



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 501 OF 2016

IN THE MATTER OF AN APPLICATION BY REUBEN

NGILA KITONYI FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE GOVERNOR, CENTRAL BANK

OF KENYA, AS GIVEN IN CAP 491, LAWS OF KENYA

REUBEN NGILA KITONYI.....APPLICANT

VERSUS

THE GOVERNOR CENTRAL BANK OF KENYA.....RESPONDENT

JUDGMENT

1. On 18th October 2016, the ex parte applicant Reuben Ngila Kitonyi filed an application for leave to institute Judicial Review proceedings to apply for an order of mandamus directed to the Governor, Central Bank of Kenya who is the respondent in this case, to give to the applicant certified copies of the proceedings leading to his termination of services from the Central Bank of Kenya or if there were no proceedings which led to his discharge from his office at the Central Bank of Kenya, then he be restored without loss of benefits, and costs to be in the cause.
2. The main ground upon which the application is predicated is that the main issue is that once charged with a crime, in which the respondent was the complainant, any invocation of it may have been discreetly used to deny the applicant the rules of natural justice (Audi Alteram Partem) before discharge.
3. The applicant was granted leave of court to file the substantive notice of motion for the said Judicial Review order of mandamus and on 28th November 2016 the applicant filed a notice of motion dated 14th November 2016 as per the leave granted on 14th November 2017.
4. The application is predicated on the statutory statement and affidavit of Reuben Ngila Kitonyi, sworn on 18th October, 2016 and annexures thereto.
5. The ex parte applicant's case as can be deduced from his statutory statement and affidavit is that he was an employee of the respondent Central Bank of Kenya until 26th September 1996 when he was removed from office with a termination under unclear circumstances. He however attributes termination from employment to the criminal case No. 281/1996 in which the respondent Central Bank of Kenya was the complainant.
6. He then filed JR No. 390/2016 which was meant to clear the criminal case above but that the said criminal case delayed in court due to the Director of Public Prosecution failure to proceed and so it was terminated without the knowledge of the applicant.
7. The applicant claims that all along, he had asked the respondent Central Bank of Kenya to supply him with the documents /proceedings which formed the basis for his termination from his employment but that the respondent had remained adamant.
8. He claims that no charges were served upon him prior to termination of his services hence the Central Bank of Kenya breached Rules of

Natural Justice. That at the time of his termination, he was waiting for conclusion of his criminal case which was nonetheless terminated by the Director of Public Prosecution without consulting him.

9. That despite several requests to Central Bank of Kenya to furnish him with reasons for his termination, Central Bank of Kenya has not responded hence these proceedings which also seek for his reinstatement because the criminal case was terminated under section 87(a) of the Criminal Procedure Code and that prior to his termination, he was earning half salary and kept asking Central Bank of Kenya for results of investigations which were never supplied to him and that is why he filed JR 390/2015 which was dismissed by Odunga J on 21st September 2016.

10. The respondent Central Bank of Kenya represented by Wekesa, Simiyu advocates filed a replying affidavit sworn by Kennedy Kaunda Abuja on 27th January 2017 contending in his depositions that he is the Director, Governor's Officer of Central Bank of Kenya.

11. According to the respondent, the ex parte applicant's motion is incompetent, an abuse of court process and incurably defective. It was contended that the applicant had earlier on filed a similar suit vide HC Miscellaneous Application No. JR 390/2015 Republic vs Director of Public Prosecution and Governor of Central Bank of Kenya Ex parte Reuben Ngila Kitonyi where the same orders as these were sought, which case was dismissed by Odunga J on 21st September 2016.

12. That the Governor of Central Bank has no capacity to sue and be sued in his own name and that even though, the motion as filed by the applicant is a mask, cloak, sham and veil for a backdoor claim for reinstatement which this court does not have jurisdiction to grant.

13. That the applicant's services with the Central Bank of Kenya were terminated on 26th September 1996 on account of gross misconduct after conclusion of disciplinary process undertaken in accordance with the Bank's Staff Rules, Regulations and Policies and which process was not underpinned by the criminal process which was ongoing.

