



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 101 OF 2013 (J.R)

**IN THE MATTER OF: AN APPLICATION BY CHIEF INSPECTOR ISSA OMAR HUSSEIN
FOR JUDICIAL REVIEW ORDER OF CERTIORARI, MANDAMUS AND PROHIBITION**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, THE INDEPENDENT POLICE
OVERSIGHT AUTHORITY ACT AND THE NATIONAL POLICE SERVICE COMMISSION
ACT**

BETWEEN

ISSA OMAR HUSSEINAPPLICANT

AND

THE ATTORNEY GENERAL OF KENYA.....1ST RESPONDENT

THE PROVINCIAL ADMINISTRATION

POLICE COMMANDER (NAIROBI).....2ND RESPONDENT

JUDGEMENT

Introduction

1. By their Notice of Motion dated 2nd April, 2013, the *ex parte* applicant herein, **Issa Omar Hussein** seek the following orders:

1. An order of certiorari to remove into this court the decision of the Nairobi Province A P Commander to redeploy ISSA OMAR HUSSEIN contained in the letter dated 9th October 2012 and to quash the same.

2. Costs hereof be provided for.

Ex parte applicant's case

2. The application is grounded on the Statutory Statement and Verifying Affidavit filed on 21st May 2013 and sworn by the applicant herein.
3. According to the deponent, he is a chief inspector of police currently servicing at Makadara District headquarters who has served the force faithfully for many years since 1988 under force number 213275 and personal number 88065783. However, on 12th October 2012 he received a notice dated 9th October 2012 redeploying him to Kenya and upon making inquiries within the force as to how the decision to transfer him had been reached given that the National Police Service Commission had put a halt to redeployment to allow for streamlining of the force, his inquiries did not yield anything as some of his superiors remained tight lipped while others insisted that he had to comply.
4. In the applicant's view, the provincial administration police commander has no powers or authority to redeploy officers as this is the mandate of the National Police Service Commission. He contends that his unlawful redeployment was actuated by malice following his refusal to go by the corrupt ways of some senior officers who are in the habit of extorting money from their colleagues in exchange for residential quarters unlike his wife who is also a serving inspector in the force and who has fallen victim to the same corrupt forces.
5. Although he has continued to report to duty daily at Makadara District Headquarters, his salary was last paid in October 2012 which decision was made arbitrarily, is unjust and unfair and was actuated by malice following his refusal to play by the rules of the corrupt forces in the force.
6. The applicant avers that he has a wife, seven children and many relatives who depend on his earnings and that they are going through a lot of suffering due to the decision taken to stop his salary.
7. According to him, the provisional AP commander has no powers under the law to transfer or deploy an officer and the decision to act against him was taken without regard to the law and he reiterates that he has reason to believe that the same corrupt forces are keen to set him up as a deserter so as to drive him out of the force hence the orders sought herein.

Respondents' case

8. In opposition to the application, the respondents filed the following grounds of opposition:
 1. **THAT judicial review proceedings deals with the processes of administrative decision making and not the merits of the decision.**
 2. **THAT the applicant has not attached to the application the decision that he is seeking to quash.**
 3. **THAT the applicant is relying on a privileged letter that was not addressed to him against the rules of evidence.**
 4. **THAT the affidavit attached to application is full of propaganda and baseless allegations.**
 5. **THAT the offices created by the Constitution of Kenya 2010 had not come into place by the time he alleged decision was made.**
 6. **THAT it is only fair and just that his application may be dismissed with costs.**
9. . The Respondents also filed a replying affidavit sworn by **Francis Mburu**, the 2nd respondent herein. According to him on the 4th day of October 2012, he received a letter dated 4th October 2012 from the then Administration Police Commandant, commanding him to release officers enlisted therein to their new stations and to effect the decision of the commandant contained in that letter he wrote another letter to the District Administration Police Commanders commanding

then to command the affected officers to report to their new station. It is therefore his position that the decision to transfer the said officers including the applicant herein was made by the commandant and not by himself. He however avers that at the time this decision was made the establishment of the National Police Service commission was still in progress and the members had not been sworn into office and as such the commandant had the power to transfer the applicant.

10. He was accordingly of the view that the application herein is based on untrue facts and should therefore be struck out.

Applicant's submissions

11. On behalf of the applicant it was submitted that under Article 246(3) of the Constitution the old order where police officers were transferred by their seniors is gone and by virtue of the Constitution, transfers fall directly within the mandate of National Police Service Commission and hence no other body can lawfully transfer police officers. It was therefore submitted that the act of the AP Commander which prompted these proceedings and the application now before the Court was ultra vires and therefore null and void *ab initio* and has no force of law.

