REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 194 OF 2014(JR)

IN THE MATTER OF AN APPLICATION BY RICHARD KIPKOGEI SAMOEI FOR THE JUDICIAL REVIEW ORDER OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT CAP. 212 LAWS OF KENYA

AND

IN THE MATTER OF TSC ACT L.N 137/1967 – SCHEDULE

AND

IN THE MATTER OF THE CODE OF REGULATION FOR TEACHERS

AND

IN THE MATTER OF THE DECISION OF THE TEACHERS SERVICE COMMISSION TO DISMISS THE EX-PARTE APPLICANT FROM TEACHING SERVICE AND OF REMOVAL OF THE EX-PARTE APPLICANT NAME FROM THE REGISTER OF TEACHERS

BETWEEN

REPUBLIC …….……..……. APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION…….....….1ST RESPONDENT

THE SECRETARY APPEALS TRIBUNAL…….…..2ND RESPONDENT

THE PDE RIFT VALLEY PROVINCE…..…….....…3RD RESPONDENT

DISTRICT EDUCATION OFFICER,

RONGAI DISTRICT…….....……4TH RESPONDENT

EX-PARTE APPLICANT

RICHARD KIPKOGEI SAMOEI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 19th March 2015, the ex parte applicant herein, **Richard Kipkogei Samoei**, seeks the following orders:

> **a. THAT an order of mandamus do issues directing the 1st Respondent to forthwith facilitate or allow the Ex-parte applicant to resume his teaching services.**
>
> **b. THAT costs of this application be provided for.**

Ex Parte Applicant's Case

2. According to the applicant, he is a teacher or was a teacher employed by the **Teachers Service Commission,** the 1st Respondent herein (hereinafter referred to as "the Commission") under TSC/NO. 259093. On the 25th day of January 2011 the respondent without affording him "a fair hearing'' or failing to accord him an opportunity of putting forward his own case in answer, engaged in an act which, according to him, constituted an error of law in reaching a decision of the same day to dismiss him from the teaching service.

3. Following the institution of these proceedings, the applicant contended that the reinstated him into the Register but declined to put him in the teaching service in a sense behaving irrationally or arbitrary. In addition, the said reinstatement was only to the register but had no back salary or any benefit attached.

4. It was therefore submitted on behalf of the applicant that after the Notice of Motion was served, the parties tried an out of court settlement which did not materialize as the respondent only went ahead to reinstate the applicant to the register but failed to post him on official duties. It is through the correspondences between the parties that the 1st respondent indicated that the teacher was only being reinstated back to the register because it is the respondent's practice that after two years of dismissal from service a teacher is reinstated back to the register and not service.

5. According to the applicant, he was dismissed through a letter dated the 25th day of February 2011 and was only reinstated back to the register after he came to court and more than three years after he was dismissed. Consequently the argument by the 1st respondent that it is the norm to do that is not only a lie but capricious in nature to defeat the end of justice as it would serve no purpose to reinstate him to the register when he was not not posted to work.

6. It was the applicant's case that though he lodged an appeal against the decision of the Commission, the same was never determined. To him, the Respondents' actions were therefore capricious as they were only meant to get rid of him herein without following due procedure. In his view, where the rules of natural justice are not adhered to then justice cannot be said to have been administered, by not according the applicant herein audience to appeal when the applicant directly applied to the required body and which body is mandated to hear the appeal but failed to do so at their own volition. In support of his submissions, the applicant relied on **Republic *vs* Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**, **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998, Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998**, **Re: National Hospital Insurance**

Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004 , **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553** in support of his submission that he was not accorded a fair administrative, expeditious, efficient, lawful, reasonable and procedurally fair hearing contrary to Article 47 of the constitution of Kenya.