14. That as a consequence, his claim for reinstatement has overtaken by the statute of limitation. Further, that Article 165(5) and 162(2) of the Constitution bars this court from hearing and determining matters of Employment and Labour Relations. That the applicant lied that his motor vehicle KAA 250X had been vandalized but preliminary investigations revealed that the applicant had breached rules governing care loan scheme and that he was involved in forgery and that before his services with the Central Bank of Kenya were terminated, he was given an opportunity to be heard before the appointments, promotion and Disciplinary Committee meeting held on 18th September 1996 where he was found to have forged documents by stamping and signing an insurance claim discharge voucher without the consent and knowledge of the keeper of the stamp.

15. That as a result, the committee recommended the termination of the applicant's services as shown by the annexed minutes and letter of termination of employment made in accordance with Rule 6.21 as reads with Rules 3:17 and 3:46 of the Stamp Rules and Regulations annexed.

16. That thereafter, the applicant lodged several appeals for the termination to be reconsidered but his appeals were never successful. The respondent denies that the criminal case No, 2881/1996 was the cause of termination of the applicant's employment. That the police independently carried out their own investigations and caused the applicant to be charged with a criminal offence and that this was after the Central Bank of Kenya lodged a complaint hence malice or illegality cannot arise under any circumstances on the part of the respondent.

17. That in any event, the applicant's complaint against his prosecution and termination of the charges thereof should be directed at the Attorney General not the respondent who had no control over the case.

18. That if the applicant has any issues relating to his employment termination then he should lodge his claim with the Employment and Labour Relations Court and not the High Court hence the proceedings herein should be dismissed with costs.

19. With leave of court, the ex parte applicant filed a further affidavit on 17th February 2017 in reply to the respondent's affidavit sworn by Kennedy Kaunda. The applicant reiterated his earlier assertions and depositions and denied all the contentions and depositions by Mr Kennedy Kaunda.

20. Parties agreed and filed written submissions and when the matter was due for highlighting of the written submissions, the applicant was granted leave to cross examine Mr Kennedy Kaunda the deponent of the Respondent's replying affidavit. Despite spirited opposition by the respondent's counsel on record, the applicant was on 23rd October 2016 allowed to cross examine Mr Kennedy Kaunda, Board Secretary and Director on charge of legal services at Governor of Central Bank and Director in the Governor's office in charge of Security and communication.

21. In cross examination Mr Abuga stated that he joined the Central Bank of Kenya in 2005 and that he was aware of the JR 390/2015. He denied that criminal charges were used to terminate the applicant's services with Central Bank of Kenya. He maintained that the termination letter of the applicant gave reasons. He stated that as a member of staff of Central Bank of Kenya, he was suspended on 9th September 1996 in accordance with Staff Rules and Regulations after he was given an opportunity to respond to the charges which he did on 6th September 1996 in writing.

22. Further, that the applicant was given reasons for his suspension and he responded thereto. He also stated that the car issue was related to the applicant's employment as it was a benefit arising from his employment and was governed by clear guidelines. He stated that he had not picked out any invitation for the applicant to appear before Appointments, Promotions and Disciplinary Committee (APDC) but maintained that the Appointments, Promotions and Disciplinary Committee took into account Mr Ngila's comprehensive response to the suspension issues raised. He stated that he had attached as investigations report to his replying affidavit although he denied attaching the

discharge voucher which he stated was in the investigations report. He conceded that a show cause letter was not annexed to his affidavit. He stated that investigations were carried out by police to establish the allegations to police and insurance that the car was stolen.

23. Mr Abuga stated that the request for reinstatement was declined by the Central Bank of Kenya.

24. In re-examination by Mr Simiyu counsel for the respondent, Mr Abuga stated that he had attached to his replying affidavit at page 77 the letter of termination of the applicant's employment and that the applicant responded to the allegations levelled against him. He denied that the Central Bank of Kenya had been sued before the Industrial Court over the applicant's employment termination Mr Abuga maintained that he stood by his depositions in his replying affidavits.

25. Parties were then directed to highlight their written submissions on a later date of 6th November 2017 but on 6th November 2017 they all agreed to adopt their written submissions and authorities filed for the court's consideration and determination.

26. The applicant had earlier on filed his submissions and issues for consideration. He was also granted leave of court to file his highlights after he lost his voice.

