REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

APPLICATION NO. E069 OF 2021

REPUBLIC... APPLICANT

-VERSUS-

RETIREMENT BENEFITS AUTHORITY................ RESPONDENT

Ex parte:

ALEX ANYONA MOMANYI & 6 OTHERS

RULING

The motion before court is dated 21 May 2021 and filed under Article 22, 23, 48,59 (c) and 165 of the Constitution and sections 7,8,9,10 and 11 of the Fair Administrative Action Act, 2015. It seeks a prayer for the prerogative order of mandamus which is couched in the following terms:

> ***"That a judicial review order of mandamus be issued to compel the respondent to determine the applicants (sic) complaint filed on 20th July, 2020 in accordance with the Retirement Benefits Act."***

The only other prayer is for provision of costs.

The application is said to be based on the affidavit of Augustine Nzioki.

The motion was filed without leave of the court and therefore on 21 June 2021 I directed parties address the court on whether such motion is viable as a preliminary point. They filed submissions and exchanged submissions on this question.

When I retreated to write the ruling, I learned that though the motion is said to be based on the affidavit of Augustine Nzioki, who appears as the 2nd applicant in these proceedings, the person who identifies himself at the introductory part of the affidavit is one William Malonza. Augustine Nzioki is only named in the jurat has having sworn the affidavit. I need to illustrate what the affidavit says to bring the point home; in its pertinent part, the affidavit states as follows:

> ***"I William Malonza am an adult male of sound mind and am of Post Office Box Number 47082-20100 Nairobi within the Republic of Kenya and do hereby make this Oath and state as follows:"***

William Malonza then proceeds to make depositions stating, *inter alia,* that he is the 118th applicant amongst the applicants whom he describes as former employees of ARM Cement PLC.

But in the jurat, the person who is said to have sworn the affidavit is Augustine Nzikoa; it is stated in that jurat as follows:

> ***"Sworn at Nairobi by the said Augustine Nzioka…"***

William Malonza is clearly a stranger in these proceedings because he is not named as an applicant or any other party for that matter. Again, there are only seven applicants in the application and the, at least 118 applicants William Malonza is referring to are not applicants in the motion before court.

Most importantly, considering there is no affidavit that has been duly sworn by Augustine Nzioka, the motion before court is effectively not supported by any affidavit and therefore is not based on any evidence. On this score alone, even if the applicants were entitled to assume that they could file their application for the prerogative order of mandamus without leave, it would fail for being fatally defective and incompetent.

Having so held, the discussion on whether the applicants needed to obtain leave before they filed the substantive motion would appear to be academic. But since parties have submitted on it, it is necessary that I acquit myself on this question. It is a question that have dealt with before and, at the risk of repeating myself, I can do no better than reiterate what I said in **Judicial Review Application No. E087 of 2021 Republic versus Public Procurement Administrative Review Board & Others ex parte AA Insurance Company Limited**.

The starting point would be Order 53 (1) of the Civil Procedure Rules which states as follows:

> ***1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.***

This rule leaves no doubt that grant of leave is a precondition to filing of a substantive motion for the prerogative orders of mandamus, prohibition or certiorari; without such a leave the substantive application cannot be entertained.

The need for leave has been explained in several decisions by the courts in England; these English decisions are relevant in our jurisdiction by virtue of section 8 (2) of the Law Reform Act, cap. 26 which provides the basis upon which the jurisdiction to grant judicial review reliefs of mandamus, prohibition or certiorari is exercised. That section reads as follows:

> ***8. (2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.***

In **Cocks v Thanet District Council (1983) 2 AC 286** at page 294F Lord Bridge said that leave is one of the safeguards built into the order 53 to protect from harassment of public authorities on whom Parliament has imposed a duty to make public law decisions. And in **O'Reilly v Mackman (1983)2 AC 237** Lord Diplock said at p. 281 A-C that the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity.

The leave stage is a procedure which provides an expeditious method according to which the court sifts out cases with no chance of success at a relatively little cost to the applicant and no cost to any prospective respondent. The requirement for leave has always provided procedural limitations which, in turn, provide a necessary protection to public authorities against claims which it is not in the public interest for the courts to entertain. It is one of the safeguards imposed in the public interest in respect of groundless, unmeritorious or tardy attacks on the validity of decisions made by public authorities in the field of public law.

