



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISC APPLICAITON NO 288 OF 2011**

**IN THE MATTER OF: AN APPLICATION BY REVEREND DANIEL MUIRURI NDUNGU  
FOR JUDICIAL REVIEW FOR ORDER OF MANDAMUS AGAINST THE PERMANENT  
SECRETARY MINISTRY OF MEDICAL SERVICES**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, THE PUBLIC SERVICE COMMISSION  
ACT AND PUBLIC SERVICE REGULATIONS**

**AND**

**IN ACCORDANCE WITH ORDER 53 OF CIVIL PROCEDURE RULES**

**BETWEEN**

**REVEREND DANIEL MUIRURI NDUNGU .....APPLICANT**

**VERSUS**

**THE HON ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE PERMANENT SECRETARY, MINISTRY OF**

**MEDICAL SERVICES.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 20<sup>th</sup> December 2011, the ex parte applicant herein, **Reverend Daniel Muiruri Ndungu**, seeks the following orders:
  - a. **An order of Mandamus do issue to compel the 2<sup>nd</sup> respondent to reinstate the applicant back to employment with the Ministry of Medical Services at Afya House, Nairobi, as acting Chief Drugs Inspector, and to pay him his monthly salary and all accrued salary arrears since 1<sup>st</sup> September 2005, and acting allowance since April 2005 when he was appointed acting Chief Drugs Inspector.**
  - b. **An order of certiorari to remove to the High Court and quash the decision of the 2<sup>nd</sup>**

respondent to post the applicant as Provincial drugs Inspector, Central Province at Nyeri as contained in the posting letter dated 22<sup>nd</sup> November 2011.

- c. **An order of prohibition to prohibit the 2<sup>nd</sup> respondent from demoting the applicant in rank or seniority and from acting contrary to the Drugs Inspector scheme of service as read with the Public Service Regulations and Public Service code of Regulations in relation to the management of the Drugs Inspectorate in General and in particular the applicant's employment and deployment.**
- d. **The costs of this application be provided for.**

#### **EX PARTE APPLICANT'S CASE**

2. The application is based on the Statement of Facts filed with the amended Chamber Summons on 7<sup>th</sup> December 2011 and the affidavit verifying facts sworn by **Reverend Daniel Muiruri Ndungu**, the applicant herein on 5<sup>th</sup> December 2011.
3. According to the applicant, he was employed by the Ministry of Health, currently renamed the Ministry of Medical Services in 1991. Between 21<sup>st</sup> July 1992 and 2<sup>nd</sup> November 2010 he was variously arrested unlawfully arrested by police and falsely imprisoned for a couple of days but was either released without any charges being preferred against him or was acquitted. Notwithstanding his acquittal the respondent did not reinstate him back to the employment and on 2<sup>nd</sup> November 2010 he was dismissed from service without any explanation. At the time of his interdiction while the said criminal proceedings were pending, he was the Chief Drugs Inspector with the Ministry since 2005.
4. Although he filed an appeal against his dismissal with the Public Service Commission and succeeded in his said appeal, and the Respondent ordered to reinstate him, back to the employment in April 2011, the Respondent has unlawfully refused to comply therewith to date. According to the applicant, even if he were to be reinstated, he would be unlawfully re-deployed to other duties, transferred to another station, demoted, exposed to harassment and his accrued arrears unpaid. In his view, the Respondent has acted maliciously against him and acted in bad faith since 1992, with the sole intention of victimising him for no lawful cause and/or justification and this is evidenced by the fact that he has been twice acquitted of criminal charges filed at the instance of the respondent despite his diligence in the performance of his duties with no evidence of unsatisfactory performance. The said action on the part of the Respondent, according to the applicant smacks of impunity and it is only an order of the Court that can compel the Respondent to spell out clearly the terms of his reinstatement.

#### **RESPONDENTS' CASE**

5. In opposition to the application the Respondent on 21<sup>st</sup> February 2012 filed the following grounds of opposition:
  1. **That the Applicant has not satisfied the conditions for the grant of orders being sought.**
  2. **That the 2<sup>nd</sup> Respondent has acted within his jurisdiction in a fair manner and in accordance with the rules of natural justice and the application is bad in law and misconceived.**
  3. **That the application is mischievous and an abuse of the due process.**
  4. **That the Application is without merit and frivolous.**
  5. **That Judicial Review is concerned with the process and not with merit.**
  6. **That judicial review is discretionary in nature and orders sought can be declined even where they deserve.**
  7. **That judicial review is public law remedy and not concerned with private rights.**

