



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

JUDICIAL REVIEW APPLICATION NO. 1 OF 2017

REPUBLIC

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

EX-PARTE ALBERT M. WANDERA.....APPLICANT

(Before Hon. Justice Byram Ongaya on Wednesday, 20th December, 2017)

JUDGMENT

The applicant filed the notice of motion on 06.07.2017 through Kimathi Wanjohi Muli Advocates. The application was under Order 53 Rule 3 and 4 of the Civil Procedure Rules, Law Reform Act, Cap.26 and all enabling provisions of the law. The application was stated to be in the matter of Articles 10, 23, 40, 47, 50 and 165(5) of the Constitution of Kenya, 2010; in the matter of the Pensions Act and the Employment Act; in the matter of the decision by the Teachers Service Commission dated January 2017 to deny the applicant pension; and in the matter of Order 53 of the Civil Procedure Rules, 2010 and the Judicature Act, Cap. 8. The applicant prayed for orders:

1. That the honourable court do issue an order of certiorari directed to the 1st respondent, by itself, its servants, and agents or any other officer acting under its authority to bring to the court for the purpose of being quashed the decision by itself made on 13th January, 2017 invalidating and cancelling the applicant's letter of appointment and subsequent confirmation letters on the grounds that the applicant is an untrained teacher and as such does not qualify for pension.
2. That the honourable court do issue an order of mandamus directed to the 1st respondent, by itself, its servants and agents or any other officer acting under its authority compelling it to compute and process the applicant's pension benefits within the next thirty days and forward the said computation to the Director of Pensions for purposes of processing the same for payment to the applicant.
3. That the honourable court do issue an order of mandamus compelling the Director of Pension to process and remit the applicant's pension benefits as computed by the respondent within the next 60 days.
4. That cost of this application is borne by the respondent.

The applicant was employed by the government by the letter dated 30.10.1981 and posted to Ngairwe Primary School in Mumias West Division with effect from 02.11.1981. The 1st respondent registered the applicant as a teacher by the certificate of registration dated 19.01.1982 and Registration No. TSC/188019. The 1st respondent issued the letter of temporary appointment dated 21.01.1982. The letter stated that the applicant had to start teaching on 02.11.1981. The letter stated at paragraph 4 thus, **“4. This appointment is purely temporary and carries with it no guarantee of permanent employment. It can be terminated by either party giving to the other party one month’s notice in writing or by paying to the other party an amount equal to one month’s gross salary in lieu of notice.”** Clause 5 stated that the employment was subject to the Code of Regulations compiled and published by the 1st respondent under section 6 of the Teachers Service Commission Act (Cap. 212, Laws of Kenya) and to any amendment of such code which may be made from time to time.

The 1st respondent issued the applicant with a letter of permanent appointment with effect from May 1990. Status under the Pensions Act (Cap. 180) was stated as **“Permanent and Pensionable”**. The letter did not emplace the applicant on any probationary service – it would appear because the claimant had been in service as earlier appointed since 1981. The letter of permanent appointment was dated 31.05.1991 and signed by the applicant on 28.08.1991.

The applicant signed another letter of probationary appointment on 03.12.2007. The letter was dated 07.02.2007. The letter stated that the appointment was as a P1 teacher with continuous service as UT with effect from 02.11.1981 and it stated the status under Pensions Act (Cap.189) was Permanent and Pensionable. The applicant then received the letter of confirmation of appointment as registration No. TSC/188019 and the letter stated thus, **“Your appointment as a teacher employed by the Teachers Service Commission Under the terms of a Letter of Probationary Appointment is hereby confirmed”**.

By the letter dated 08.10.2014 the 1st respondent acknowledged receipt of the applicant’s letter dated 08.10.2014 giving notice of intention to retire from the teaching service and that the retirement had been approved effective 01.01.2015. Thus the last applicant’s day on duty was fixed as 31.12.2014, he would be paid up to that date, and as per the letter, the claimant was requested to provide all the listed documents to hasten the processing of his pension papers for payment by the treasury. The 1st respondent took the opportunity, by that letter, to thank the applicant for the service rendered to the teaching service and wished the applicant all the best in his retirement.