In IRC v. National Federation of Self-Employed and Small Businesses Ltd (1982) AC 617 Lord Diplock explained the need for leave this way:

> ***"Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."***

The two purposes identified here are to save court's time and so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed. It is an essential protection against abuse of legal process. Woolf J has referred to the need for leave as "*the unique statutory means by which the court can protect itself against abuse of judicial review.*" **(R v Secretary of State for the Environment, ex p Greater London Council (1985) Times, 30 December.**

These authorities are clear that the requirement for leave when seeking to invoke Judicial Review jurisdiction serves a specific purpose; it is not a pastime exercise and neither is it an option that a litigant seeking judicial review remedies may choose to comply with at his convenience; it is a mandatory procedural step without which the court would not be able to exercise the discretion with which it is clothed either to allow or decline the institution of the substantive suit for judicial review reliefs.

I am minded that among the various provisions of the law that the applicant has invoked in its quest for reliefs sought, Section 8(2) of the Law Reform Act and Order 53(1) of the Civil Procedure Rules are not among them. But the omission to invoke these provisions of the law does not necessarily imply that the applicant is thereby exempted from complying with the procedure for invoking the judicial review jurisdiction of this Honourable Court. As long as an applicant is seeking judicial review reliefs, irrespective of whether they are the traditional reliefs of mandamus, certiorari and prohibition or the expanded ones under section 11 of the Fair Administrative Actions Act, No. 4 of 2015, he is bound by the procedure for filing the application for such reliefs.

I am also minded that the applicant has invoked various provisions of the Fair Administrative Action Act, 2015, in particular, sections 7, 8,9, 10 and 11 none of which provide for application for leave as the preliminary step in lodging the application for judicial review.

However, none of those provisions expressly oust the application of Order 53 (1) of the Civil Procedure Rules in applications for judicial review. The specific provision in the Fair Administrative Actions Act relating to procedure is section 9 of the Act; it provides as follows:

> ***9. Procedure for judicial review.***

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under anyother written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court

may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

The Act does not say how the application is made and, in my humble view, this is a deliberate omission because the procedure for invoking judicial review jurisdiction remains Order 53 of the Civil Procedure Rules.

One very important point to remember is that the common law principles upon which the requirement for leave was grounded still subsist today and are as much relevant today as they were before. I suppose it is for this reason that section 12 of the Fair Administrative Actions Act is express that the Act is complementary to and not a substitute of the general principles of common law; that section reads as follows:

12. Principles of common law and rules of natural justice.

This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.

Section 14 on transition provisions affirms the position that the procedure adopted in judicial review applications before the coming into force of the Fair Administrative Actions Act has not been done away with. That section states as follows:

14. Transition provisions.

(1) In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done.

(2) Despite subsection (1)-

(a) if, and in so far as it is impracticable in any proceedings to apply the provisions of this Act, the practice and procedure obtaining before the enactment of this Act shall be followed; and

(b) in any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted. (Emphasis added)

Although section 14 (2) (a) suggests that the practice and procedure obtaining before the enactment of the Act may only apply in circumstances where it is impracticable to apply the provisions of the Act, the Act does not invalidate the practice and procedure preceding the enactment of the Act.

In any event, it is a legitimate argument that as long as the Act does not provide the procedure for the making of applications for judicial review, then the practice and procedure in making such applications before the enactment of the Act are to be followed.

What may appear to be a gap in matters procedure will, perhaps, be filled once the regulations or practice directions contemplated under section 13 and 14 (2) have been made.

Section 13 says:

13. Regulations.

(1) The Cabinet Secretary may, in consultation with the Commission on

Administrative Justice, make regulations for the better carrying out of the provisions of this Act.

(2) Regulations made under subsection (5) shall, before publication in the Gazette, be approved by Parliament.

In the absence of the regulations or practice directions, it would be premature to assume that the requirement of leave has been rendered unnecessary. In the current scheme of things, there is no legal basis to institute judicial review proceedings without leave of the court. It would, in the words of section 14(2) (a) of the Fair Administrative Actions Act, be impracticable to invoke the jurisdiction of a judicial review court without leave.

In any event, considering the common law principles and rationale behind the requirement for leave which I have adverted to, there is no plausible reason to assume that the regulations or practice directions, once made, will dispense with the need for leave.

