



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 2 OF 2013

(Formerly Nakuru High Court Judicial Review Application No. 43 of 2012)

REPUBLIC

-VERSUS-

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

**PERMANENT SECRETARY, PROVINCIAL ADMINISTRATION AND INTERNAL
SECURITY.....2ND RESPONDENT**

HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

-EX-PARTE-

STEPHEN WAWERU KARIUKI.....APPLICANT

(Before Hon. Justice Byram Ongaya on Friday 21st June, 2013)

JUDGMENT

The applicant **Stephen Waweru Kariuki** filed on 04.02.2013, the Notice of motion for the judicial review order of mandamus. The notice of motion was filed through Hari Gakinya & Company Advocates and was brought under sections 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya and Order 53 Rules 3(1) and (3) of the Civil Procedure Rules. The notice of motion is based on the statutory statement and verifying affidavit by the applicant sworn on 19.07.2012 accompanying the application for leave and on such other grounds as may be adduced at the hearing of the application. The applicant has prayed for an order of mandamus directed at the respondents compelling them to pay him unpaid salaries for the period between when he worked for the Office of the President as Chief, Kabazi Location until his age of retirement under mandatory retirement at age of 55 years.

The respondents filed the grounds of opposition on 07.06.2013 through the Senior Litigation Counsel, Mr. E. N. Njuguna for the Attorney General. For the respondents, counsel submitted that the application for leave was filed without the verifying affidavit and statement of facts as required under order 53 of the Civil Procedure Rules. The court record shows that the applicant filed on 19.07.2012 a bundle of documents including the certificate of urgency, the chamber summons, and applicant's supporting affidavit and attached exhibits, the statutory statement of facts and the applicant's verifying affidavit together with the attached exhibits. Accordingly, the court finds that the applicant complied with the provisions of the rules on filing the statement of facts and the verifying affidavit.

The applicant was employed by the Kenya's colonial government in 1962 as a Clerk Grade III on 4th October, 1962. He served on probationary terms from 1.11.1962 and was confirmed to permanent and pensionable service with effect from 4.10.1962. In the course of his due service, he was promoted to hold the position of Chief, Subukia Location grade II and later as Chief, Kabazi Location in Nakuru District.

By the letter dated 19.10.1983 signed by Benjamin K.M Ogol being Senior District Commissioner at Nakuru, informed the applicant that he had been dismissed from the government service with immediate effect. The applicant's case is that the dismissal was sudden and without following the due process of justice. He was not given any notice or a hearing.

The petitioner wrote complaining about the unfairness in the manner he had been dismissed. The letter dated 20.02.1984 by the District Commissioner at Nakuru informed the applicant about his retirement in the public interest. He was thanked in that letter for his services to the nation. Time ran and he was not paid any pension or any terminal dues. His case was a confusing state of things as it was not clear if he had been dismissed or retired in the public interest.

Thus, the applicant by the letter dated 19.04.2003 appealed to the Public Service Commission against the dismissal or otherwise retirement. In the appeal, the applicant asked the Commission to rescind the decision to retire in public interest and allow him retire on age grounds so that he could draw full retirement benefits. He pleaded that the Commission considers his twenty one years' service over half of which were on permanent and pensionable terms and that until 19.10.1983, the date of his retirement he held a clean record of service. The Commission's decision on the appeal was communicated to the applicant by the letter dated 24.10.2011 from the Office of the President, Provincial Administration and Internal Security. The letter stated as follows:

“RE: APPEAL AGAINST RETIREMENT IN THE PUBLIC INTEREST

This is to inform you that the Public Service Commission (K) has considered out of time and allowed an appeal against retirement in the public interest and decided that you be belatedly retired from the service on the mandatory retirement age of 55 years with effect from 1st July, 1998.

Enclosed herewith please find the Official Secrets Act Declaration Form for officers leaving the Service for you to sign in the space provided and return to this office duly witnessed together with your original Civil Servants Identity Card, if any, for cancellation.

Note that the period you were away from the service will be treated as leave without pay for pension purposes.

Signed

G.KIHARA

FOR: PERMANENT SECRETARY”

By the letter dated 31.10.2011, the claimant wrote to the Office of the President appreciating the positive consideration of his appeal and requesting for belated promotion in processing his retirement benefits. The Office of the President replied by the letter dated 21.05.2012 addressed to the applicant as follows:

“RE: CLAIM FOR UNPAID SALARY

This is to convey the decision of the Authorized Officer that you be informed salary is earned. Hence note that you did not work during the period following your retirement and therefore you were not entitled to any salary.

Signed

G.KIHARA

FOR: PERMANENT SECRETARY”

The applicant has prayed for an order of mandamus directed at the respondents compelling them to pay him unpaid salaries for the period between when he worked for the Office of the President as Chief, Kabazi Location until his age of retirement under mandatory retirement at age of 55 years.

As submitted for the applicant, for an order of mandamus to issue, the applicant must establish a public duty imposed upon the respondents to pay for the period of time as prayed and further, the applicant must establish that the respondents have despite demand, failed to perform the duty to the detriment of the applicant.

First consideration is whether the respondents have a duty to pay for the period the applicant did not work. The claimant submitted an appeal against his dismissal or otherwise apparent retirement in the public interest. The material before the court show that in fact the applicant was dismissed from government service with effect from 19.10.1983 as per exhibit **SKW VII** on the verifying affidavit and he prayed in his appeal to the Commission for full retirement benefits in view of 21 years of service being 1.11.1967 to 19.10.1983. It is clear that the applicant appealed for full retirement benefits for the period served. The Commission granted his prayer by retiring him on account of the mandatory retirement age of 55 years. The letter communicating the decision on appeal quoted in this judgment is clear that the period the applicant had not worked (being 19.10.1983 to 1.07.1998) would be treated as leave without pay for pension purposes.

In view of the decision on appeal, the court finds that the public duty to pay the applicant salaries for the period he did work never accrued by reason of the appellate decision made by the Commission. The letter conveying the decision clearly states that the period would be treated as leave without pay. In absence of a statutory provision requiring the respondents to pay for the period as claimed, the court finds that the applicant has not established a public duty the respondents have failed to perform to his detriment and mandamus would therefore not issue in this case. It is the court’s opinion that if the applicant was dissatisfied with the Commission’s appellate decision, the appropriate course of action was to seek a review of the decision before that Commission or to question the appellate decision on its merits before a competent authority or proper proceedings in this court. The current proceedings do not question the merits of the appellate decision and that is not the nature of the case currently before this court. The material before the court instead shows that the applicant was satisfied with the appellate decision as shown by his appreciation.

The court has considered the inconsistencies in the pleadings in this case. The statutory statement identified the Permanent Secretary as the 1st respondent and the Commission together with the Attorney General as interested parties. In the notice of motion, the applicant named the Permanent Secretary, the Commission and the Attorney General all as the respondents. Such was a fundamental irregularity deviating from Order 53 Rule 4 which states:

“4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of

any such further affidavits.

(3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.”

The court finds that in contravention of the Rule, the applicant altered the parties to the application in the notice of motion without the court’s leave contrary to the statement as filed and also thereby altered the prayer from the original prayer as set out in the statement. The affidavit of service on record does not show that the statement and the verifying affidavit were served as envisaged under the rule. Such irregularities serve as an impetus to denial of the order of mandamus.

In conclusion, the applicant’s notice of motion is dismissed with costs.

Signed, dated and delivered in court at Nakuru this Friday, 14th June, 2013.

BYRAM ONGAYA

JUDGE