claimant never went through the Court Martial and was paid 100% pension.

34. The procedure envisaged is found under the Armed Forces Rules of Procedure (rule 712) and 80, 81 of the Armed Forces Act.

35. Section 80 of the Armed Forces Act states as follows:-

“Where a person subject to this Act is accused of an offence under Part V, the accusation shall be reported in form of a charge to the accused's commanding office, and the commanding office shall investigate the charge in the prescribed manner”.

36. Section 81 of the Armed Forces Act (repealed) states as follows:-

1) ..”After investigating a charge against an officer, the commanding officer shall either:-

a) if the charge is one which he has power to deal with summarily and he considers that the charge should be so dealt with, deal summarily with the charge; or

b) in any other case, refer the charge in the prescribed manner to the appropriate superior authority:

Provided that he may dismiss the charge if he is of the opinion that it ought not to be further proceeded with.

2) Where the commanding officer deals with a charge summarily and records a finding of guilty, the punishments which he may award to an officer of the rank of captain or corresponding rank or below are, subject to the limitations hereinafter provided, those set out in the following scale:-

a) forfeiture of up to six months' seniority of rank in the

prescribed manner;

b) a fine not exceeding half a month's pay;

c) severe reprimand;

d) reprimand;

e) admonition;

f) where the offence has occasioned any expense, loss or damage, stoppages.

3) Where the commanding officer refers the charge to the appropriate superior authority, the appropriate superior authority shall either:-

a) if the charge is one which he has power to deal with summarily and he considers that the charge should be so dealt with, deal summarily with the charge; or

b) in any other case, take the prescribed steps with a view to the charge being tried by court martial:

Provided that the appropriate superior authority may refer the charge back to the accused's commanding officer with a direction that it shall be dismissed or dealt with summarily, but without prejudice to the bringing of another charge if the appropriate superior authority so directs or if the commanding officer thinks fit.

4) Where the appropriate superior authority deals with a charge summarily and records a finding of guilty, the punishments which he may award are, subject to the limitations hereinafter provided, those set out in the following scale:-

a) forfeiture of up to twelve months seniority of rank and the prescribed manner;

b) a fine not exceeding one month's pay;

c) severe reprimand;

d) reprimand;

e) admonition;

f) where the offence has occasioned any expense, loss or damage, stoppages.

5) Where the commanding officer or the appropriate superior authority deals with a charge summarily and considers that the accused is guilty, then, if he intends to award a punishment of forfeiture of seniority of rank, a fine or stoppages-

a) a finding shall not be recorded until the accused has been afforded the opportunity of choosing to be tried by court martial; and

b) if the accused chooses to be tried by court martial, a finding shall not be recorded but the prescribed steps shall be taken with a view to the charge being tried by court martial.

6) Except where expressly provided by this Act, not more than one punishment shall be awarded under this section for one offence.

7) Stoppages may be awarded either in addition to or without any other punishment.

8) A severe reprimand or a reprimand may be awarded in addition to forfeiture of seniority of rank or a fine.

37. In the case of the Claimant he never went through the above processes. It is therefore my finding that there was no valid reason to terminate the commission of the Claimant and in any case, the process for the said termination as per the law was also not followed.

38. In **Ronald Muge Cherogony v. the Chief of General Staff of the Armed Forces of Kenya & 2 Others**, Misc. Cause No. 671 of 1999. The learned Judge Visram (as he then was) in that case ruled:-

“Where a statute lays down a particular procedure for the doing of an act, such a procedure may be construed to be [directory] or mandatory. If it is [directory], then it is meant to be a guideline and a departure therefrom is not necessarily fatal to the validity of the decision-making process. However, if it is mandatory then any departure renders the ultimate decision null and void. Where an act affects the rights of a person and that effect is penal in nature statutory conditions and procedure should be scrupulously adhered to. I am much influenced by Section 86(2) of the Constitution which states that ‘In relation to any person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 71, 73 and 74.’ Since the applicant cannot rely on, inter alia, s.77 of the Constitution which establishes the right to a fair hearing, it is imperative that whatever procedural safeguards... provided by the Armed Forces Act and rules made thereunder are strictly preserved. I therefore find the procedures laid down in the Act, Rules and Standing Orders to be mandatory, and departure therefrom [is] fatal.”

39. In the circumstances, in answer to issue No.1 above I find that the termination of commission of the Claimant was ultra vires the Armed Forces Act and therefore null and void.

40. On issue of damages to his property indeed the Claimant established that his property was destroyed during the eviction and judgement has already been entered for him in Nairobi ELC No. 1785/1995 by Hon. J. L. Gacheru for 4 million for the loss and damage suffered due to the illegal eviction. I will therefore not say anything more on this issue.

41. In terms of remedies, I find for Claimant and due to the unfair revocation of his commission, I award him as follows:-

- 1. A declaration that the revocation termination of commission was ultra vires the Armed Forces Act, is null and void.**
- 2. I award him damages for unlawful revocation of commission of Kshs.5 million.**
- 3. Exemplary damages of 2 million Kenya shillings.**
- 4. Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this 1st day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Orenga holding brief for Lt. Mate – for Respondent

Muiga holding brief for Muriithi Kireria for Claimant – Present