



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 59 OF 2015 (JR)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS IN THE NATURE OF PROHIBITION AND CERTIORARI TO QUASH THE DIRECTIVE OF THE OFFICER COMMANDING LIKONI POLICE STATION MADE ON 11TH DECEMBER, 2015

AND

IN THE MATTER OF: ARTICLE 47 OF THE CONSTITUTION OF KENYA GUARANTEEING EVERYONE THE RIGHT TO FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF: ORDER 53 RULES 1, 2 AND 3 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORMS ACT

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT AND POLICE FORCE STANDING ORDERS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. DEPUTY INSPECTOR GENERAL OF POLICE

2. OCS LIKONI POLICE STATION.....RESPONDENTS

AND

GITONGA MOHAMMED STANLEY.....EX PARTE APPLICANT

RULING

1. In his Notice of Motion dated 3rd December, 2015 and filed on 4th January, 2016, the ex parte Applicant Gitonga Mohammed Stanley sought the following orders -

- (a) an order of certiorari to remove into this Honourable Court and quash the order made on 11/12/2015 confirming the decision of the 1st Applicant made on 14/11/2014 and communicated to the Applicant through the 2nd Respondent;
- (b) an order of prohibition directed at the Respondents restraining them from compelling the ex parte Applicant to report to Griftu Police Station or taking any action against the Applicant for failing to report to aforesaid Station;
- (c) the costs of the Application.

2. The Applicant's case is set out in the Statutory Statement dated 17th December, 2015, the Affidavit Verifying the Facts sworn on 17th December, 2015, and filed on 18th December, 2015, and the Applicant's counsel's written submissions dated 14th March, 2016, and filed on 15th March, 2016 together with the authorities cited therein and attached thereto.

3. In brief, the Applicant's case is that his transfer to Griftu Police Station in Wajir County is contrary to the Force Standing Orders which provide that an officer would serve in an operational area for a period of three years, while he had served in the area for a total of eleven (11) years. He served for four (4) years in Ijara Division of North Eastern Province. He was transferred to Mandera Division in the same Province where he served from the year 2004 to 2008. He was transferred to Marsabit Division where he says, he served diligently before being transferred to Tigania in Meru Eastern Province, where he served for about one year before transfer to Likoni Police Station. The Applicant pleads that in the course of his service in North Eastern Province, his wife deserted him, as it is not conducive to live with a spouse in those areas.

4. The Applicant also pleads that despite his appeal dated 24th November, 2014 against his transfer, he received no response but that instead, he was subjected to a **Marching Order** procedures on 11th December, 2014 requiring him to report to his new posting at Griftu Police Station.

5. According to the **Marching Orders**, the Applicant was released, and was to report to his new Station in terms of the transfer letter dated 14th November, 2014.

6. Unhappy with that course of events, the ex parte Applicant came to this court and obtained **stay orders** pending the determination of his application, the subject of this Ruling. The Applicant therefore seeks the orders first above referred to.

THE RESPONDENT'S CASE

7. The application was opposed by the Respondents, **firstly**, through the Grounds of Opposition dated 5th January, 2016 and filed on 6th January, 2016 by the Attorney-General. **Secondly** by the Replying Affidavit of No. 13733640, Samuel Kiponda, the OCS Likoni Police Station sworn on 1st March, 2016, and filed on 3rd March, 2016. **Thirdly**, by the Written Submissions of the Attorney-General dated 6th April, 2016 and filed on 7th April, 2016, together with the authorities cited therein and relied upon on behalf of the Respondents.

8. The Respondents oppose the Applicant's application on two fronts, **firstly** that the question raised by the Application is one of employment, and that this court has no jurisdiction by virtue of Article 162(2) (a) of the Constitution pursuant to which the Employment and Labour Relations Court was established under the Employment and Labour Relations Act, (Cap 234B), and which court bears and determines disputes relating to employment and labour relations, and that no amount of judicial craft or ingenuity would confer jurisdiction upon this court. Counsel relied on the case of **SAMUEL KAMAU**

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

9. The same conclusion was reached in the case of **IN THE MATTER OF INDEPENDENT ELECTORAL COMMISSION (APPLICANT) (Constitutional Application Number 2 of 2011)** where the court held –

“Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

10. On that ground alone, counsel for the Respondents submitted that the court lacks jurisdiction, and the application should be disallowed as it does not fall within the jurisdiction and ambit of this court (High Court).

