



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JUDICIAL REVIEW NO. 4 OF 2015

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

IN THE MATTER OF APPLICATION BY SISTER NABWIRE HENDRIKA TO THIS HONOURABLE COURT TO APPLY FOR JUDICIAL REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ART.23(3) (f)

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

SECTION 8 AND 9

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 ORDER 53 RULE 3

AND 4

AND

IN THE MATTER OF THE PENSIONS ACT CAP 189 LAWS OF KENYA

SECTION 5 AND SECTION 24(2) (c)

AND

IN THE MATTER OF BUSIA PRINCIPAL MAGISTRATE'S CIVIL CASE NO. 118 OF 2009

AND DECREE DATED 11TH FEBRUARY, 2010

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PENSIONS MIN.

OF FINANCE DEPARTMENT OF PENSION TREASURY.....2ND RESPONDENT

EX-PARTE:

SISTER NABWIRE HENDRIKA.....INTERESTED PARTY

JUDGMENT

The Ex parte Applicant Sister **Hendrika Nabwire** (*herein after called "the applicant"*) was employed by the Teachers Service Commission (TSC) as a P3 teacher in 1972 after training at Eregi Teachers College between 1970 and 1971, and obtaining registration as a teacher on 31st July, 1972 vide certificate No. 711212. She retired from service on 30th August, 2006 having risen to the position of P1 teacher. Upon retirement she applied for payment of pension but TSC declined to pay. She then moved to court and filed Busia PMCC No. 118 of 2009 which was heard and judgement delivered in her favour on 19th November, 2009. TSC thereafter processed her pension and forwarded the forms with supporting documents to the Director of Pensions who declined to accept the pension Forms prompting her to file the present judicial review application after obtaining leave to do so.

Applicant's case

In her application dated 12th June, 2012 applicant seeks an Order of Mandamus to be issued against the 2nd Respondent in respect of a decree and judgement of the court in Busia Principal Magistrate's Civil Case No. 118 of 2009 compelling the 2nd Respondent to pay her retirement benefits claim and costs.

In the statement of facts, the affidavit and the submissions in support of the Application the Applicant states that according to both the Pensions Act and Teachers Service Code of Regulations the Applicant is entitled to be paid pension, that the 2nd Respondent declined and refused to receive the applicants retirement Benefits Claim Form G178 together with other supporting documents forwarded to the 2nd Respondent by the relevant officer in charge of pensions at the Teachers Service Commission and to effect payment.

The TSC has fully exhausted its statutory mandate and has complied with the decree and judgement of the court in Busia Principal Magistrate Court Case No. 118 of 2009.

The applicant states that the 2nd Respondent has the legal mandate to make such payment but has declined to do so, an act that the applicant submits is an abuse of public office and court process.

Respondent's case

The Respondent filed written submissions in which it states that the Applicant's claim lacks merit on two grounds. The first is that by virtue of Section 24 of the Pensions Act, only citizens of Kenya are eligible for Pensions. That the Applicant failed to disclose her nationality in her application for pension and has persisted in doing so to date. That in the annexed GP Form, instead of the identity card number, there is an alien certificate number. That being an alien, she is not entitled to pension under the provisions of Section 24 of the Pensions Act.

The second ground raised by Respondent is that the relief of an order for mandamus is a discretionary remedy and a party who seeks the court's favour must not be guilty of material non-disclosure, and that the failure of the Applicant to disclose her nationality militates against the grant of the remedy of mandamus. The Respondent relied on the case of Republic V Attorney General Ex Parte Patricia Olga (Nairobi Misc. App.(J.R) No. 324 of 2013).

Determination

The issues that arise from the submissions of the parties are the following

1. Whether section 24 of the Pensions Act locks out the Applicant from payment of pension.
2. Whether the Respondent can legitimately refuse to comply with the judgement in Busia Principal Magistrate's Civil Case No. 118 of 2009.
3. Whether the Applicant is entitled to the orders sought.

Section 24 of the Pensions Act provides as follows:-

(1) This Act (including the First Schedule but excluding the Second, Third and

Fourth Schedules) shall, subject to the modifications thereof contained in the Fifth Schedule, apply to a teacher, and a teacher shall, for the purposes of this Act and during his approved service in Kenya, be deemed to be an officer in the service of

the Government.

(2) For the purposes of this section and the Fifth Schedule—

“approved service” means such service as the Minister for the time being

responsible for education may, after consultation with the Minister for the time being responsible for finance, declare to be approved service for the purposes of this Act;

“Commission” means the Teachers Service Commission established by the Teachers Service Commission Act (Cap. 212);

“teacher” means—

(a) any person who, before the 1st August, 1962, was a contributor to the Fund established under the African Teachers Service (Contributory Pensions Fund) Regulations (L.N. 390/1957 now revoked) and who was eligible to exercise an option under Education Circular No. 3 of 1962 dated the 18th October, 1962;

(b) any person who was a contributor to the Group Pension Scheme referred to in Education Circular No. 10 of 1963 dated the 9th October, 1963 and who was eligible to exercise an option under that Circular;

(c) any person who—

(i) *being an African, was appointed on or after the 1st August, 1962 to the Teachers Service established under the Teachers Service Act (No. 3 of 1954 now repealed); or*

(ii) *not being an African, but being a teacher for the purposes of the Teachers Service Act—*

