



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2115 OF 2015

CAPTAIN J.N. WAFUBWA.....CLAIMANT

VERSUS

THE DEFENCE COUNCIL.....RESPONDENT

RULING

1. In a ruling delivered on 18th November 2016, I upheld a preliminary objection raised by the Respondent and thereby struck out the Claimant's claim, on the ground that the issues raised are *res judicata*.

2. The Claimant subsequently came back to Court by way of Notice of Motion under certificate of urgency dated, 7th June 2017, seeking orders directing the Attorney General and the Solicitor General to re-assess his terminal benefits.

3. The Respondent thereafter raised another preliminary objection by notice dated 5th July 2017, on the same ground of *res judicata*. In this regard, the Respondent cites the following instances in which the Claimant's claim has been litigated and determine

a. HCCC No 674 of 1993: the High Court ordered that the Claimant's benefits and pension be assessed at the rank of Major despite his having retired as a Captain;

b. Civil Appeal No 278 of 2003: the Claimant challenged the High Court decision and sought to have his benefits assessed at the rank of Lieutenant Colonel. The Attorney General cross appealed and the Court of Appeal reversed the decision by the High Court;

c. HC Petition No 715 of 2006: the Claimant applied for orders directing the Minister for Finance/Treasury to assess his benefits for services rendered under military law. The application was dismissed on the ground that it was an abuse of the court process in light of the Court Appeal decision in Civil Appeal No 278 of 2003;

d. JR Misc. Civil Application No 368 of 2009: the Claimant sought to review the decision of the Court of Appeal in Civil Appeal of 278 of 2003. The High Court dismissed two related applications dated 3rd May 2011 and 10th February 2012 noting that the High Court could not review a decision of the Court of Appeal. Earlier on 13th April 2011, the High Court had dismissed a related application observing that the matter was *res judicata*;

e. HC JR Misc. Civil Application No 79 of 2013: the Claimant alleged that the then Permanent Secretary of Defence had failed to have his benefits paid. The Claimant had failed to clear with his

service (Kenya Air Force) to enable the processing of his benefits and for instructions to be issued to the Director of Pensions to release his pension. The application was dismissed on the grounds that Judicial review remedies were not applicable and the Claimant was relying on a Court of Appeal decision (CA No 278 of 2003) that had dismissed his prayers;

f. HCCC Misc. Application No JR 454 of 2014: this is the most recent application filed by the Claimant seeking orders of Mandamus to compel the Minister for Finance and Treasury to reassess his terminal benefits in compliance with Military law. The High Court dismissed the application on the ground that it did not meet the threshold for Judicial Review.

4. What is new in this application is the Claimant's attempt to introduce the Attorney General and the Solicitor General. This is however a futile move in light of the ruling of this Court delivered on 18th November 2016, by which the Claimant's claim was struck out. The effect is that there is no suit pending before the Court upon which any further orders may be granted.

5. The Court has fully rendered itself on this matter and is now *functus officio*. The preliminary objection raised by the Respondent therefore succeeds and is upheld.

6. Each party will bear their own costs.

7. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF NOVEMBER 2017

LINNET NDOLO

JUDGE

Appearance:

Captain J.N. Wafubwa (the Claimant in person)

Mr. Omondi with Mr. Soita for the Respondent