REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 44 OF 2016

IN THE MATTER OF AN APPLICATION BY JAMES NGUMU MUTUNGI FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC……..APPLICANT

VERSUS

THE NATIONAL POLICE SERVICE

COMMISSION…….…….RESPONDENT

EX PARTE: JAMES NGUMU MUTUNGI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 19th February, 2016, the *ex parte* applicant herein, **James Ngumu Mutungi**, seeks the following orders:

a. **THAT this Court do grant the Applicant orders of Certiorari to quash the Respondent's decision to remove the applicant from the National Police Service dated 9th October, 2015 and leave so granted do operate as stay (sic).**
b. **THAT this Court do grant the Applicants (sic) orders of prohibition to restrain the Respondent from taking further and or any steps that would cause the Applicant to be removed from National Police Service and or from discharging his duties as such.**
c. **THAT all the necessary and consequential orders and directions be given.**
d. **THAT the costs of this application be provided for.**

Applicant's Case

2. According to the applicant, a Superintendent of Police and the Staff Officer Operations, Mombasa County, on 16th June, 2014, he appeared before the Respondent for vetting exercise at the Respondent's headquarters. Thereafter on 9th October, 2015, the vetting panel delivered its verdict in which in declared the applicant unfit to serve in the Police Force and thus discontinued the applicant's services.
3. Aggrieved by the decision the applicant, pursuant to Regulation 33 of the ***National Police Service (Vetting) Regulations 2013*** (hereinafter referred to as the "Vetting Regulations") submitted his

application for review which was received on 21st October, 2015 followed by further submissions on 23rd October, 2015 upon receipt of the proceedings. On 25th June, 2016, the Respondent rendered its decision thereon by which the Respondent found no merit in the said application and dismissed the same.

4. In the applicant's view, the Respondent acted capriciously, with bad faith, unreasonably, fettered its discretion, flouted the rules of natural justice and failed to exercise fairness in considering the said application and further deliberately refused to consider relevant considerations while delving in irrelevant ones.
5. Whereas the applicant was dismissed on his inability to manage contraband goods, the applicant contended that the duty of a police officer is to carry out surveillance, investigate, arrest and where necessary present the accused person in Court if there is sufficient evidence to support the case a duty which the applicant contended he duly performed. In the applicant's view the Respondent wrongly exercised its discretion as it did not state the reasons for arriving at their decision. It was further contended that the decision was based on an allegation that the applicant had released a murder suspect under unclear circumstances, a matter which the applicant had been exonerated by his OCPD and there was no further evidence adduced to warrant the variation of the said decision. There were other allegations which according to the applicant did not warrant his being dismissed from the force.
6. According to the applicant, the Respondent arrived at its decisions not based on facts but perceptions and their decision seems to have been influenced by the warnings and shortcoming letters in the applicant's filed. To the applicant, it was incumbent upon the Respondent to have made effort to verify whether indeed the contents of the said letters were supported by facts and not mere allegations.

Respondent's Case

7. In opposition to the Application the Respondent contended that the National Police Service Commission (hereinafter referred to as the Commission) is mandated under Article 246(3) (b) of the Constitution to *inter alia* observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service. According to the Respondent, section 7 (1) of the ***National Police Service Act*** states that all persons who were immediately before the commencement of the Act, officers or employees of the Kenya Police Force and the Administration Police Force established under the ***Police Act*** (Cap 84) and the ***Administration Police Act*** (Cap 85) respectively, including officers working with the criminal investigations department, shall upon commencement of the Act become members of the Service in accordance with the Constitution and the said Act. Based on the foregoing, the Commission formulated vetting regulations to enable it carry out the vetting exercise of all police officers who were in the Force prior to the enactment of the new Constitution and the Act. It was further averred that the Commission is mandated under section 7(2) of the ***National Police Service Act*** together with Regulation 4(a) of the ***National Police Service (Vetting) Regulations 2013*** (hereinafter referred to as the Vetting Regulations) to carry out the vetting exercise on all police officers. Further, section 7 (3) of the ***National Police Service Act*** read together with Regulation 32 of the ***Vetting Regulations*** gives the Commission the power to discontinue the service of any police officer who fails the vetting on grounds of being unsuitable or incompetent.
8. According to the respondent, the Commission, in vetting police officers, is guided by the Constitution, the ***National Police Service Commission Act***, the ***National Police Service Act*** and the ***Vetting Regulations***. In removing the officer from the Service, the Respondents averred that the Commission is bound by Regulation 3, 4 and 14 of the ***Vetting Regulations*** which Regulations not only set out the objectives and purpose of the vetting process but also the principles and standards that guides the Commission in carrying out the vetting to arrive at a just decision to remove the officer or not.
9. It was contended that pursuant to the mandate stipulated in the aforementioned Constitution, the ***National Police Service Act*** and the ***Vetting Regulations***, the Commission started the vetting of police officers in December, 2013 starting with the most senior police officers of the ranks of SDCP 1& 2, DCP, S/ACP, ACP, SSP, SP and ASP and by the end of November 2015 the Commission had vetted 1778 police officers of the aforementioned ranks. After the vetting process

of the rank of SDCP 1& 2, DCP, S/ACP, ACP, SSP, SP and ASP was complete, 87 police officers, among them the applicant herein were found to be unsuitable and incompetent to continue to serve. It was contended that the Commission relied heavily on both the personal and confidential files of the officer to access his conduct and discipline. From the aforementioned files, it was evident that indeed the ex-parte applicant herein was guilty of gross misconduct and wanting in discipline and this was captured by the many disciplinary shortcomings records in his file ranging from laxity and non-commitment, sheer indiscipline and chronic don't care attitude with regards to the performance of his duties.