One other thing I am inclined to say is, as much as the Fair Administrative Actions Act has widened the scope of judicial reliefs, it must always be remembered that the administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body, the business of administration could be brought to a standstill. The prospect of judicial relief cannot be held out to every person whose interests may be affected by administrative action. **(see De Smith, Woolf and Jowell, Judicial Review of Administrative Action, at page 3)**.

In the same book at page 18 it was stated that:

> ***"Yet in public law cases the quest for the lawful exercise of power will take into account both the rights of the person challenging Government action (who may be an individual, a group of individuals or another public body) and the fact that the body challenged is frequently acting on behalf of the public. Neither side should be favoured on the basis of their status as litigants. Yet at the heart of a system of public law should be a recognition of the need to strike the appropriate balance between the legitimate requirements of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals. When performing their functions, public authorities should recognise their responsibility to strike this balance. When this does not happen there needs to be a means of redress."***

It is for this reason that the Court has the discretion to grant or not to grant leave to an applicant to file an application for judicial review. In the absence of this step, public bodies would face a floodgate of judicial review applications and certainly 'the business of administration would be brought to a standstill.'

I must reiterate that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary stage, the intended application for prerogative orders. It is that stage that, in exercise of its discretion, the judicial review court will weigh between '*the legitimate requirements of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals.*'

If, upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs.

It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application for judicial review orders at which the discretion of this Honourable Court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.

For the reasons I have given, I am not persuaded by the decision in **Constitutional Petition No. 337 of 2018 Felix Kiprono Matagei versus The Honourable Attorney General & Another (2021) eKLR**, which the applicant's counsel invoked in his submissions, to the extent that it is suggested that the requirement for leave in applications for judicial review remedies is unwarranted.

I need to say something more about the applicants' application, assuming it was properly before court.

From what I gather on the face of the motion, it is their case that that they were dissatisfied with the omission by their employer not to remit their pension benefits to a particular pension scheme or at all and so they filed a complaint with the respondent dated 15 July 2020; the complaint was filed in accordance with section 46 of the Retirement Benefits Act, cap. 197.

The respondent did not act on the complaint almost a year after it had been filed yet it has previously made representations to the public that such complainants are resolved or ought to be resolved within six months after they have been filed.

The respondent's conduct, according to the applicants, has violated their constitutional rights, in particular Articles 47(1) and 159 (2) (b) of the Constitution and also breached sections 4 and 5 of the Fair Administrative Action Act.

That in summary, is the reason for the quest for the order of mandamus to compel the respondent to Act.

Section 48 (1) and (2) of the Retirement Benefits Act provides that any person aggrieved by the decision of the Authority of the Chief Executive Officer under the provisions of the Act or any regulations made thereunder may appeal to the tribunal within 30 days of the decision.

That section also provides that where any dispute arises between any person and the authority as to the exercise of the powers conferred upon the Authority by the Act, either party may appeal to the Tribunal in such manner as may be prescribed.

The Tribunal referred to is established under section 47 of the Act.

The procedure for determination of the sort of dispute that the applicants have lodged in this Honourable Court has been expressly provided in the statute. No reason has been given why they have chosen to overlook that procedure and invoke the judicial review of this Honourable Court instead.

It is trite that where there is an alternative remedy provided by an Act of Parliament which is as effective in resolution of a dispute, the court ought to ensure that the dispute is resolved in accordance with the relevant statute. This was so held in **National Assembly vs. Karume Civil Application No. Nai. 92 of 199 where the Court of Appeal said as follows:**

> ***"In our view, there is considerable merit in the submissions that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."***

It is also worth noting that amongst the laws that the applicant invoked in its application is section 9 of the Fair Administrative Action Act. Subsection (2) of that Act reads as follows:

> ***9. (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted***.

Both the decision of the Court of Appeal in the National Assembly case (supra) and section 9 of the Fair Administrative Action Act point to the principal that judicial review should only be invoked as a last resort in resolution of disputes and where there is a procedure that is equally effective and convenient that procedure should be first exhausted.

In the application before court, it has not been demonstrated that the prescribed procedure is not as effective or convenient as the judicial review one. Neither has it been demonstrated that the remedies available in the prescribed procedure are not as effective. In the final analysis, I find the applicants' application to be fatally defective, misconceived and an abuse of the due process of this Honourable Court. It is dismissed with costs.

SIGNED, DATED AND DELIVERED ON 27TH JANUARY 2022

NGAAH JAIRUS

JUDGE