



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 34 OF 2014

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI TO QUASH THE DIVISION OF KILIFI COUNTY WEEKLY
ORDER NO. 5**

AND

**IN THE MATTER OF: NATIONAL POLICE SERVICE ACT 2011 REGULATION 3 SUB
REGULATION 2000 THE POLICE REGULATION AS READ WITH SECTION 88(2)**

AND

IN THE MATTER OF: FORCE STANDING ORDER PARAGRAPH 16 (IV) CAP 20

AND

**IN ACCORDANCE WITH: ORDER 53 RULES 1, 2 AND 4 OF THE CIVIL PROCEDURE
RULES AND SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

REPUBLIC.....APPLICANT

VERSUS

- 1. MINISTER FOR INTERIOR AND NATIONAL COORDINATION**
- 2. INSPECTOR GENERAL OF POLICE**
- 3. OFFICER COMMANDING POLICE DIVISION RABAI JOHN MATSILI**
- 4. OCS RABAI POLICE STATION INSPECTOR JULIUS**

BARU.....RESPONDENTS

AND

NO. 69950 PC STEPHEN MUNGAEX PARTE APPLICANT

RULING

The Application for Leave

1. In his application dated 8th July, 2014 and filed on 9th July, 2014, the *ex parte* Applicant sought and was granted leave to commence Judicial Review proceedings for an Order of **Certiorari**.

The Notice of Motion

2. In his substantive motion dated and filed on 16th July, 2014 the Applicant sought two orders:-
 1. an order of certiorari to remove to this court and quash forthwith Orderly Room Proceedings disciplinary conviction contained in the Weekly Order 5/2014
 2. an order of prohibition prohibiting the County Police Commander Kilifi from effecting and/or enforcing the Orderly Room Proceedings disciplinary conviction
 3. the costs of the Application be awarded to the Applicant

Prohibition from Departing from original Pleading

3. Order 53 rule 4(1) of the Civil Procedure Rules provides *inter alia* that upon the hearing of the Notice of Motion the Applicant can only rely upon the Statement and any affidavits accompanying the application for leave, and no ground shall, be relied upon or any relief sought at the hearing of the motion except the ground and relief set out in the statement. To rely on any new ground or new relief, the applicant is required under rule 4(2) thereof to apply for and obtain leave to amend the Statement.
4. In this case, the Applicant has introduced a prayer for a new relief, namely prohibition of the implementation of the orders of the Orderly Room Proceedings without first seeking leave of court to amend the Statement in order to introduce the new ground for relief. That is clearly contrary to the express provisions of Order 53 rule 4(1) and (2). I therefore strike out the prayer for an order of prohibition. The only question which remains is whether an order of **certiorari** lies against the Respondents. In his submissions, counsel for the Applicant cited the case of **REPUBLIC VS. REGISTRAR OF TITLES & ANOTHER, ex parte David Gachina Muriithi & Another [2014] eKLR**, in which the court cited with approval, the opinion of the court in the English case of **COUNCIL FOR CIVIL SERVICE UNIONS VS. MINISTER FOR CIVIL SERVICES [1985] A.C. 374 at 410D** where Lord Diplock said –

“Judicial Review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by Judicial Review. The first ground I would call “illegality”, the second “irrationality” and the third “procedural impropriety”.

By “Illegality”, as a ground for Judicial Review I mean that the decision-maker must understand correctly the Law that regulates his decision-making, power and must give effect to it.....

By “irrationality” I mean that what can succinctly be referred to as the “Wednesbury Unreasonableness”, it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided and could have arrived at it.....