10. According to the respondent in removing the applicant herein the Commission was guided by regulation 14(2) (b) of the vetting regulations which require the Commission to look at the past record of the officer including conduct, discipline and diligence and human rights records of the officer.
11. It was therefore contended that it is wrong for the ex-parte applicant to say that the Commission was acting in bad faith and abused its power by removing him based on the numerous disciplinary issues which were in his confidential and open file yet he was unable to defend himself during the vetting against the disciplinary shortcomings in his record.
12. To the Respondent, vetting is not a disciplinary issue but is a combination of the analysis of the record of an officer from their inception day in the service, disciplinary record, professional conduct, financial probity, integrity of an officer and their human right record and therefore the mandate of the Commission during vetting is to look at the past and current record of the officer in order to arrive at a decision of whether he said officer should continue to serve or not.
13. It was the Respondent's case that the ex parte applicant's application herein is incurably defective as it goes against order 53 rules 1 and 2 of the ***Civil Procedure Rules***.
14. According to the Respondent, pursuant to Regulation 33 of the ***Vetting Regulations***, the Commission did not admit the applicant's application for review as it was not merited and the ex-parte applicant was notified of the same vide a letter dated 25th January 2016.
15. To the Respondent, it is not in all cases that a party must be accorded an opportunity to be heard and hearing does not in all cases entail oral submission or oral hearing.

Determinations

16. Having considered the application, the response thereto, the submissions of the respective parties and the authorities cited this is the view I form of the matter.
17. In these proceedings it is important to note that the decision being challenged before this Court is the decision made by the Respondent on 9th October, 2015 and not the decision made on the application for review on 25th January, 2016. This raises the issue whether the applicant having applied for review of the decision made on 9th October, 2015 can properly challenge the said decision which was whether rightly or wrongly affirmed on review. In my view, to permit parties who have unsuccessfully challenged a decision through other alternative legal avenues to do so again by way of judicial review would amount to an abuse of the process of the Court. If the Court were to allow such course, it would mean that the Court would have set aside the decision made by the Respondent on the application for review when the said application is not the subject of these proceedings. In other words the end result of the success of these proceedings is to set aside the decision made on the application for review through the backdoor. That, this Court cannot do.
18. Nevertheless I have considered the grounds upon which the applicants seeks orders for review and it is clear to me that the applicant faults the Respondents failure to appreciate the weight of the evidence that was presented before it as meriting the decision arrived at. The applicant seems to be of the view that the matters for which the applicant had been exonerated ought not to have been the basis of his dismissal from the force. I agree with the position adopted by the Respondent that vetting is not a disciplinary issue but a combination of the analysis of the record of an officer from inception day in the service, disciplinary record, professional conduct, financial probity, integrity of an officer and the human rights record. It is therefore my view that the mere fact that an officer may have been exonerated in disciplinary proceedings does not preclude the Commission from taking such disciplinary proceedings into account as long as the officer is afforded an opportunity to address the same and the decision of the Commission is neither irrational nor contravenes the principle of proportionality.

19. From the applicant's own affidavit he did file submissions in support of his case. Accordingly, he cannot claim that he was not afforded an opportunity of being heard. The procedure in such matters is aptly dealt with by **Michael Fordham** in ***Judicial Review Handbook***; 4th Edn. at page 1007 as follows:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

20. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

21. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

22. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

23. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

24. However as is stated in ***Halsbury Laws of England*, 5th Edition 2010 Vol. 61** at para. 639:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with

the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."

25. Having considered the issues raised herein it is my view that the grounds advanced by the Applicant ought to have been the subject of an appeal as opposed to judicial review. As was appreciated by this Court in **Republic vs. Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege [2014] eKLR**:

"…In this case it is not in doubt that the decision which is being challenged in these proceedings was the subject of an application for setting aside which decision was disallowed by the Respondent. Whether that decision was right or not the Applicant ought to have appealed against the same instead of challenging the decision in respect of which attempt to set aside had failed. In judicial review proceedings the mere fact that the Tribunal's decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognized that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review."

26. In the foregoing premises this application cannot succeed. Firstly, it would serve no useful purpose quashing the decision made on 9th October, 2015, which is the decision sought to be quashed without quashing the decision made on 25th January 2015. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...*The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders*. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or *serves no useful or practical significance*." [Emphasis added].

27. In my view to quash the decision of 9th October, 2015 while leaving the one of 25th January, 2016 would be in vain and would serve no useful or practical significance as it would leave the latter decision intact.
28. Secondly, it is my view that the issues raised herein go to the merit of the Respondent's decision hence not proper grounds to warrant the grant of judicial review reliefs.

Order

29. In the result the Notice of Motion dated 19th February, 2016 fails and is dismissed with costs to the Respondent.

30.Orders accordingly

Dated at Nairobi this 21st day of July, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Mwangi