REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CONSTITUIONAL AND JUDICIAL REVIEW DIVISION)

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 268 OF 2011

REPUBLIC……..….APPLICANT

VERSUS

THE COMMISSIONER OF POLICE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

SIMON WILIAM MURIITHI.....EX PARTE APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 16th December 2011 filed in Court on 19th December 2011, the *ex parte* applicant herein, **Simon William Muriithi**, seeks the following orders:

1. **This Honourable court be pleased to issue an Order of mandamus to compel the Commissioner of Police to lift the interdiction from duty made or slapped on the ex-parte Applicant on 13th October 2009.**

2. **That this Honourable Court do hereby declare that the interdiction issued by the respondent against the ex-parte Applicant on 13th October, 2009 is no longer valid in the light of this honourable Court's order dated 11th May, 2011 in H.C (JR) MISC. APPLICATION No. 22 of 2011 at Nairobi.**

3. **That costs of this application be provided for.**

2. The application is based on the following grounds:

1. That interdiction was based on the outcome of Garissa Criminal Case No. 757 of 2008.

2. That on 11th May, 2011 the High Court, Hon. Justice Mr. Musinga removed and quashed the proceedings of the Principal Magistrate Garissa Criminal Case No. 757 of 2008.

3. That there is no other Criminal Case pending before any Court against the Applicant but the Respondent has refused ignored and/or neglected to lift the interdiction against the Applicant.

4. That the Interdiction From Duty slapped on the Applicant and remaining in force after the proceedings were quashed is illegal, *ultra vires* and a violation of the Applicants Constitutional Rights.

5. That the Applicant is still receiving half salary even after the Criminal Proceedings vide Garissa Criminal Case No. 757 of 2008 were quashed.

6. That the Applicant has used all diligence both verbal and in writing to persuade the respondent to lift the interdiction From Duty but the Respondent has refused to comply.

3. The said application is supported by the Statutory Statement filed on 4th November 2011 and the verifying affidavit sworn by the applicant on 1st November 2011. According to the applicant he is a Police Officer who was interdicted from duty by the Respondent on grounds based on Garissa Criminal Case No. 757 of 2008 whose proceedings were quashed on 11th May 2011 and an order made directing that the proceedings start de novo by a Different Court of concurrent jurisdiction. According to him there is no other criminal case pending before any Court against him yet the Respondent has refused and/or neglected to lift the interdiction against him. In the applicant's view, the interdiction from duty slapped on him and remaining in force after the proceedings were quashed is illegal, ultra vires and a violation of his Constitutional rights. He further contends that he is still on half salary after the said proceedings were quashed despite exercise of due diligence to have the interdiction lifted.
4. In opposition to the application the respondents filed an affidavit sworn by **Terry W. Kahoro**, a prosecution counsel on 2nd October 2012. According to the deponent, the applicant was interdicted from duty on half pay following his being charged for the offence of obtaining money by false pretences. The applicant instituted judicial review proceedings which were decided in his favour when the Court quashed the proceedings in the Principal Magistrate's Court in Criminal Case No. 757 of 2008 and ordered that the same be heard de novo before another court. In the deponent's view the said order only quashed the proceedings before a particular magistrate but did not extend to quash and the order seeking mandamus to lift his interdiction is misconceived since the order cannot issue against a decision that has already been made. The order did not affect the existence of the criminal case and as such the criminal case was not affected by the order quashing the decision as the case still exists and the status quo of the interdiction remained. Accordingly, the applicant's contention that the criminal case against him was terminated and that the interdiction should be lifted is misleading. In her view the application is without merits and ought to be dismissed.
5. In his submissions the ex parte applicant reiterated the contents of the supported affidavit while the respondents similarly reiterated the contents of the replying affidavit.
6. In my view the determination of this application largely hinges on the meaning and effect of an order that the hearing of a case starts *de novo*. Dealing with such circumstances the Court of Appeal in **Peter Okeyo Ogila vs. Rachuonyo Farmers Co-Operative Union Ltd. Civil Appeal No. 79 of 1992** expressed itself as follows:

"The circumstances of this case are somewhat peculiar. The only issue before the Court was what would be a fair and reasonable compensation to award to the appellant for his injuries. Mr. Justice Githinji attempted this by reference to decided cases, he then arrived at a total figure. That judgement was set aside...In those circumstances, Mr Justice Wambilyanga before whom case for assessment has duty to hear and assess the damages de novo. He has to apply his own mind to the matter and decide for himself, what would be a fair and reasonable compensation. He took some evidence that will enable him to do this. But he did not exercise his judicial function of making his own assessment. He merely reproduced the judgement which had been set aside and increased it by a small sum to take account of inflation. In our opinion, this course is impermissible and the judgement not being his, is a nullity...As this matter has suffered considerable delay, we direct that the fresh hearing shall

be done as a matter of urgency."

7. In **Nation Media Group Limited vs. Busia Teachers Co-Operative Credit and Savings Society Limited & Another Civil Appeal No. 209 of 2005** the Court Appeal held:

   "A consent order having been entered that the trial do start *de novo,* the superior court's decision not to proceed with the hearing of the suit *de novo,* and to rely on the previous proceedings taken before the earlier Judge was without jurisdiction, and in breach of the order requiring hearing *de novo* of the suit before the superior court."

8. What comes out from the foregoing decisions is that where a Court orders that the proceedings start de novo, the Court to which the matter is remitted has to start the hearing afresh. An order for trial de novo does not amount to an acquittal but simply obliterates the earlier proceedings with the effect that the trial has to start afresh. In effect the charge remains the same unless there is an amendment and the trial continues until brought to finality either by withdrawal, acquittal or conviction.
9. It has not been alleged by the applicant that any of the three events mentioned above has occurred. Accordingly, it follows that the applicant's contention that the effect of the order quashing the proceedings was the vacation of his interdiction is incorrect and what the applicant is expected to do is to hasten the trial process so that he can be vindicated.
10. Apart from that in **Jotham Mulati Welamondi vs. The Electoral Commission Of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held:

    "Mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. *Fortiori* it should be an appropriate remedy to compel the performance of a constitutional duty...The court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice but such intervention would only be by way of prohibition (if the act is incomplete) or certiorari (if the act is complete) and not by way of mandamus...Mandamus cannot issue to compel the exercise of discretionary power let alone its exercise with a view to arriving at a particular result."

11. In this case the order sought by way of mandamus is not the performance of a duty imposed on the respondent but an exercise of discretion in a certain manner. In those circumstances mandamus is not the most efficacious remedy.
12. Accordingly, the Notice of Motion dated 16th December 2011 lacks merits and is dismissed with costs.

Dated at Nairobi this day 27th of February 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Muthomi for Mr. Riungu for applicant