



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 34 OF 2013

LETICIA GAJI TARASISIO

MARTIN MUTUGI (Suing On Their Own Behalf and As The Legal

Representatives Of The Estate Of The Late

TARASISIO MEME M'ARIMBA (DECEASED).....PETITIONERS

VERSUS

THE PRINCIPAL SECRETARY MINISTRY OF DEFENCE

THE ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

1. The Petitioners herein are the administrators of the deceased estate. The deceased was a member of Kenya Defence Forces. His services were terminated on medical grounds. He thereafter unsuccessfully pursued his terminal benefits and unfortunately died on 8th March, 2010 before the benefits were paid.

2. After his death, the Petitioners took over the pursuit of the terminal benefits and according to them their efforts have been frustrated by the respondent's failure to provide them with necessary information. The Petitioners therefore sought orders that:-

1. A mandatory injunction compelling the Respondents to furnish the Petitioners with the following information and/or documents;

- a. Copies of the deceased's payslip prior to his discharge from active service.**
- b. A computation of the terminal benefits that the deceased was entitled to.**
- c. Details of when (if at all), the deceased was paid his terminal benefits.**
- d. Details of how the deceased was paid his benefits if at all.**
- e. Any evidence that the deceased acknowledged receipt of his terminal benefits allegedly paid to him.**

2. An order for the respondents to pay the petitioners all the deceased's outstanding death/terminal benefits.

3. Such other orders as this Honourable Court shall deem fit and just to grant.

3. The respondents opposed the petition through the 2nd respondent on grounds among others that:-

a. That the second respondent is functus officio with respect to the payment of gratuity of the deceased serviceman due to the fact that the assessment of gratuity was undertaken and forwarded to the National Treasury for processing and payment.

b. That the second respondent does not have legal mandate to pay and/or administer pensions and gratuities since that function is within the province of the National Treasury since such payments are paid from the consolidated fund.

c. That the second respondent has in the past provided the petitioners with copies of documents from the pensions and gratuity register confirming that the National Treasury was informed that it should pay the deceased gratuity.

d. That the petitioners cannot now allege that the respondents have violated any of their Constitutional rights.

e. That the deceased serviceman retired more than 34 years ago and due to effluxion of time the respondents are unable to trace the deceased's personal file save for the records contained in the pensions register.

f. That the petition is otherwise incompetent, misconceived, misplaced and is an abuse of the process of this Honourable Court as the Petitioner's rights and fundamental freedoms have not been breached and the same ought to be dismissed with costs.

4. Mr. Mutua for the petitioner briefly submitted that the respondents have only elected to file grounds of opposition as opposed to Replying Affidavit, it therefore followed that the facts and grounds upon which the petition is based remained uncontroverted. According to counsel therefore the Petition remains unchallenged and should be allowed as prayed.

5. Mr. Obura for the respondent on the other hand submitted that the 1st respondent became functus officio with regard to payment of gratuity of the deceased serviceman when assessment of gratuity was undertaken and forwarded to the National Treasury for processing and payment. According to counsel, the respondents do not have the legal mandate to pay and/or administer pensions and gratuities since this was a function that is given to National Treasury. Counsel further submitted that in the past it had provided the petitioner with adequate information within its knowledge which included documents from the pension and gratuities register showing that the National Treasury was informed that it should pay the deceased's gratuity.

6. Concerning the contention that by not filing a replying affidavit the allegations in the petition become undefended, counsel submitted that allegations of violations of fundamental rights were outrightly controverted by the respondents in the submissions. According to Counsel, proceedings in public law are special proceedings and if the respondent failed to file a replying affidavit, it does not follow that the petitioners have proved their case on a balance of probabilities.

7. This petition has been brought under article 22(1) 22(2) (a), 35(1) (a) 40 and 41 of the Constitution. The essence of the orders sought however focuses more on article 35(1) (a) which deals with access to information held by the state. This article recognizes the right of every citizen to access information held by the state.

8. I have carefully considered the orders sought in the petition and the factual background that culminated

in the filing of this petition and I am of the view that these orders are not only innocuous but relate to information that if provided to the petitioner would make them pursue better the terminal benefits of the deceased if not already paid. In their nature they would not occasion the respondent any financial loss.

9. The contention by the 2nd respondent that the 1st respondent became functus officio when it computed the deceased pension and submitted to the National Treasury for payment may not be the best approach in the matter. The second respondent as a legal advisor to the National Government has the responsibility to advise the National Treasury to make this harmless information available. In the circumstances the Court allows the petition as prayed.

10. There will be no order as to costs.

11. It is so ordered.

Dated at Nairobi this 23rd day of October 2015

Abuodha J. N.

Judge

Delivered this 23rd day of October 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge