



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 11 OF 2013

NASIBO DABASO JILLOPETITIONER

-VERSUS-

1. THE COMMANDER, KENYA ARMY)

2. THE HON. ATTORNEY GENERAL).....RESPONDENTS

Mr. Millimo Benson for Petitioner.

Mr. Moimbo Momanyi for Respondent/Objector

RULING

This petition dated 26th November, 2012 was filed at the High Court on 27th November, 2012.

The same was transferred to the Industrial Court by Hon. Justice Lenaola on 4th February, 2013.

The Petitioner is **Ms. Nasibo Dabaso Jillo** whereas the 1st Respondent is the **Commander, Kenya Army** and the 2nd Respondent is the **Hon. Attorney General**.

On the 4th April, 2013, the 2nd Respondent filed a notice of Preliminary objection to wit:

1. *That the issues raised in the petition herein are res judicata, the same having been directly and substantially in issue between the parties herein in High Court Miscellaneous Application No. 184 of 2009, wherein a judgment was delivered by R.P.V. Wendoh J extinguishing the Petitioner's claims herein.*
2. *That the Petitioner herein has not appealed against the said judgment and this petition is a disguised appeal. Admitting this petition for hearing is tantamount to this court sitting to review, overturn and/or generally superintend over the actions of another court of concurrent jurisdiction.*

The Respondent did not file a response on the substantive issues raised in the petition.

The counsel for the Petitioner submitted that the judgment by Hon. Lady Justice R.V.P. Wendoh dated 18th December, 2009 clearly shows that the dispute was between the same parties in the present matter and the judge singled out issues for determination therein as:

Whether the Respondent's decision not to retain the Petitioner due to her health status was unlawful;

Whether the decision was arrived at unprocedurally and whether the decision was unreasonable.

That the court found that it could not force a relationship between the Petitioner and the Respondent and that the Petitioner could not be accommodated as an employee of the Respondent due to her health. In short, the court dismissed the application.

In the Judicial Review application the Applicant sought orders of *certiorari* and *mandamus* to compel the Commandant of the Kenya Army to reinstate her. She was discharged on the date of passing out parade.

It was submitted for the Respondent that the Petitioner has not appealed against the said judgment and this petition is a disguised appeal and same be dismissed with costs, the Judicial Review Application having been dismissed on merit.

The counsel for the Respondent further submitted that the Petitioner subsequently filed High Court Case No. 97 of 2010 but she later withdrew it only to later file this petition.

The preliminary objection is opposed by the Petitioner on grounds that the issues in dispute in the petition are not the same as those in the Judicial Review Application No. 184 of 2009. That the issues in the petition are not in dispute since no response has been filed to the petition nor has any leave been sought to file a response to the petition. That in the event the preliminary objection fails, the court should proceed and grant the prayers sought as follows:

- i. *A Declaration that the discharge and or removal of the petitioner herein from the Kenya Army was tainted with illegality, irregularity, unfairness in contravention of the established rules of natural justice and therefore invalid, null and void abinitio.*
- ii. *A Declaration that the discharge and or removal of the Petitioner herein from the Kenya Army was in violation of her right to a fair administrative action.*
- iii. *A Declaration that the discharge and/or removal of the Petitioner from the Kenya Army was done in violation of the Petitioner's rights to human treatment, respect and protection of her dignity.*
- iv. *A declaration that the discharge and or removal of the Petitioner from the Kenya Army on the purported ground of medical ground was done in violation of the Petitioner's right to equal protection, benefit of the law and non-discrimination on the basis of health status and or disability.*
- v. *A Declaration that the Petitioner's discharge and or removal from the Kenya Army was in violation of her right to fair labour practices and legitimate expectation.*
- vi. *A Declaration that the continued Respondent's retention and detention of the Petitioner's personal belongings and documents inclusive of her National Identity Card has occasioned and continues to occasion a denial and or breach of the Petitioner's rights listed there under.*
- vii. *Direct the Respondent to release the said personal belongings.*
- viii. *An order for compensation directed against the Respondents jointly and severally in the sum of Kshs.50 million for violation of her fundamental rights and freedoms.*
- ix. *An order for compensation for loss of income, career advancement and terminal dues upon retirement.*
- x. *Interest on the award and interest.*

The Petitioner relies on various authorities in opposition to the preliminary objection which the court has duly considered.

In the matter of **Stephen Waweru vs. The Committee Nyandundo Primary School and Anor.** HCCC No. 232 of 2001, Justice D.K. Maraga ruling on **Section 7** of the **Civil Procedure Act** concluded thus:

“It is clear from this provision that for the matter to be res judicata the court trying the former suit must have been a court competent to try it.

There is no doubt that the High Court had jurisdiction to entertain the judicial review application Misc. Civil Application No. 184 of 2009.

In his commentary to the Code of Civil Procedure Act V of 1908, 16th Ed. Anupan & Clivastava, an advocate of the High Court, Delhi wrote on page 611 as follows:

“In order that a defence of res judicata may succeed it is necessary to not only show that the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the cause of action which was the foundation of the former suit or proceedings.”

The essentials of *res judicata* are summarized on page 173 as follows:

“I. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.

II. The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

III. The parties as aforesaid must have litigated under the same title in the former suit.

IV. The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such an issue has been subsequently raised.

V. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

For a matter to be adjudged *res judicata* these essentials must all be satisfied.

The Industrial Court as presently constituted under **Article 162 (2)** of the Constitution read with **Section 12 (1)** of the **Industrial Court Act, 2011** has exclusive original and appellate jurisdiction to hear and determine all disputes arising from an employer and employee relationship.

Indeed, this suit was transferred to the Industrial Court because the High Court lacks jurisdiction to hear and determine it.

Going by essential number (IV) above that *“The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue has been subsequently raised”* it is clear that this essential has not been satisfied and therefore the matter before this court cannot be said to be *res judicata*.

Furthermore, the relief sought before the Industrial Court is very different from that sought in the

judicial review application.

Indeed, Hon. Justice R.P.V. Wendoh on page 14 of her judgment advised the Petitioner to file a civil suit if there are other reliefs she may require “*as judicial review remedies are discretionary in nature and even though the Applicant may have demonstrated that the process leading to her discharge from the armed Forces was unfair and harsh and she was denied her right to be heard, yet the court may not grant the orders sought*” (Page 12 – 13).

To this extent the preliminary objection is dismissed.

As observed earlier in the ruling, the Respondent has not pleaded over. The facts in this case therefore largely remain uncontroverted.

However it is in the interest of justice and fair play in line with **Article 159 (2) (d)** of the Constitution of Kenya, 2010 which provides that justice shall be administered without undue regard to procedural technicalities, that the court allows the Respondent to file a response on the merits within 30 days from the date of this Ruling.

Costs will be in the cause.

It is so ordered.

Dated and delivered at Nairobi this 6th day of September, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE