REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 190 OF 2014

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 23(3)(F)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW PROCEEDINGS AGAINST THE RESPONDENTS

AND

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26-LAWS OF KENYA SECTION 8 AND 9

AND

IN THE MATTER OF JUDICIAL SERVICE COMMISSION

AND

IN THE MATTER OF LEGITIMATE EXPECTATION AND REASONABLENESS

AND

IN THE MATTER OF SEPARATION AND POWERS AND PROPORTIONALITY

AND

IN THE MATER OF JUDICIAL DUTY, THE CONSTITUTION AND THE LAW

AND

IN THE MATTER UNDERMINING JUDICIAL AUTHORITY AND ORDERS OF THE COURT

AND

IN THE MATTER OF ULTRAVIRES

AND

IN THE MATTER OF THE AGE OF RETIREMENT OF HON. LADY JUSTICE JOYCE N. KHAMINWA

BETWEEN

HON. DR. LADY JUSTICE JOYCE N. KHAMINWA……..…….APPLICANT

AND

THE JUDICIAL SERVICE COMMISSION…….……1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY……...……2ND RESPONDENT

RULING

Introduction

1. By a Chamber Summons dated 22nd May, 2014 filed in this Court the same day, the applicant herein, **The Hon. Lady Justice Joyce N. Khaminwa,** a judge of this Court seeks the following orders:

1. **THAT the Application herewith be certified as urgent and service thereof be dispensed with in the first instance.**

2. THAT leave do issue to the applicant to apply for:-

(a) An order of Certiorari do issue to remove to this court and quash the decision of the 1st and 2nd Respondents to retire the Applicant from employment as communicated in the "Retirement Notice" through a letter dated 28th April 2014 (Ref: PJ 27434) from the 2nd Respondent to the Applicant

(b) An order of Prohibition directed at the Respondents jointly and severally barring them from acting on or implementing the decision of the 1st and 2nd Respondents to retire the Applicant "upon attaining the compulsory retirement age of seventy (70)".

3 The leave so granted does operate as a stay against the Respondent herein from retiring the Applicant based on the same or similar issues herein, pending the hearing and determination of this Application and the suit herein.

4 Cost of this suit.

Applicant's Case

2. The application is supported by the Statutory Statement filed together with the Chamber Summons and the applicant's verifying affidavit sworn on 22nd May, 2014.
3. The Application is based on the grounds that the 2nd Respondent, through a letter dated 28th April 2014 informed the Applicant of the decision by the 1st Respondent to retire the Applicant purportedly upon attaining *"the compulsory retirement age of seventy (70) years"*. The said letter purports to serve as a *"notice of retirement from service with effect from 3rd of June 2014"* and states that the 1st Respondent "deliberated on the Judges' retirement age and resolved that all Judges shall retire at the age of seventy (70) years".
4. It is the Applicant's contention that the decision to retire her upon attaining 70 years is *ultra vires* the powers of the 1st Respondent whose functions are clearly set out in Article 172 of the Constitution of Kenya and there is no provision that confers to it power and authority to retire a

Judge.

5. The Applicant contended that according to the provisions of the repealed Constitution, the retirement age in respect of the Judge was 74 years and having been appointed as judge under the previous Constitution, despite the fact that the present Constitution provides the retirement of a judge to be 70 years, as her position is preserved under the Sixth Schedule to the Constitution (Transitional and Consequential provisions) at Section 31(1), she is not to suffer any prejudice as a Judge as regards her terms of employment because of the enactment of the Constitution and is entitled to continue serving as a Judge up to the age of 74 years.
6. The Applicant's case is therefore that the impugned decision by the Respondents to retire her is laced with procedural impropriety and a failure to observe the rule of law and natural justice. Further, the said decision was made in bad faith and/or with utmost *malafides* and is laced with improper motive, is irrational and unreasonable in the circumstances obtaining. To her, the impugned decision is flawed and is meant to undermine the judicial process as there are currently ongoing proceedings in Court over the *"suitability"* of the Applicant to continue working as a Judge including Miscellaneous Application 113 of 2013 filed by the Applicant against the Judges & Magistrates Vetting Board (JMVB); other related cases were consolidated and include **HCJR No. 295 of 2012,** filed by the **Hon. Lady Justice Jeanne Gacheche** against the JMVB and the Judicial Service Commission (JSC); Eldoret H.C. **Constitutional Petition No. 11 of 2012**, filed by the Centre for Human Rights and Democracy and 2 other; Nairobi **H.C. Constitutional Petition No. 433 of 2012**, filed by **Hon. Mr. Justice Riaga Omollo** against the JMVB, the Attorney-General and the JSC, and Nairobi H.C. **Constitutional Petition No. 438 of 2012,** by **Hon. Mr. Justice Joseph G. Nyamu** against the JMVB, the Attorney-General and the JSC. There is also in the Court of Appeal in Nairobi **Civil Appeal No. 308 of 2012** and **Supreme Court Petition No. 13A of 2013**. All these maters have been consolidated due to the similarity of the issues raised therein.
7. To the Applicant the decision to retire the Applicant is thus intended to undermine her Appeal against the JMVB's decision to declare her unsuitable to continue serving as a Judge, an Appeal that is pending in Court. The said decision, it is contended, went against the principles of natural justice which provides that every claimant is entitled to have their claim considered in accordance with the principles of natural and constitutional justice and in the context of determinations of entitlement under the social welfare legislation that includes the right to know the information, upon which a decision is being made; the opportunity to comment upon any reports or documents being used in reaching the decision and to present his or her case; the right to know the reasons for any adverse decision; the right to have all relevant evidence considered and irrelevant evidence not taken into account; to have the decision made by an impartial person whose discretion has not been fettered; and where it is necessary for a fair determination of the issues, an oral hearing.
8. The Applicant's case is therefore that the Respondents in arriving at the impugned decision acted ultra vires its mandate and the Constitution of Kenya and have abused and/or misused their power in making the impugned decision.
9. On 23rd May, 2014, **Hon. Mr. Justice Majanja** directed that the Application be served on the Respondents for hearing on 26th May, 2014 at 2.30pm. Although the Respondents were duly served, there was no appearance when the matter was called out for hearing on the said 26th May, 2014.
10. On behalf of the Applicant **Dr Khaminwa** submitted that the Applicant was employed as a Judge under the old Constitution under which the retirement age of a Judge was 74 years. When the current Constitution came into force, the Applicant continued to serve thereunder. Learned Senior Counsel submitted that though under the current Constitution the retirement age for a Judge is 70 years, there is a provision therein to the effect that a person employed under the old Constitution will serve as provided under the old Constitution.
11. However the applicant received a letter from the Chief Registrar of the Judiciary dated 24th April, 2014 stating that she has to retire by the 3rd June, 2014. Relying on the Constitutions of other countries with similar transitional provisions such as Puerto Rico, South Africa, Armenia, Japan and Bangladesh, **Dr Khaminwa** submitted that under the emerging world Kenya cannot be an exception to the other People's Constitutions and purport to act unreasonably and irrationally.
12. It was further submitted that apart from the foregoing there is an issue of legitimate expectation that the Applicant accepted the judicial job on the condition that she would retire at the age of 74.

It was further submitted that you cannot give a Judge of the Superior Court less than one month to retire.

13. To the Applicant a Judge of the High Court's employer is not the Judicial Service Commission since that Commission only makes recommendation for appointment to the President who is the appointing authority. There however, is no provision in the Constitution empowering the Commission to retire a Judge and in particular it is doubtful whether it is the Chief Registrar of the Judiciary who should retire a Judge.
14. It was further contended that there are other cases pending in which the issue of the Applicant's suitability to continue to serve is in issue hence the decision to retire the Applicant is meant to circumvent the High Court's orders.

Determination

15. I have considered the foregoing.
16. The rationale for the requirement that leave be sought and obtained is to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. However, leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case. Leave stage is therefore a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993, Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**
17. As was held by **Waki, J** (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996**:

"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

18. See also **Meixner & Another vs. Attorney General [2005] 2 KLR 189.**
19. The yardstick for the grant of leave was however set by the Court of Appeal in **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject

matter… It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers… In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought."

20. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199**, the Court of Appeal was of the view that leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.
21. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

"Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him…. Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of *John vs. Rees [1970] Ch 345 at 402.* In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

22. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is neither a mere formality nor a practice of magic. It is not to be granted as a matter of

course. Delay is one of the factors which a Court often considers in deciding whether or not to grant leave. The applicant for leave is under an obligation to show to the court that he or she has a prima facie arguable case for grant of leave. Therefore whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile.

23. Section 31(1) of the Sixth Schedule to the Constitution (Transitional and Consequential Provisions) provides:

Unless this Schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person.

24. In my view the transitional provisions were meant to ensure a smooth exit from the old constitutional order to the present constitutional order. The drafters of the Constitution must have appreciated that abrupt transit was bound to be bumpy and calamitous. This appreciation is much more serious for the institution of the Judiciary.
25. *Prima facie*, the Applicant's case that she ought to continue holding office of a Judge for the unexpired period of her term, cannot be said to be frivolous at this stage in light of the foregoing provision. Accordingly, the contention that the Commission's decision to retire the Applicant before attaining the age of 74 is unconstitutional is a weighty legal issue warranting further forensic investigation.
26. Apart from that a cursory reading of Article 172(1) of the Constitution does not on the face of it expressly grant powers to the Commission to retire a Judge. Without deciding this issue with finality, it is my view that the issue merits further investigation.
27. Taking the foregoing into consideration, it is my view and I so find that the Applicant has established a prima facie case which warrants the grant of leave. Accordingly leave is hereby granted to the Applicant to apply for the judicial review orders in terms of the instant application. The said Application is to be filed and served within 10 days.
28. As is the case with respect to leave, it is now trite that the decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judicially. The circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise can now be said to be settled. Where the decision sought to be quashed has been implemented leave ought not to operate as a stay. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**
29. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself as follows:

"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited… The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

30. In the instant case, it is clear that the manner in which the instant application is framed, if a stay is not granted the outcome of the application if successful may well be rendered nugatory and an academic exercise. Apart from that whereas, the decisions, if any, which may be made by the Applicant for the limited period when the stay is in force may, if the Application fails, be undone by being set aside, if the stay sought is not granted and the Applicant is retired, the reinstatement of the Applicant may pose serious legal challenges since the Court is not aware of any provision which allows for the reinstatement of a retired Judge. To avoid such an eventuality, it is my view that the lesser evil is to direct which I hereby do that the grant of leave herein shall operate as a stay of the decision to retire the Applicant until the hearing of the substantive motion or until further orders of the Court.

Dated at Nairobi this 27th day of May 2014

G V ODUNGA

JUDGE

In the presence of Dr Khaminwa for the Applicant