Respondents' submissions

12. On behalf of the Respondents it was submitted that under section 3(2) of the repealed **Administration Police Act** Cap 85, the Administration Police Commandant is vested with the power to exercise control over the Administration police officers, and command includes redeployment, by the law, custom and practice. One of the ex parte applicants are members of the National Police Service. Whereas the respondents are aware of the provisions of Article 246 of the Constitution which vested the power to transfer police officers on the National Police Service Commission, this Article had a transitional clause in section 3(3) of the Sixth Schedule which provided that "Until the National Police Service Commission referred to in Article 246 is established, section 108(2) of the former constitution applies to appointments, discipline and the removal of persons from the office in the National Police Service." Reliance was also placed on section 3(1) of the same schedule.

13. It was submitted that the National Police Service Commission though the members of the said Commission were appointed on 3rd October 2012, they were not sworn into the office until 9th October 2012 and hence started discharging their functions on 10th October 2012. It was therefore submitted that the decision of the commandant made on 4th October 2012 was lawful as the Commission had not been established.

14. It was further submitted that since the decision sought to be quashed was not made by the second respondent who was only implementing the same, the application is incompetent as the 2nd respondent ought not to have been sued. It was further submitted that the decision sought to be quashed was itself not attached and since the letter relied upon was privileged the Court ought not to rely on it. It was in any event submitted that the said letter was a mere communication of a decision that had been made and was not the decision itself hence incapable of being quashed and reliance was placed on **Republic vs. National Highway Authority & 7 Others [2013] eKLR**.

15. It is also submitted that some of the grounds relied upon by the applicant go to the merits of the decision which ought not to be grounds upon which judicial review remedies are to be based.

Determinations

16. Having considered the foregoing, this is the view I form of the matter.

17. Article 246 of the Constitution sets out the National Police Commission (hereinafter referred to as the Commission) and in Clause (3) the powers of the said Commission are set out as hereunder:

(a) 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;

(b) observing due process, exercise disciplinary control over and remove persons holding or

acting in offices within the Service; and

(c) perform any other functions prescribed by national legislation.

18. As I held in High Court Misc. Application No. 93 of 2013 between **Republic vs. The Deputy Inspector General of National Police Service and 2 Others ex parte Morris Sagala & Others:**

“the powers to *inter alia* determine promotions and transfers within the National Police Service was given to the Commission and any legislation which purported to take away such powers and place them on any other body would have been inconsistent with the Constitution since to create two centres with the same powers was bound to cause confusion in the administration of the police service. Kenyans must have had a good reason for removing the powers of transfer of the members of the Service from the predecessor of the Inspector General, the Commissioner of Police, to the Commission. Since the Inspector General is a Member of the Commission, it is expected that where a need for transfer of the Members of the Police Service arises he would be able to explain this position and the Commission would be able to take appropriate steps.”

19. This legal provision is clearly appreciated by the Respondents. The Respondents however contend that since the Commission had not been sworn into office by the time the impugned decision was made, the same was properly and legally made pursuant to section 3(3) of the Sixth Schedule to the Constitution. The said section for avoidance of doubt provides:

Until the National Police Service Commission mentioned in Article 246 is established, section 108(2) of the former Constitution applies to appointments, discipline and the removal of persons from office in the National Police Service.

20. It is not contended by the applicant that prior to the establishment of the Commission the person who effected the transfer of the applicant had no powers to do so. Under the legal maxim *omnia praesumuntur legitime facta donec probetur in contrarium*, all things are presumed to have been legitimately done, until the contrary is proved.

21. If therefore as at the time of the making of the challenged decision, the Commission was not yet in place as it had not been sworn in, it would follow that under the Transitional Provisions aforementioned the people who had power to exercise the said powers retained the same.

22. From the documents on record it is clear that the members of the commission were sworn in on 9th October, 2012 and this was after these proceedings were commenced.

23. In my view there is no material on the basis of which I can find that the transfer of the applicant was ultra vires the powers of the respondents.

15. Apart from the foregoing it is clear that the 2nd respondent was only implementing a decision which had already been made. The authority that made the said decision is not party to these proceedings. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

“Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law.”

24. The foregoing determination goes hand in hand with the failure to comply with the provisions of Order 53 rule 7. Under the said provision the applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his

failure to do so to the satisfaction of the High Court. However, in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, it was held that the decision to alienate land or to allocate is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law.

25. As I held in **Republic vs. National Highway Authority & 7 Others [2013] eKLR**,

“where the *ex parte* applicant for any reason is unable to exhibit the decision sought to be quashed, he ought to satisfy the Court on his failure to exhibit the decision which decision is required to be verified by affidavit with the registrar. Failure to comply with this mandatory provision renders the application incompetent. In my view it is important to annex a copy of the impugned decision not only for the court to satisfy itself as to the time it was made and also to be certain that the decision actually exists.”

ORDER

26. In the result I find no merit in the Notice of Motion dated 2nd April, 2013 which is hereby dismissed but with no order as to costs taking into account the fact that at the time of the commencement of these proceedings the members of the Commission had already been appointed only the swearing in had not taken place hence they were incapacitated in commencing their duties.

Dated at Nairobi this 30st day of January 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kago for Mr Ingutya for the applicant

Miss Cheruiyot for the 1st and 2nd Respondent