27. According to the applicant, he asked to be given elaborate proceedings leading to his termination of employment so that he can seek for certiorari to have those proceedings quashed after which he can seek for mandamus to have him reinstated back to his job.

28. That he sought for mandamus because despite his demands for the elaborate proceedings leading to his termination from employment, the respondent adamantly refused to supply him with the proceedings.

29. According to Mr Ngila, without elaborate proceedings being produced by the respondent, the respondent has no defence in this matter where alternative prayers are sought in the prayer for mandamus. The applicant maintained that this court has jurisdiction to order for mandamus and reinstatement since the criminal charges against him were terminated and that his dismissal was done without any basis in law as he was never given letter of notice to show cause hence there was no reason to terminate his employment.

30. He relied on **John Shanguya vs The Public Service Commission and 2 Others HC Miscellaneous Application No. 31/1983** and maintained that in the absence of proceedings leading to his termination, he could only apply for mandamus not certiorari. He also relied on **Chief Constable vs Evans HL[1982] 141** on termination of employment and **Jupiter Insurance Vs Rayabali Hasham [1960] EA 592** with the latter case relating to matters of insurance of motor vehicles.

31. In his highlights, the applicant maintained that he could only be discharged from office according to the terms of service, as a public officer. He relied on **Ridge vs Baldwin & others** and argued that having been discharged in the criminal case, those facts in the criminal matter could not be relied on to terminate his employment since no evidence was adduced to prove his involvement in the alleged crime of forgery. He stated that even after cross examining Mr Abuga, it was clear that there were no elaborate proceedings that led to his termination from employment hence this court should order for the reinstatement of the applicant back into his employment. The applicant submitted that he had been discriminated because other staff of the respondent were on half pay when their criminal cases were pending and that after their acquittal, they were relied on **criminal case No. 511/2009 Republic vs Lucy Nyokabi Wairoto and Agnes Naiyala**.

32. He maintained that he was never heard and was never given a show cause letter as required by the terms of his public office, which facts he asserts, were never controverted by the respondent.

33. He further maintained that nobody can be discharged from a public office without application of the Rules of natural justice. That unlike in the **Chief Constable of North Wales Police vs Evans** case, the applicant was not a trainee. That he was a full time employee. The applicant submitted that before his arrest, there were no internal charges preferred against him and that he was never served with those internal charges afterwards which violates the rules of natural justice. He also submitted that this matter is not the same as JR 390/2015 because the latter matter related to a criminal case hence this matter must not be resjudicata 390/2015 which related criminal charges.

34. Reliance was placed on **Ochong Okello vs Maseno University HC Miscellaneous Application 227/2003 (Kisumu)** where the court held that "*decision made by persons endowed with authority must be certain, reasonable, predictable and show a sign of continuity but not to smack confusion and contradiction.*"

35. Further reliance was placed on **University of Ceylon vs Fernando** (no Citation where the Privy Council stated that once a question is asked, and there is no reply, there should be clear position to grant an order of certiorari to quash the dismissal. That in this case, he has asked questions about vouchers which he was charged with, in the criminal court and that of the internal proceedings but there is no answer, yet a voucher cannot lead to a discharge, where even the effect of the that voucher is not stated.

36. The applicant urged this court to allow his application and grant the orders of mandamus as sought so that he can be restored into the service with costs to him. Submissions filed by the applicant on 6th April 2017 the applicant reiterated his position and maintained that the respondents decision was not reasonable and that the respondent was evasive and that in the absence of termination proceedings this court must allow his application. He also cited the decision of **Odunga J in JR 390/2015** where the learned judge stated that if the applicant's termination of employment was based on the terminated criminal proceedings there is nothing stopping him from reclaiming his position assuming the law allows such remedy.

37. The respondent filed submissions on 10th March 2017 maintaining that the application by the applicant is an abuse of this court's process because this matter is Resjudicata JR 390/2015.