I have described the third head as procedural “impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

5. The *ex parte* Applicant’s counsel offered no submissions on Lord Diplock’s first classification of the grounds upon which administrative action is subject to control by Judicial Review, there were no illegality committed by the Respondents. That head of classification does not therefore apply to the application herein.
6. Counsel for the Applicant however admitted the Respondents assigned the Applicant duties on the same day he was required to attend Orderly Room Proceedings. Counsel therefore contended that the decision to assign the Applicant duties as well as requiring him to present himself at the

- Orderly Room Proceedings as so irrational that no officer properly addressing his mind to the two questions could have come to that decision.
7. I have perused, carefully the Statement of Facts, the Grounds therein, the Applicant's Affidavit Verifying the Facts, the Applicant's Further Affidavit sworn on 28th July, 2014 and filed on 30th July, 2014, and finally the submissions of counsel for the Applicant. I have also perused carefully, the Replying Affidavit of Inspector Julius Baru, the Officer Commanding Station Rabai Police Station, sworn on 22nd July, 2014 and the Replying Affidavit of Superintendent of Police John Matsili, sworn on 24th July, 2014 and filed on 25th July, 2014.
 8. What comes out clearly is that the Applicant failed to attend duty on the 18th December, 2013. He was supposed to be the Duty Officer at the Report Office on that date. According to the uncontroverted Affidavit of Superintendent John Matsili, the Applicant had no explanation as to why he did not report on duty on 18th December, 2013. One of the consequences of failure to report on duty without cause is to render an officer liable to Orderly Room Proceedings.
 9. Orderly Room Proceedings are disciplinary enquiry in respect of "*officers*" by members of the disciplined forces, including the Applicant herein. Like all cases where the consequences are likely to adverse against the person subject to Orderly Room Proceedings, the Applicant was served with the Charge Sheet which clearly specified the charges failure to report at the Duty/Report office on 18th December, 2013.
 10. The Applicant's defence/reply that he could not attend the Orderly Room Proceedings allegedly because the same officers charging him had assigned him other duties on 23rd December, 2013 lacks not merely logic and reason but credibility. Here is an officer being charged with a disciplinary offence, and required to attend proceedings, and decides to walk away to some other duty! It is highly unlikely that an officer of the rank of Inspector and Commander of a Police Station and a Superintendent of Police, an Officer Commanding Police Division would issue a Charge Sheet, send the Applicant on duty and concoct a story by way of Orderly Room Proceedings to spite the Applicant.
 11. Credence is to be found in paragraph 10 of the Replying Affidavit of Superintendent Matsili. In paragraph 9, the deponent avers that he called upon the Applicant to explain why he never reported on duty but the Applicant did not have any explanation. He therefore determined that the officer had committed a severe offence. In paragraph 10, the deponent states he instructed Inspector Julius Baru to institute Orderly Room Proceedings –

“.....to know why he never reported on duty so as to determine whether there had been breach of regulations or any of the Force Standing Orders and institute necessary disciplinary measures.”

12. The Applicant was informed and served with the Charge Sheet of the Orderly Room Proceedings. Again he chose not to attend. Despite his non-attendance the presiding officer appointed an officer Inspector Rama Said to defend the Applicant in his absence and find him guilty.
13. In the course of the proceedings, the Presiding Officer found his power of passing sentence insufficient, and remitted the matter to higher authority for passing of appropriate sentence.
14. The County Police Commander Kilifi passed the sentence and fined the Applicant/defaulters Kshs. 2,500/= as evidenced by the Kilifi County Weekly Order No. 5/2014 dated 11th April, 2014. The Applicant was duly informed of the outcome of proceedings and sentence on 17th April, 2014.
15. An order of certiorari will issue for illegality. Section 88(2) of the National Police Service Act 2011 creates an offence for failing to attend duty at a Report and Inquiry Office. The Applicant has not denied that he failed to attend duty at the Report and Inquiry Office on 18th December, 2013. He has not challenged the evidence of his colleagues PW1, John Makili, the OCPD Rabai, PW2, No. 688499 PC Nelson Mwenye and PW3, No. 83997, PC John Muraguri.
16. I have already stated that there was no plausible reason for these officers to lie or give false testimony against the Applicant.
17. In the circumstances, I find that the Orderly Room Proceedings against the Applicant were conducted in accordance with the law, namely, the National Police Service Act 2011, and the National Police Service Regulations. The application is I must say, baseless and therefore

frivolous, and the same is dismissed with a direction that the costs occasioned herein be borne by each party.

18.It is so ordered.

Dated, Signed and Delivered in Mombasa this 15th day of May, 2015

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

No Appearance for Applicant

Ms. Kiti holding brief Eredi for Respondent

Court Assistant Kaunda