7. According to the applicant, the Commission never followed the procedures set out in their Code of Regulations, the code required that the applicant be granted adequate time for preparation and presentation of his case. In the instant case the respondent was charged with having carnal knowledge of a pupil named **Nancy Charity Kipngetich Kogoyo** which led to her pregnancy and birth of a baby boy named **Victor Kipkemboi.** The applicant raised several exculpatory facts central and mainly being the paternity of the child which were ignored by the Commission, which in his view considered irrelevant factors in arriving at its decision. It was further averred that the applicant was never granted an opportunity to adequately prepare a defence hence was not granted adequate facilities to defend himself.

8. It was however contended by the applicants that all the acts of the Commission were **"now water under the bridge''** after it reinstated the Applicant to the Register of Teachers.

9. According to the applicant, whatever the issues, he had been reinstated to the register but with no back benefits, no back salary but importantly and that is the gist of the Applicant complaint, he was not allowed back to class and that is why he contended that the Commission was acting unreasonably, irrationally and whimsically. To him the decision to reinstate a teacher to the register and leave him or her there and there defies logic and amounts to unfairness by the decision making authority.

10. According to the applicant, in the instant case there was procedural impropriety unreasonableness and taking in to consideration extraneous matters by the decision making authority when it failed to observe rules of natural justice and furthermore failed to observe procedural rules expressly laid down in the Teacher Service Code. As such therefore the judicial review application has merit and ought to be granted by the court.

11. It was the applicant's case that by reinstating him to the Register and denying him a chance to go back to class and teach in a career that he trained, examined, invigilated, graduated and allowed to teach, the Respondents' action was unreasonably, irrational, capricious and whimsical hence a candidate for quashing in their totality as they were null and void ***ab initio***.

12. It was the ex parte applicant's case that this application was not opposed hence the reliefs ought to be granted.

1st Respondent's Case

13. The Commission on is part justified the decision it took against the applicant and contended that the same was based on the material facts justified. It denied that there was unfairness in the manner in which it conducted its proceedings and accused the applicant of withholding material facts from the Court.

14. In its submissions the Commission contended that the dispute herein was founded on a contractual relationship hence had no public law connotation and as a result these proceedings are incompetent. This submission was based on **Stephen Muthengi Kanui vs. Teachers Service Commission JR No. 98 of 2011**.

15. It was the Commission's position that reinstatement was not a remedy available to the applicant considering the nature of the relationship between the parties to these proceedings.

16. Based on sections 30 and 31 of the ***Teachers Service Commission Act***, Cap 212, Laws of Kenya (hereinafter referred to as "the Act") the Commission submitted that whereas it has the power to restore

the name of a teacher back to the register, such restoration does not automatically lead to reinstatement of the teacher back to the employment which reinstatement would lead to employer- employee relationship.

Determinations

15. I have considered the foregoing.

16. Although the applicants revisited the history of the dispute and concentrated on whether or not his dismissal was lawful, as he eventually appreciated, those issues were rendered superfluous by his reinstatement to the Register. The only issue before this Court is whether the Commission was under a statutory obligation to reinstate him to employment consequent upon his restoration to the register. To determine this issue one has to revisit the principles guiding the grant of an order of *mandamus*.

17. In **Shah vs. Attorney General (No. 3) [1970] EA 543,** it was held that:

> ***Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature."**

18. Similarly in **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** it was held by the Court of Appeal that:

> **"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way."**

19. What comes out clearly from the foregoing is that *mandamus* will only issue where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest in which event the court is then clothed with the jurisdiction to grant the relief in the nature of *mandamus* to compel the its fulfilment. The Courts will therefore not intervene to compel an action by unless the duty to act is clearly established and plainly defined and the obligation to act is peremptory. The person seeking *mandamus* must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty not be permissive but imperative and must be of public rather than private nature. See **Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathondu Miano Civil Appeal No. 24 of 1985.**

20. In this case, the applicant's case is premised on the ground that the Commission having restored his name the register, it would be irrational to leave him "high and dry'' without him being posted to a School.