11. Counsel also argued that the courts do not act in vain, and the orders sought in the Notice of Motion are in vain. Counsel argued that since the Applicant abandoned the application to quash his transfer, but the marching orders, the orders of transfer would remain valid, and the quashing of the Marching Orders would be in vain. Reliance was placed upon the case of **MINISTER FOR ROADS AND PUBLIC WORKS & ANOTHER, ex parte Kyevaluki Services Limited [2012]eKLR.**

12. Counsel for the Respondents also urged the court to deny the orders of prohibition. The order to transfer the ex parte Applicant was a lawful order, and failure to abide by such an order, is a disciplinary offence under Section 15 of the Police Act, (Cap 89, Laws of Kenya). Counsel also submitted that it is mischievous of the Applicant to seek an order of prohibition for any disciplinary action against him. The discretion to prefer criminal charges arising out of any criminal conduct lies in the office of the Director of Public Prosecution as donated to him by Article 157 of the Constitution.

13. On the proposition that the prayer for an order of prohibition is presumptive and speculative, counsel relied on the cases of **REPUBLIC VS. MINISTER FOR ROADS AND PUBLIC WORKS & ANOTHER ex parte Kyevaluki Services Limited [2012] eKLR.** Counsel also argued that the application herein does not meet the conditions for grant of an order of prohibition as laid down in the case of **KENYA NATIONAL EXAMINATIONS COUNCIL VS. REPUBLIC ex parte Geoffrey Gethinji & 9 others [1997]eKLR.**

14. For those reasons counsel urged that the application herein be dismissed with costs to the Respondent.

ANALYSIS

15. I have considered the respective submissions by counsel arising out of their pleadings. The related issues for determination are **firstly**, whether this court has jurisdiction to determine the application herein and if it does not, it must lay down its pen and ink-pot. If yes, it must determine whether the orders of certiorari and prohibition lie.

16. This court has, by virtue of Section 8 of the Law Reform Act (Cap 26, Laws of Kenya) jurisdiction to determine the application herein. Section 8 aforesaid provides that the High Court shall not, in its civil and criminal jurisdiction issue any of the prerogative orders of **certiorari, prohibition or mandamus.** A **fortiori**, the Employment and Labour Relations Court would also have such jurisdiction. This is because, judicial review is a jurisdiction **sui generis**, of its own kind, a special jurisdiction, which is neither civil nor criminal **COMMISSIONER OF LANDS VS. HOTEL KUNSTE KLR (E&L) 249.**

17. It has been stated in numerous cases, but, it pays to reiterate here that judicial review is not about the merits of case, but the decision-making process. In **REPUBLIC VS. KENYA REVENUE**

AUTHORITY, ex parte Yaya Towers Limited [2008]eKLR, the Court of Appeal expressed itself thus

“... the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that of the authority constituted by law to decide the matter in question.”

18. As stated in the decision in the English case of **CIVIL SERVANTS UNION VS. THE MINISTER FOR CIVIL SERVICE [1985] AC**, the remedy of judicial review, and in particular the remedy of “certiorari”, is founded upon the three “I’s”, “**illegality**”, “**irrationality**”, and “**procedural impropriety**”, all summarized in the doctrine of “**ultra vires**”, and is intended and meant to correct the various improprieties which may be committed by those entrusted with the exercise of public authority. The **YAYA Centre case** (supra), expanded Lord Diplock’s three “I’s” into –

- (i) abuse of discretion;
- (ii) irrationality;
- (iii) excess of jurisdiction;
- (iv) improper motives;
- (v) failure to exercise discretion;
- (vi) abuse of the rules of natural justice;
- (vii) fettering discretion;
- (viii) error of law.

