



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 55 OF 2013

IN THE MATTER OF AN APPLICATION BY CPL.LYDIA GOGA & 6 OTHERS FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS IN THE NATURE OF CERTORARI AND PROHIBITION TO QUASH THE DIRECTIVE OF THE NAKURU SUB COUNTY ADMINISTRATION POLICE COMMANDER MADE ON 24TH DECEMBER,2013

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT 7 THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT & SECTION 8& 9 OF THE LAW REFORM ACT

BETWEEN

NAOMI ASITIBAR

LYDIA GOGA

CATHERINE NJERI

CHRISTINE MUTUNE

DAVLIN ONSINDU KERUBO

SHEILA ONDARI

ROSE MWANGI.....APPLICANTS

AND

THE NAKURU SUB-COUNTY COMMANDER

ADMINISTRATION POLICE.....1ST RESPONDENT

THE NAKURU COUNTY COMMANDER,

ADMINISTRATION POLICE.....2ND RESPONDENT

THE NATIONAL POLICE SERVICE
COMMISSION.....3RD RESPONDENT

INDEPENDENT POLICE OVERSIGHT AUTHORITY.....4TH
RESPONDENT

RULING

1. The Applicants filed this application, pursuant to the leave granted by this court on 31st December 2013, by way of the Notice of Motion filed on 2nd January 2014. The application was brought under **Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and Order 53 Rule 1(3) of the Civil Procedure Rules**. The Applicants sought the following orders-

(a) **an order of Certiorari to bring before this court and quash the directive by the 2nd Respondent which was communicated by the 1st Respondent vide a letter dated 24th December 2013 purporting to transfer the Applicants from one station to another without the authority of the Inspector General or Deputy Inspector General of the National Police Service**

(b) **an order of Prohibition to restrain the 1st and 2nd Respondents from further making orders, directives and decisions with regard to the Applicant's employment, transfer and stationing.**

2. The *ex-parte* Applicant relied on the grounds on the face of the application, the Statutory Statement and Verifying Affidavit filed together with the application for leave to institute the proceedings herein filed in this court on 31st December 2013. 1
3. The 1st, 4th, 6th and 7th Applicants were struck off from the record and the suit is in regard to the 2nd, 3rd and 5th Applicants.

THE APPLICANTS' CASE

4. The Applicants are Administration Police Officers employed by the National Police Service Commission and are stationed in Nakuru Sub-County. They allege that on 27th December 2013 they were served with letters transferring them from Nakuru Sub-County. They were further directed to report to their new stations by 3rd January 2014.
5. The Applicants have challenged this decision on three grounds; that the decision was made in contravention of the procedures laid down in the Force Standing Order; that the decision was made without the authority of the National Police Service Commission which is the only body vested with the mandate to transfer Police Officers; and that the Applicants were not consulted before the decision to transfer them was made.
6. The Applicants aver that they are ready to work in any part of the country and have no reservations about being transferred as long as the transfer is done procedurally and they are given time to relocate to their new stations.

THE RESPONDENTS' CASE

7. In the Grounds of Opposition filed on 11th March 2014 by the Hon. Attorney General on behalf of the 1st, 2nd and 3rd Respondents contended that the application as filed is fatally defective and offends the mandatory provisions of **Order 53 of the Civil Procedure Rules, 2010**. The Respondents also alleged that the application is frivolous, vexatious and an abuse of the Court process and should be dismissed with costs.
8. The case against the 4th Respondent was withdrawn by the Applicants at the commencement of

the hearing hereof.