21. Section 31 of the ***Teachers Service Commission Act,*** Cap 212, Laws of Kenya provides:

> ***(1) Where the name of any person has been removed from the register, the Commission may, either of its own motion or on the application of the concerned teacher made in the prescribed manner, and in either case after observing due process, direct that—***
>
> ***(a) the removal of that teacher's name from the register be confirmed; or***
>
> ***(b) the name of the teacher be restored in the register.***
>
> ***(2) An application under subsection (1) may only be made after the expiry of a period of eighteen months from the date of removal of the name from the register.***

22. These proceedings were commenced by way of a Chamber Summons dated 23rd May, 2014 in which the ex parte applicant sought leave to apply for a raft of judicial review orders out of time and that upon the same being granted that lave be granted to him to apply for orders of certiorari to quash the Commission's impugned decision and mandamus to compel it to reinstate him to the register and allow him to resume his teaching services.

23. Before even the leave to apply out of time could be granted, the Court was informed that the applicant had been reinstated. Thereafter followed a series of mentions geared towards an amicable settlement which eventually failed. On 2nd March, 2015 this Court granted leave in terms of the said chamber summons. However in the Notice of Motion filed pursuant to the said leave, the applicant only sought an order of *mandamus*.

24. The effect of the foregoing is that the decision by the Commission removing the name of the ex parte applicant from the register has never been quashed. That the Commission on its own motion decided to restore his name to the register in the exercise of its powers under section 30 of the said Act, in my view is not the same thing as quashing its decision.

25. Section 31 of the Act does not state that pursuant to the restoration of a teacher's name to the register the Commission is then obliged to post the same teacher to a school. No other legal provision or other duty was cited to me that would oblige the Commission to do so. In the premises, there is no basis upon which this Court can compel the Commission to post the applicant to a school when there is no obligation, statutory or otherwise that is placed on it to do so.

26. Apart from that it is clear that the applicant had exercised his appellate options against the decision of the Commission. That appeal, according to the applicant has never been heard todate.

27. Section 9(2) of the ***Fair Administrative Action Act***, No. 4 of 2015 on the other hand provides:

> ***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.***

28. Subsection (3) thereof provides:

> ***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).***

29. Subsection (4) of the said section however provides:

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.

30. As it was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission 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. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

31. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

32. It is now a cardinal principle, a principle underpinned by statute, vide the provisions of section 9 of the ***Fair Administrative Action Act, 2015*** that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. See **Re Preston [1985] AC 835 at 825D** and **R (Regina) vs. Dudsheath**, *ex parte*, **Meredith [1950] 2 ALL E.R. 741.**

33. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

34. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. Having chosen the appellate route, it is my view that it was not open to the applicant to abandon the same midstream and commence these proceedings whose effect are to subsume the said pending appellate process. If the applicant was of the view that the appellate Tribunal was not undertaking its duty within a reasonable time, his option would have been to move this Court to issue orders compelling the said Tribunal to carry out its statutory mandate but not to compel this Court to in effect issue orders which ought to be issued by the said Tribunal.

35. It ought to be emphasised that in matters of mandamus the relief being discretionary availability of alternative reliefs may lead to the denial of the same unless it is shown that the alternative mode of

redress are less convenient, beneficial and effectual. That unfortunately has not been shown.

36. I agree with the decision in **Shah vs. Attorney General** (supra) that the court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice.

37. In **Raichand Khimji & Co. vs. Attorney-General Civil Appeal No. 49 of 1972 [1972] EA 536** the East African Court of Appeal held that the High Court's supervisory powers over administrative and quasi-judicial tribunals are discretionary and should only be used in exceptional cases, for instance if there has been a failure of justice or want of good faith.

Order

38. Having considered the foregoing, I find that the applicant has failed to show that there is a duty cast upon the Commission to reinstate the applicant to his former employment and to post him to a school which calls for this Court to issue an order compelling it to do so. In addition, the commencement of these proceedings during the existence of an appeal by the applicant renders these proceedings incompetent.

39. In the premises this application fails and is dismissed but taking into account the fact that the allegation by the applicant that his appeal has never been determined was not controverted, there will be no order as to costs.

40. Orders accordingly.

Dated at Nairobi this 17th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of :

Miss Kalwai for Mr Naeku for the Respondent

Cc Mutisya