19. In **REPUBLIC VS. ANTI-COUNTERFEIT AGENCY & 2 OTHERS ex parte Surgipharm Limited [2011]eKLR** the court referring to Halsbury’s Laws of England, 4th Edition Vol. III, paragraph 12, at page 270, the court said -

“**The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ... are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver of the right to object may also result in the court declining to grant relief.**”

20. The Court of Appeal set out instances in which the court will grant an order of prohibition in **KENYA NATIONAL EXAMINATION COUNCIL VS. REPUBLIC, ex parte Geoffrey Githinji & 9 others (supra)**, where at pages 11 and 12 of its decision, the court said –

“**What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids the tribunal or body to continue proceedings thereon in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct, the course, practice or procedure of the inferior tribunal, or a wrong decision on the merits of the proceedings....the point we are making is that an order of**

prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.”

21. In **JGH Maina A/S WESTERN MARINE SERVICES LIMITED, CNPC NORTH EAST REFINING & CHEMICAL ENGINEERING COMPANY LIMITED/PRIDE ENTERPRISES VS. PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS [2015]eKLR** the court cited with approval the decision of Kasule J of Uganda in **PASTOLI VS. KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2009]2EA 300** where the same Judge noted –

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...”

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...”

22. In **MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC [2002] eKLR**, the Court of Appeal observed -

“In judicial review, the court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made?

23. The court considered what constitutes legitimate expectation, in the case of **REPUBLIC VS. KENYA REVENUE AUTHORITY, ex parte AMSCO Kenya Limited [2014]eKLR** –

“It was held in Keroche Industries Limited vs. Kenya Revenue Authority & 5 others, [2007] KLR.....legitimate expectation is based not only on ensuring that legitimate expectation by the parties are not thwarted but on a higher public interest beneficial to all including the respondents, which is, the value or need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way...Public authorities must be held to their practices and promises by the courts and the only exemption is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”

DETERMINATION

24. The Application herein is essentially that the transfer of the Applicant was unjustified for contravening the rules of natural justice because the Applicant legitimately and reasonably expected not to be transferred to an operational area after having served in those areas for not less than eleven (11) years of his fifteen years’ service in the Police Service. Is this Applicant justified in this contention?

25. I do not think that there is any doubt or dispute that the National Police Service Commission established under Article 246(a) of the Constitution of Kenya 2010, has power to **recruit and appoint persons to hold or act in offices in the Service, confirm appointments, and determine promotions and transfers within the National Police Service** and also perform other functions prescribed by national legislation. Section 21(2)(c) of the National Police (Amendment) Act, empowers a Service Board (established under Section 21(c) of the Act), to determine the recommendations of the Service on recruitments, promotions, transfers and discipline for submission to the National Police Commission.

26. The ex parte Applicant has challenged the process of his transfer – the release or “Marching Order” dated 11th December, 2015. His submissions have however dwelt entirely on the propriety of his transfer and by extension of the Marching Order.

27. The question to the answer is whether the “**Marching Order**” is tainted with illegality, unreasonableness or procedural impropriety. In my humble opinion, the answer must be in the negative.

28. An Officer Commanding Station (OCS) is bound to obey an order of transfer of any officer once transmitted to him under Article 247(3)(a) of the Constitution, and made in terms of legislation enacted pursuant to Article 246(3)(c), that is the National Police Act, 2011 as amended by Section 16 of the National Police Service (Amendment) Act, 2014, and actioned in terms of Section 21(3) € of the said Act. The Second Respondent had no authority to go back to inquire from the First Respondent whether the Applicant’s transfer was legitimate.

29. Whereas there is second reason in the Applicant’s argument on legitimate expectation, he has not sought to have the decision to transfer him quashed. He has attacked a procedural decision which was in the chain of command legitimate and the Applicant is bound by his pleadings. There is no merit in this case.

30. In the circumstances, the Notice of Motion dated 30th December, 2015, and filed on 4th January, 2016 is dismissed with no order as to costs.

31. It is so ordered.

Dated, Signed and Delivered in Mombasa this 17th day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Njenga holding brief Otware for Applicant

Miss Lutta holding brief Ngari for Respondent

Mr. S. Kaunda Court Assistant