(a) *was appointed to an aided school as a teacher before the 1st January, 1964 and was not eligible to contribute to the Group Pension Scheme referred to in Education Circular No. 10 of 1963 dated the 9th October, 1963; or*

(b) *was appointed to an aided school as a teacher on or after the 1st January, 1964: Provided that no such person shall be eligible for the grant of a pension or gratuity under this Act unless he is a citizen of Kenya;*

(d) *any citizen of Kenya who, being a teacher for the purposes of the Teachers Service Act, is employed as a teacher in any school in Kenya which is an unaided school;*

(e) *any citizen of Kenya who, having been registered as a teacher by the Commission, was employed as a teacher by the Commission on or after the 23rd January, 1967;*

(f) *any citizen of Kenya who, having been registered as a teacher by the Commission, was employed as a teacher by any employer other than the Commission on or after the 23rd January, 1967.*

[Act No. 32 of 1966, s. 2, Act No. 49 of 1968, s. 3.]

According to the Respondent, the proviso to Section 24(2)(c)(ii)(b) locks out any person who is not a citizen of Kenya from pension or gratuity under the Act. It is however submitted on behalf of the Applicant in the Reply to Respondent's Submissions that the Respondent has misapprehended Section 24 of the Act, that Section 24(c)(ii) creates an exception to the general understanding that every teacher employed on permanent and pensionable terms is entitled to payment of pension on retirement, that the positioning of the proviso applies to the categories of teachers under Section 24(c)(ii) (a) and (b) who are Africans but not to any other class of teachers. It is submitted for the Applicant that the proviso immediately after Section 24(2)(c)(ii)(b) only applies to non-Africans.

For the court to establish whether or not the Applicant qualifies for pension under Section 24 of the Act it is important to understand the provisions of the section.

Section 24 is divided into sub-sections (1) and (2). Subsection (2) deals with definitions. Under the definition of "teacher" there are three different definitions divided into sub-paragraphs (a), (b) and (c).

Under (c) there are two further sub-divisions into (i) and (ii). Sub-division (i) provides for "*any person being an African.....*" while sub-division (ii) provides for "*any person not being an African.....*"

Under (ii), there are further categorisations under (a) to (f) all of which provide for persons not being African. It is under this category that there is the provision that the Respondent has relied upon which states;

"a) Was appointed to an aided school as a teacher before the 1st January, 1964 and was not

eligible to contribute to the Group Pension Scheme referred to in Education Circular No. 10 of 1963 dated the 9th October, 1963; or

b) Was appointed to an aided school as a teacher on or after the 1st January, 1964."

The proviso that the Respondent relies upon only covers a teacher **who is not an African "who was appointed to an aided school as a teacher on or after the 1st January, 1964"**

The Applicant being an African, is covered under (e) (ii) and is entitled to Pension under the Pensions Act. I agree with the applicant that the Respondent misapprehended the provisions of section 24 and erroneously excluded the applicant from benefiting from pension under the Act.

The next issue for determination is whether the Respondent is bound by the decision in Busia Principal Magistrate's Civil Case No. 118 of 2009.

In the judgment of the court in Busia PMCC 118 of 2009, the Magistrate stated as follows-

"The 3rd issue that I will consider, is whether T.S.C pays pension. It is true that T.S.C. does not pay pension but the evidence by the defence reveals that they facilitate the payment by processing the documentation. If that be their role they should simply process the documentation and forward the same to Pension Director who then may base it on Nationality if there be an issue which wish be resolved.

In the premises of the foregoing, I find that the plaintiff is entitled to her pensions for the period she has worked with the T.S.C which I order that she be paid by T.S.C processing the documentation upon production by the plaintiff relevant documents as to identity."

The Judgement is a final determination of the Applicant's entitlement to pension. That decision has not been subjected to appeal or review and remains valid as the final determination on the issue.

The issue therefore is whether the Respondent can validly refuse to pay pension to the Claimant after her employer, the TSC has cleared her for payment.

My understanding of the role of Pensions Office is that it pays pension to officers who are eligible for pension upon such officers being cleared by the department under which they were employed. Its role is like that of a bank paying upon presentation of the cheque. The role of the 2nd Respondent is to pay. If there are any issues, it should seek clarification from TSC and not refuse to accept the Pension Forms as it did in this case. It has no mandate to refuse to pay if TSC confirms that payment should be made or if there is an Order of a court directing that payment should be made by or on behalf of TSC.

Having ruled that Section 24 does not lock out the Applicant from receiving her pension, there is no valid reason why the Respondent should not pay her .

There is a further ground that was not raised by either party. This is the right of the Applicant to be heard before a decision detrimental to her is made by a Public body exercising administrative authority. Article 47(2) of the Constitution provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Article 47(1) provides for expeditious, efficient, lawful, reasonable and procedurally fair administrative action.

In the present case the Respondent simply refused to receive the Applicant's pension forms that had been processed by TSC and locked her out without giving her written reasons or a hearing. This is a violation of her Constitutional right enshrined under Article 47 which applies to "Every person" as opposed to a "Citizen."

For the foregoing reasons an order of mandamus is hereby issued directed at the Director of Pensions, the 2nd Respondent herein compelling the 2nd Respondent to pay the applicant her pension as processed by TSC pursuant to a decree in Busia Principal Magistrate's Court case No. 118 of 2009.

The 2nd Respondent will pay the applicant's costs.

Orders accordingly.

Judgment dated, signed and delivered this 19th February, 2016.

MAUREEN ONYANGO

JUDGE



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