



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS JR NO. 283 OF 2011

F O O.....PLAINTIFF

VERSUS

THE SECRETARY TSC & ANOTHER.....RESPONDENTS

J U D G M E N T

1). The notice of motion dated 24-11-2011 prays for the following reliefs:

1. **That this honourable court be pleased to grant to the applicant an order of Judicial Review in the nature of certiorari removing into this court for purposes of questioning the purported decision by the respondent of dismissing the applicant herein through its secretary dated 5-9-2011 and the subsequent decision to remove the applicant's name from the Teacher Service Commission register.**
2. **Cost of the application.**

2). Briefly, the facts as per the applicant's are that he was an employee of the respondent teaching at *[particulars withheld]* Secondary School. Sometimes on 5-9-2011 he was dismissed for the reason that he had an immoral conduct with his student one M A who was in Form III. It was alleged that he had canal knowledge with the said student which resulted in her being pregnant.

3). Prior to being dismissed there are several meetings which were held between the applicant and the school authorities as well as the respondents herein. I have had the advantage of reading the annexures to the affidavit as well as the supporting statements. The applicant contended that the action by the respondent was unprocedural and that he was denied the right of being heard and that the said decision was based on extraneous factors without any factual evidence.

4). The respondent has sworn a lengthy affidavit through one S M K stating that it followed all the required procedures and that the applicant was all through given a hearing. He said that there was sufficient evidence to show that indeed the applicant had an immoral liaison with the pupil . Its rules required that in the event that there was such a finding then the only option left was to dismiss the applicant from service.

5). Having carefully read and perused the documents on record as well as the parties submissions what is there to be determined are:

- a. **Whether or not the dismissal was procedural.**
- b. **Whether or not the applicant is entitled to the prayers sought.**
- c. **What is the competency of the application.**

6). The cardinal rule of judicial review is to always ensure that the rules of natural justice are followed by all and sundry prior to undertaking any action such as in this case. The applicant has contended that such rules were not followed. This court does not concern itself with the outcome as such of the disciplinary process but whether or not the laid down rules and procedures were followed. In other words whether or not the applicant was given an opportunity to be heard.

7). From the annexures on record and which are not disputed by the parties it appears that there were at least 3 meetings held which involved the matter and which the applicant was present. The first meeting is contained in a report dated 21-11-2010 by the School Board of Governors. There was also a meeting held on 11-10-2010 by the District Education Board chaired by the PDE Nyanza and finally a meeting by TSC on 5-9-2011. From all the meetings above I find that the applicant was well able to ask questions and well represented. Infact the meeting by TSC dated 5-9-2011 shows well written minutes which convinces one that the applicant was given a chance to defend the allegations.

8). Consequently, and as stated earlier on, the applicant I am convinced was well able to present his defence. The issue at hand is not whether the allegation were proven or not but the proper laid down procedures were followed. The cardinal rule of natural justice namely granting the accused an opportunity of being heard before reaching a verdict was granted to the applicant.

9). What about the competency of the motion? The respondent has argued that the same is not competent for the reason that the reliefs sought in the statement are not sought in the motion. From the statement of facts as filed, the applicant has sought apart from questioning the decision by the respondent, he has prayed for the reinstatement of the applicant. The motion however has left out the prayer of reinstatement.

Order 53 Rule 4 (1) of the Civil Procedure Rules provides:

“Copies of the statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereinafter in this rule provided be relied upon or any relief sought at the hearing of the motion except the grounds and reliefs set out in the said statement”.

10). Obviously, from the above quotation, there is a variance between the motion being argued together with the statements. This is fatal. The writs of judicial review are specific and *sui generis*.

One cannot deviate from its procedural requirements. I find that the applicant deviated from this what is contained in the application for leave should as a matter of necessity remain in the substantive application. Justice Gacheche in Nairobi Misc. Application No. 1124 of 2005 Republic -VS- Ministry of Planning and National Development exparte National council of Non Governmental Organisations said:

“Where Judicial Review orders have not been sought in the statement and where reliefs sought in the notice of motion do not tally with those in the statement, the application for Judicial Review is incompetent. It is clearly evident that contrary to the requirements that they be similar in all ways the prayer in the statement is quite different from those in the notice of motion, which renders the application defective and I would on that ground uphold the second preliminary objection”.

11). Finally, the question is whether the applicant is entitled to the orders sought? There is no doubt that the relationship between the applicant and the 1st respondent was contractual. In the said contract there were rules and regulations governing the parties. Both parties were to adhere to their side of the bargain. Judicial Review remedies are generally in the regime of public law. Respectfully therefore I think the issues herein are in the regime of public law. There are rules and regulations as pointed above, governing the parties. This court will always intervene where there was injustice in terms of the cardinal principle of natural justice earlier on stated.

12). In determining therefore that this matter is squarely a private matter I rely on the court of appeal decision in Kisumu HCCA 182 of 2004 Staff Disciplinary Committee of Maseno University & 2 Others -VS- Prof. Ochong Okello (2012)e KLR where the court stated as follows:

“I concur with the above proposition and find that the breach or threatened breach of the appellants contract of employment was not a public act or a matter of public law but was a matter of contractual relationship between the appellant and the respondents, governed by private law. It was not therefore an appropriate action justifying the granting of orders of Judicial Review. The respondent may well have had a genuine grievance. His remedy however lies under private law which covers disputes relating to contractual relationships. Therefore the High Court erred in granting the orders of judicial review as Prof. Ochong did not have public right capable of protection under the supervisory jurisdiction of the court”.

13). The court proceeded to decline the orders of certiorari. Conversely there was a contractual relationship between the applicant and the respondent. If the applicant thought that there was such a breach then the contract must contain remedies which I believe include damages, and which the applicant ought to pursue.

In the premises and for the reasons stated above this court cannot reinstate the applicant as prayed as this would be imposing a contract on top of another contract which is not the court's duty. I do not find merit in this application. The allegations obviously are grave and weighty. It has to do with a disciplinary process in regard to an employee having a sexual liaison with a student who in this case is a minor. As earlier opined, it is not for this court to determine the veracity or otherwise of the allegations. Those are the province of a criminal process. Suffice to say that for now this application is defective and wrongly brought before this court. The same is otherwise dismissed with costs.

Dated, signed and delivered at Kisumu this 31st day of July, 2014.

H.K. CHEMITEI

JUDGE