38. Reliance was placed on **Omodi vs National Bank of Kenya & Others [2001] EA 177 and E.T. vs Attorney General & Another [2012] e KLR** on the need for courts to be vigilant to guard against litigants evading the doctrine of resjudicata by introducing new causes of action so as to seek the same remedy before the court. It was further submitted that the applicant's application is already spent or overtaken by events and or the remedy sought has already been availed to him through the replying affidavit which shows his services were terminated for gross misconduct through an elaborate process. that under Section 10 of the Employment Act Cap 126, an employer is only obliged to keep employment records of an employee for a period of 5 years yet in this case, it was submitted, the respondent had availed documents showing the process leading to the applicant's termination.

39. It was submitted that therefore the 2nd limb of motion which was depended on the first limb of availing proceedings of his termination, is superfluous. It was also submitted that Judicial Review is not concerned with the merits of the decision which is apparent in this case. Reliance was placed on **James Opiyo Wandayi vs KNA & 2 Others [2010] e KLR and Republic vs NTSA & 10 Others exparte James Maina Mugo [2015] e KLR**.

40. It was also submitted that this matter is an employment and Labour Relations matter disguised as Judicial Review. Reliance was placed on **Republic vs Chief Executive Officer IEBC & Another Exparte M' Anyiri Hannington Gitaari[2016] e KLR** where the court held that mandamus is not an order of specific performance like in a contract situation. There must be a statutory duty in existence to be performed by the person and which has not been performed.

41. Further reliance was placed on **Seven Seas Technologies Ltd vs Eric Chege [2014] e KLR** where the court stated that the High Court is expressly excluded by the Constitution to deal with matters under Article 162 of the Constitution.

42. It was further submitted that any claim for reinstatement is barred by statute as the termination was made on 26th September 1996 over 20 years ago. Reliance was placed on **Section 90 of the Employment Act and Rosemary Wanjiku Kungu vs Elijah Macharia Githinji & Another [2014] e KLR**.

43. The respondent urged the court to dismiss this case with costs to the respondent.

DETERMINATION

44. I have considered all the foregoing and more importantly, the exparte applicant's several issues and submissions filed on record one after the other as highlighted and the authorities relied on. I have taken into account the fact that the applicant was self represented (prose) litigant and despite advise by the court as stipulated in Article 48 of the Constitution that he obtains free legal aid and or representation from the National Legal Aid Service housed at the office of the Attorney General and Department of Justice, he declined.

45. I have also taken into account the respondent's position and submissions supported by statutory, case law and constitutional provisions cited.

46. In my humble view, they only issue that would dispose of the protracted matter which has taken this court a lot of judicial time to hear, so that the parties and especially the exparte applicant who is self represented to not only feel that he has been heard, but given ample opportunity to be heard including cross examination of the respondent's representative is whether this court has jurisdiction to hear and determine the matters raised herein.

47. From the exparte applicant's notice of motion, grounds, affidavits, brief submissions, issues for consideration, further submissions and issues filed and the highlighted submissions, no doubt, the claim hinges on his termination from the employment on 26th September 1996 which he claims was uncalled for because he was never given an opportunity to be heard or even a notice to show cause letter. He also claims that the Central Bank of Kenya terminated his services when the criminal case was still pending and that therefore the criminal case having been terminated by the prosecution, though without involving him, he should be restored back to his job. He seeks for an order of mandamus at the respondents to give the applicant certified copies of the proceedings leading to his termination of services from Central Bank of Kenya and that if there are no such proceedings which led to his discharge from his office at the Central Bank of Kenya, then he be restored without loss of benefits.

48. In his submissions, the applicant claims that is only after he is supplied with the certified copies of proceedings that he can apply for certiorari to quash the decision to terminate his services otherwise he should be granted mandamus to compel the supply of the proceedings and if such proceedings are not supplied then the respondent should be compelled to restore him to his job at the Central Bank.

49. The respondent in its replying affidavit contends that the claim herein is an abuse of court process, is frivolous, vexatious, is spent, as the proceedings/minutes of the Appointments, Promotions and Disciplinary Committee are now annexed to the reply; is unmerited and that this court has no jurisdiction to hear and determine such a matter which relates to Employment and Labour Relations which is in the presence of Employment and Labour Relations Court. It is also alleged and contended that this matter is resjudicata JR 390/2015 where the applicant sought mandamus to compel the Director of Public Prosecution to give him an investigation report after terminating his criminal case No. 2881/96 under the Section 87(a) of the Criminal Procedure Code pending investigations.