By the letter dated 07.11.2016 titled **“Payment of Pension”** the 1st respondent addressed the applicant thus, **“Teachers Service Commission conducted investigations and the findings are that your academic and professional certificates are not genuine. It was furthermore established that you never trained as a teacher. In view of the foregoing, the Commission is unable to process your pension benefits.”**

The 1st respondent wrote a further letter dated 13.01.2017 thus, **“After thorough investigation by TSC Auditors, it was established that you are not a trained teacher and therefore do not qualify for pension. Our letters Ref. TSC/188019/48 and TSC/188019/178 dated 02/7/15 are invalid. Treat them as cancelled. You are notified to submit your defence in writing to the Commission.”**

The applicant being dissatisfied with the turn of events filed the present judicial review application.

The 1st respondent appointed Sylvia Ngere Advocate to act in the matter. The 1st respondent filed the replying affidavit of Pauline Kiandiko, the acting Senior Deputy Director Pensions Division of the 1st respondent. The 1st respondent’s case is as follows:

1. The applicant was employed by the 1st respondent as a teacher and deployed at the Busia County at all material times.

2. As part of the declaration to get employed as applied in 1981 as an untrained teacher, the applicant stated that he was born in 1961 and that he was 20 years old as at the time of the application. He further declared that he had attended Nabumali High School (Mbale) and obtained a certificate for East African Certificate of Education in the year 1972. The certificate was stated to be for the examinations held November/December 1972. The effect was that the applicant had sat for the examination at the age of 11 years. Further, the name on the certificate was for Wandera Tabuman J. A, obviously not belonging to the applicant.

3. About 23.04.1991 the applicant submitted to the 1st respondent a notification of results from Kericho Teachers College for one Lucy Ndirangu N. Index No. 51/ 188019 which was close to the ex-parte applicant's registration No. 188019. On that basis the applicant was promoted to a P1 teacher from untrained teacher. In 2004 the 1st respondent requested the applicant to provide academic and professional certificates but the claimant failed to do so. On 08.10.2014 the applicant applied to retire voluntarily and surrounding that request were reported incidents of his chronic absenteeism. The 1st respondent accepted the request. Internal investigations then revealed that the claimant had no valid training as a teacher and therefore he did not qualify for pension. The teacher had received a salary for a P1 teacher from 01.05.1990 to 27.02.2015 without the requisite qualifications. He was invited at by the 1st respondent on 25.08.2016 but failed to produce his academic and professional certificates and admitted that he had never trained as a teacher. On that date the applicant wrote for reducing his age as being born in 1961 instead of 1956 and confessed that he had not gone for any teacher training course.

4. The 1st respondent concluded that in view of the emerging facts, the payment of the applicant's pension benefits could not be approved and processed.

The 2nd respondent supported the 1st respondent's case and did not file any papers in the suit except the notice of appointment dated 12.07.2017 appointing D.M. Njoroge, Litigation Counsel, for the Attorney General.

The **only issue** for determination in the case is whether the applicant is entitled to the remedies as prayed for. The applicant has not denied any of the irregularities and fraudulent circumstances surrounding the applicant's record of service and subsequent emplacement on permanent and pensionable terms of service. As submitted for the respondent, the court returns that the 1st respondent's decision to deny the applicant pension benefits was arrived at in good faith. The court returns that it has been established that the applicant lacked academic and professional papers to be employed as a teacher in 1981 and then to be promoted as a P1 teacher with confirmation on permanent and pensionable service effective 1981, the date of initial and erroneous appointment. The court will not aid those who seek its favour upon their own dirty hands and misleading the court and shamelessly so. The court returns that the 1st respondent has established that the applicant had fraudulently secured employment and continued in the teachers' service without requisite qualifications. It is unfortunate that the 1st respondent acted belatedly and there has been no recovery of the salaries undeservedly paid to the applicant. It is also not clear why the respondent has not moved against its own officers who may have participated in the apparent fraud such as by way of a surcharge to recover the erroneously or mistakenly or undeservedly paid salaries throughout the applicant's service. In view of the findings, the court returns that the application would be liable to dismissal with costs.

In conclusion, the application by the notice of motion for judicial review orders filed herein is hereby dismissed with costs.

Signed, dated and delivered in court at Nyeri this **Wednesday, 20th December, 2017.**

BYRAM ONGAYA

JUDGE