



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO.19 OF 2016

REPUBLIC APPLICANT

VERSUS

GENERAL SAMSON MWATHETHE,

THE CHIEF OF DEFENCE FORCES,

DEPARTMENT OF DEFENCE 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

EX PARTE

SERGEANT SAMSON KAZUNGU

RULING

The Applicant, by application and Notice of Motion dated 25th April, 2017 is seeking for orders that;

- a) *The 1ST respondent herein be summoned to appear in court in person to show cause why he should not be held in contempt and disobedience of this court order on 3rd March, 2017.*
- b) *In consequence thereof the 1st respondent be appropriately fined and or be committed to civil jail or as the court may direct.*
- c) *This court be pleased to give any or other order and or direction under the circumstances.*
- d) *Costs of this application be provided for.*

the application is supported by the affidavit of Sergeant Samson Kazungu and on the grounds that the 1st respondent is in blatant disregard of the orders herein issued on 22nd October, 2015 and 3rd March, 2017 and thus in contempt. The non-compliance by the respondents is in violation of the *ex parte* applicant's constitutional rights and the law and thus in contravention of the rule of law. Since 2013 the *ex parte* applicant has led a life of penury, has undergone suffering and efforts to have him reinstated back to his employment and or payment of his benefits have been futile due to the 1st respondent personal acts of negligence and omissions.

Other grounds in support of the application are that the *ex parte* applicant has filed the application herein

against the respondents due to their persistent violation of the constitution and section 28 and 30 of the Contempt of Court Act and the Judicature Act.

In response, the respondents through the office of the Attorney General filed Grounds of opposition on the basis that the application offends that provisions of section 30(1) of the Contempt of Court Act in particular the requirement of 30 days' notice and leave and thus in contravention of the law. There are no orders sought against the 2nd respondent who should be removed from these proceedings and the application be dismissed.

In Reply, Major Gilbert Gichuhi from the office of the Kenya Defence Forces filed his Replying Affidavit an avers that section 253(5) of the Kenya Defence Forces Act and chapter 4 of the Kenya Forces Standing orders require a service member who has served for more than 21 years colour service to apply to the Service Commander for re-engagement on a yearly basis if they wish to continue in service. The *ex parte* applicant service ended on 15th November, 2015 as he did not apply for re-engagement. Service in the Kenya Defence Forces is determined by age as provided under the Kenya Defence Forces Act.

Major Gichuhi also avers that the applicant does not qualify for re-enlistment under chapter 4 of the standing orders which limits the same to persons aged below 37 years. Upon delivery of judgement herein on 22nd October, 2015 the applicant failed to apply to re-enlistment. His run out date lapsed on 15th November, 2015 whereupon he would have been retired from service automatically upon attaining the mandatory retirement age for his rank at the time.

For reinstatement to be effected, the service member must apply and the applicant does not meet the criteria. The Integrated Personnel Pay Data System that manages matters of payment cannot process payment for personnel whose run out date has lapsed.

The 1st respondent is thus unable to comply with the part of the judgment dated 22nd October, 2015 requiring the applicant to be reinstated back to service on his previous rank of senior sergeant before the demotion date with effect from 15th September, 2014.

The applicant submitted that on 3rd March, 2017 the court granted orders of mandamus and served the respondent for compliance which they have failed to do. The opposition to the application on the basis that the applicant has not followed the provisions of section 30 of the Contempt of Court Act but the order of 3rd March, 2017 granted the applicant order of *mandamus* thus leave and notice to the respondents. The respondents have personal knowledge of the orders of the court but have opted not to obey.

In reply the respondents submits that section 30 of the Contempt of Court Act has not been complied with as the respondents have not been served with notice and thus there is no knowledge of the order. There is no order issued against the 2nd respondent for compliance and his office is improperly enjoined.

The burden of proof in matters of personal service is upon the applicant who has failed to discharge the same. The 1st respondent made effort to reinstate the applicant in the pay roll but was unable due to run out date of 5th November, 2015 and thus failure to comply is not in bad faith.

The application is therefore mature, bad in law and should be dismissed.

Determination

It is common cause herein that on 22nd October, 2015 the High Court issued orders quashing the conviction of the applicant and also directed the respondents to reinstate him back to service on his previous rank of Senior Sergeant before the demotion with effect from 15th September, 2014. There was no compliance.

On 3rd March, 2017 the applicant obtained orders of *mandamus* compelling the 1st respondent to reinstate

the applicant back into service and to pay owing dues to the date of dismissal 15th September, 2014 within 30 days. The court also directed that where there was no compliance the applicant was at liberty to institute contempt proceedings to enforce the orders of the court.

In reference to section 30 of the Contempt of Court Act, the law provides as follows;

30. Punishment against management of State organ, government department, ministry or corporation

(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

The orders thus issued by the High Court on 22nd October, 2015 put into account and further the orders of *mandamus* issued on 3rd March, 2017 and the responses now made by the respondents through the office of the 2nd respondent and averments in the Replying affidavit of Major Gichuhi for the office of Kenya Defence Forces, it is apparent that the respondent are jointly and severally aware of the court orders herein and have with a single purpose opted not to obey.

The averments made by Major Gichuhi in his affidavit are well taken into account. However, such are matters that ought to have been addressed in proceedings before the High Court in the Criminal Appal No.135 of 2014 or during the hearing of the application of orders of *mandamus* herein. To claim that there is impossibility of enforcement of the court orders due to the fact of *run out date* is no justification to failure to comply with lawful orders of the court.

Even where the Defence Forces Act and the Standing orders thereof requires that a service officer who has served for more than 21 years to apply for re-engagement, the order to have the applicant paid for the period or reinstatement up and until the date of his retirement on the grounds of age has not been complied with. There is no effort to pay for the duration covered. There is no effort to compensate the applicant over the period of his reinstatement based on the quashing of his conviction.

As such where the applicant was reinstated by the order of the court vide orders of 22nd October, 2015 and until the 15th November, 2015 when the law applicable he was to retire on age grounds, there is no effort by the respondents to comply. The 2nd respondent cannot extricate the office from these proceedings as the office with the constitutional mandate to advice the national government where the office of the 1st respondent is posted.

With the orders of 3rd March, 2017 now in place, putting into account the provisions of section 235(5) of the Kenya Defence Forces Act and the standing orders thereof, the respondents are given thirty (30) days hereof to comply herein; matter shall be mentioned in 45 days to confirm compliance. Such sufficient time is allowed putting into account the function of the respondents. On the due date, where there is no compliance the court will direct as appropriate.

Dated and delivered in open court at Nairobi this 27th day of July, 2017.

M MBARU JUDGE

In the presence of:

Lillian Njenga and David Muturi – Court Assistants

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