SUBMISSIONS

9. At the hearing of the application, Counsel for the Applicants first pointed out to the court that none of the Respondents had filed a Replying Affidavit. He then argued that **Article 245** of the **Constitution** vests powers to transfer Police Officers solely on the 3rd Respondent. Therefore the letter issued on 24th December 2013 which as issued by the 1st Respondent is unconstitutional. In this regard this court was referred to the finding of the court in **Issa Omar Hussein V. Attorney General of Kenya & another** [2014] eKLR and **Republic V. Deputy Inspector General of National Police & 32 others**, [2013] eKLR. In both cases, it was held that the powers to transfer is vested exclusively on the National Police Service Commission, the 3rd Respondent.
10. Mr. Njuguna, State Counsel, submitted that the names of the 1st, 4th, 6th and 7th Applicants were struck off from the record. The proceedings before the court are therefore defective because they are premised upon a Verifying Affidavit which was sworn by the 7th Respondent who is no longer a party to this suit. He further argued that the Verifying Affidavit and Statutory Statement contain the evidence to be relied on in a Judicial Review Application and without them there is no evidence upon which the suit can be determined.
11. Counsel also argued that the application is defective as it was not brought in the name of the Republic. He also submitted that the letter dated 24th December 2013 was written in an administrative capacity. Therefore its contents cannot be challenged by way of Judicial Review. Counsel further contended that the order of Prohibition sought by the Applicants cannot be granted as the decision has already been made and communicated to them. Counsel also submitted that the argument by Counsel for the Applicants regarding the Constitutionality of the decision being challenged was not pleaded in the application and therefore ought not be considered by the court. He therefore urged the court to dismiss the application with costs.

ISSUES FOR DETERMINATION

12. I have considered the pleadings and the submissions of the parties, I find the following to be the issues for determination-
 - (a) the improper intituling of the application
 - (b) whether the application herein is defective
 - (c) whether the 7th Applicant's affidavit should be disregarded
 - (d) whether the Applicants are entitled to the orders sought
 - (e) costs.

ANALYSIS

13. This court notes that the issue of the titling of the application was raised by Counsel for the Respondent and authorities provided in support. I have noted that the application was not brought in the name of Republic at the leave stage and in all the further pleadings made by the Applicants this improper titling has been adopted. It is trite law that prerogative orders are issued in the name of the Republic and that applications be made in the name of the Republic at the instance of the aggrieved Applicants. Reference is made to the cases of **Jotham Mulati Welamondi V. The Chairman Electoral Commission of Kenya**, (2002) 1KLR 486 and **Farmers Bus Service V. Transport Licensing Appeals Tribunal**, (1959) EA 179. It was held in these decisions that failure to bring Judicial Review applications in the name of the Republic rendered them fatally defective and incompetent leading to them being struck out.
14. The above position has changed greatly and courts now look more at the substance of Judicial

Review application as opposed to defects in intituling. Refer to the case of **Republic Ex-Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers V. Charles Lutta Kasamani T/A Kasamani & Co. Advocates & Anor., Civil Appeal (Application)**, No. 281of 2005.

15. The issue of the Verifying Affidavit sworn by the 7th Applicant was visited by Counsel for the 1st Respondent. It was his contention that the 7th Applicant who had sworn the Verifying Affidavit was no longer a party to the proceedings and therefore her affidavit was no longer of any evidential value. The way I understand the Counsel's submissions is that since the 7th Applicant had been struck out from the pleadings it therefore follows that the affidavit she had sworn on behalf of herself and the other Applicants that this affidavit ought to be struck out as well.
16. This court has taken into consideration these submissions and notes that the facts as set out in a Verifying Affidavit are the basis of and the evidential aspect of all judicial review proceedings. If the court were to concur with those submissions and effect the drastic action of striking out the Verifying Affidavit it would then mean that there being no Verifying Affidavit the remaining Applicants would have no evidence to support their case.
17. Again this court reiterates that the substance of the application is of more importance and this court also has inherent powers to make such orders that may be necessary for the ends of justice to be met.
18. This court has noted that the Letter of 24th December, 2014 annexed to the Affidavit was jointly addressed to all the Applicants herein and bears all their names.
19. For that reason alone and in acting judiciously this court will allow the 7th Applicants Affidavit in Verification of the Statement to remain on record. The position would have nevertheless been different if separate letters had been written and addressed to each of the Applicants on an individual basis and particularly if the one letter annexed and sought to be relied upon had been that of the 7th Applicant, solely.
20. I will now address the Letter dated the 24th December, 2013 the subject matter of these proceedings. The law applicable is **Order 53 Rule (2)** of the **Civil Procedure Rules 2010** envisages a situation where one applies for orders of certiorari. That is:

“..... to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed.....”

21. Counsel for the 1st Respondent submitted that this Letter written by the 1st Respondent and addressed to all the Applicants does not fall into any of the above categories.
22. In discerning whether the letter falls into any of the categories spelt out in **Order 53(2)** this court makes reference to the Orders sought in the Notice of Motion dated the 2nd of January, 2014 and in particular prayer (a) and it is quoted verbatim hereunder:

“..... (a) OF CERTIORARI to bring before this Honourable Court to Quash the directive by the 2nd Respondent which was communicated (emphasis mine) to the Applicants by the 1st Respondent vide a letter dated the 24th December, 2013 purporting to transfer the Applicants from one station to another without authority from the Inspector General or Deputy Inspector General of the National Police Service.”

23. In my view the words used by the Applicants in the above mentioned prayer seeking for the order of certiorari is their own undoing. The words that this court has captured are as set out hereunder:

‘... was communicated to the Applicants by the 1st Respondent vide letter dated the 24th December, 2013...’

24. The question that comes to mind is, if the letter is merely a communication? The letter in question is very brief and reads as follows:

“RE: AP TRANSFER

This is to inform you that you have been transferred from this station to the station indicated against your names:

- **Cpl. Naomi Asibitar** - **Transzoia West**
- **Cpl. Lydia Goga** - **Tinderet**
- **Cpl. Catherine Njeri** - **Kieni East**
- **Cpl. Christine Mutune** - **Nzaui**
- **Apc. Davlin Onsindu** - **Butere**
- **Apc. Sheila Ondari** - **Borabu**
- **Apc. Rose Mwangi** - **Mathioya**

On receipt of this letter therefore, make your own arrangements to report to your new station not later than 03/01/2014.

Meanwhile, I take this opportunity to thank you for the good services you rendered while station (sic) here and urge you to extend the same to your new station.

JOHN W. WACHIRA – SSP

SUB COUNTY COMMANDER

NAKURU SUB COUNTY

Copy to

The County AP Commander

NAKURU COUNTY”

25. The Black’s Law Dictionary defines a communication as:

(i) **“ information given;**

(ii) **‘ sharing of knowledge by one with another’;**

26. The other words of interest used in the prayer are **‘directive from the 2nd Respondent’**. Upon perusal of the letter in issue it makes no mention of any directive alleged to have come from the 2nd Respondent. The court opines that time might have been a constraint and the Applicants hurriedly filed their application and may not have been able to lay their hands on this alleged directive and or proceedings thereto, if any.

27. This court is of the view that the letter sought to be quashed is merely a non verbal communication device or medium through which the 1st Respondent delivered a message to the Applicants informing them of their transfers.

28. It is trite law that Judicial Review is not concerned with the merits of a decision made but with the decision making process.

29. In this application, the process is not being challenged as no proceedings were annexed and this court is satisfied that the letter does not fall under any of the categories envisaged by **Order 53(2)** in that it is neither a judgment, nor an order, nor a decree, nor a conviction emanating from a proceeding.

30. As for the prayer for an order of Prohibition the court states that had the Applicants succeeded in obtaining the order for Certiorari this order would also have been granted to restrain any futuristic actions by the Respondents.

31. As for the constitutionality of the Respondents' actions, this court opines that the constitutionality of the decision was not pleaded nor expounded upon and this court will therefore not address this issue.
32. I commend both Counsels for saving the court's time by agreeing to forgo prosecuting the pending application for contempt of court and instead graciously agreed to go straight to the hearing of the main application.

FINDINGS

33. The application is found to be improperly intitled but the defect is found not to be fatal to the application.
34. The Verifying Affidavit is also found not to fatally affect the application.
35. The Letter dated the 24th December, 2013 is found to be merely an informative communication on transfer and which is not capable of being quashed by an order of *Certiorari*.
36. The order for Prohibition is also found not to be merited.

DETERMINATION

37. The application is lacking in merit and is hereby dismissed.
38. Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 24th day of September, 2014.

A. MSHILA

JUDGE