50. I have no doubt that the matter relates to Employment and Labour Relations. Similar or the same prayers could be lodged before the Employment and Labour Relations Court. That court has the same status as the High Court but has no concurrent jurisdiction with regard to the nature of the disputes that the court is to hear and determine.

51. Article 162(2)(a) of the Constitution contemplates the establishment of a specialized court to hear and determine disputes relating to Employment and Labour Relations.

52. Article 162(3) mandates Parliament to enact legislation to confer jurisdiction and functions to the said court. In 2011, Parliament enacted the Industrial Court Act which was later renamed the Employment and Labour Relations Court. Section 12(1) of the said court provides for the jurisdiction of the said court which includes disputes between employees of former employees and their employers or former employees, among others.

53. In addition, Section 12(1) of the Act provides for powers of the court to grant orders including prerogative orders or Judicial Review remedies. That means that the court is vested with jurisdiction to hear and determine Judicial Review proceedings and make any of the Judicial Review orders or remedies contemplated in Sections 8 and 9 of the Law Reform Act; and Order 53 of the Civil Procedure Rules to wit; mandamus, certiorari and prohibition.

54. Article 165 (5) (b) of the Constitution expressly bars the High Court from hearing and determining disputes falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution. The courts are the Employment and Labour Relations Court and the Environment and Land Court Act.

55. It follows that this court cannot arrogate itself of any jurisdiction which it is not conferred with and which jurisdiction is, in the first instance, taken away by the Constitution and an Act of Parliament and clothed in a specialized court- Employment and Labour Relations Court.

56. The Constitution is the Supreme Law of the land and where it either confers or divests a court of jurisdiction, no other organ, Authority or person or body, not even by consent of parties can vest jurisdiction in a court or tribunal.

57. Mandamus seeking supply of certified copies of proceedings leading to the applicant's termination from employment and in default the applicant be reinstated into his employment are twin orders or Judicial Review remedies which can only be issued by a court of competent jurisdiction.

58. Moreso, for mandamus to issue, there must be demonstrated a public or statutory duty placed upon the respondent to perform, which the respondent has failed to perform, and not a discretionary duty.

59. It was not demonstrated that the respondent Governor of Central Bank who is an office holder of Central Bank of Kenya, a statutory and constitutional entity, had failed to supply the applicant with proceedings leading to his termination from employment.

60. Nonetheless, the applicant produced minutes of Appointments, Promotions and Disciplinary Committee; and mandamus not being an order of specific performance like in a contract situation, this court is devoid of any jurisdiction to hear and determine the matters raised by the exparte applicant which all relate to his employment with his former employer Central Bank of Kenya and which matters the Employment and Labour Relations court would have jurisdiction to hear and determine on their merits.

61. For example, the Employment and Labour Relations Court is the only court which can determine whether in terminating the applicant, he was accorded a hearing, whether the Rules of natural justice were adhered to, whether the termination was related to the criminal proceedings in cr. 2881.96 which were prematurely terminated under Section 87(a) of the Criminal Procedure Code and therefore whether the applicant deserved to be restored back to his job.

62. Jurisdiction is everything without which a court of law acts in vain. This is a principle espoused in **Owners of Motor Vessel "Lilian S" vs Caltex Oil (K) Ltd.**

63. It is for those reasons that this court having found and held that it is devoid of any jurisdiction to hear and determine this matter that it must down its tools and say no more.

64. Accordingly, the entire proceedings hereto are struck out for want of jurisdiction, despite the court having accorded the applicant all the time that he required to be heard on his claim.

65. Costs are in the discretion of the court. However, in this case, I am of the view that the order that commends itself in the circumstances prevailing in a long standing dispute pitying the applicant's former employee of Central Bank of Kenya and Governor of Central Bank of Kenya is that each party shall bear their own costs of these proceedings which are hereby struck out.

Dated, signed and delivered in open court at Nairobi this 25th day of January, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Reuben Ngila the applicant in person

Mr Gathiba h/b for Mr Simiyu for the Respondent

CA:KOMBO