#### **SUBMISSIONS IN SUPPORT OF THE EX PARTE APPLICANTS' APPLICATION**

6. In support of the application, the ex parte applicant submitted that as the Respondent has not filed

- any affidavit sworn in opposition to the application, the facts pleaded in the application are not disputed and are hence admitted. The only fact that has since changed is that the Respondent, subsequent to the commencement of these proceedings purported to post the applicant on 22<sup>nd</sup> November 2011 to the Provincial Director of Medical Services, Central Province in Nyeri wherein the applicant was to report not later than 28<sup>th</sup> November 2011 for redeployment. According to the applicant the said action was meant to pre-empt the inter partes hearing of the application for leave slated for 29<sup>th</sup> November 2011. It is submitted that the issues raised in the grounds of opposition hold no water in the face of the factual averments herein.
7. In the applicant's view his employer, the Ministry of Medical Service has never accorded him the rules of natural justice; has acted in an unreasonable, unfair, unjust and capricious manner in its dealings with the applicant; has acted in excess of its jurisdiction in dealing with the applicant; and has acted mischievously, without following the due process of the law and in some instances abused the due process of the law. Since the ***Public Service Code of Regulations (Revised 2006)*** and the ***Scheme of Service for Inspectors of Drugs, the Employment Act (2007)*** and the provisions of Article 236(b) of the Constitution are applicable to him, the applicant submits that his employment was government by statute hence it had statutory underpinning and therefore the remedy of judicial review avails the applicant and relies on **R vs. The Permanent Secretary, Ministry of Medical Services ex parte Dr. Pius Wanjala High Court Misc. Application No. 131 of 2011.** On the authority of **R vs. Kenya Wildlife Service ex parte Joachim W. Kagiri [2011] KLR** it is contended that the Court cannot intervene by way of judicial review unless it is sufficiently demonstrated that the interdiction was contrary to statute. Whereas judicial review is concerned with public law as opposed to private law, it is submitted that the applicant's employment and terms of service fall within the Public Law since they are governed by statute, and therefore, the terms of employment and sanctions thereof have statutory underpinning. The applicant further relies on **Paul Melly vs. Permanent Secretary, Treasury Hgh Court Miscellaneous Application No. 1179 of 2003; Eric Makokha & Others vs. Lawrence Sagini & Others Civil Appeal No. 20 of 2003** and **East Berkshire Health Authority ex parte Walsh [1984] 3 ER 425.**
  8. By unlawfully dismissing the applicant, it is submitted the 2<sup>nd</sup> respondent cannot be said to have acted within her jurisdiction as she had no powers to do that and neither were the rules of natural justice observed. When the respondent declined to reinstate the applicant it is submitted it acted without jurisdiction. Regulation 39 of the ***Public Service Regulations [2005]***, it is submitted provides that the Secretary shall advise the authorised officer concerned of the decision of the Commission on any particular matter and the authorised officer shall take up appropriate action while section 45(3)(a) of the ***Employment Act of 2007*** which according to the applicant applies to him, states that where the dismissal was unfair, the remedy include reinstatement and treating the employee in all respects as if the employee's employment had not been terminated. Section 23(3) of the ***Public Service Commission Regulations [2005]*** requires that if an officer is neither dismissed nor otherwise punished, such officer's whole salary withheld on interdiction shall be restored to him upon termination of such proceedings. Hence in demoting the applicant, it is submitted that 2<sup>nd</sup> respondent never acted in a fair manner since the applicant's demotion is a preserve of the Public Service Commission and in any case the applicant has been under any disciplinary proceedings. The punishment, it is submitted violates regulation 25(3) of the ***Public Service Commission Regulations [2005]*** which state that no punishment shall be inflicted on any public officer which would be contrary to any law and is in contravention of section (sic) 236(b) of the Constitution. While posting to a station is within the jurisdiction of the 2<sup>nd</sup> respondent, it is submitted that the jurisdiction can only be exercised in observance of seniority. The applicant further relies on **Associated Provincial Picture Ltd vs. Wednesbury Corporation [1947] 2 All ER 680.**
  9. By hurriedly posting the applicant after the respondent was served with the Notice of Motion, it is submitted the said posting was not done in good faith. **RESPONDENTS' SUBMISSIONS**
  10. On the part of the respondents, it is submitted that the orders sought cannot be granted since the issue in question arise from employer-employee relationship and do not lie under the realm of judicial review which deals with processes and not the merit of a case. According to the respondent the applicant is not challenging the procedure but the position of his reinstatement.

According to the respondent the issue of the applicant's reinstatement back to the same position will not apply through the process of judicial review. Since the applicant was acting as Chief Drug Inspector which was subject to confirmation or not, this is an issue which would be sorted out internally.

11. For the applicant to succeed in the application, the Respondents contend that the applicant has to demonstrate that the matter is of public right as opposed to private law right and since the matter relates to private law right, judicial review is not concerned with the merits of the decisions of the statutory bodies or tribunal but rather public rights and decision making process hence where the decision of a statutory body is wrong, the matter of challenging it is by appeal and not judicial review. According to the respondents, the applicant has not demonstrated a clear case as to why the order of certiorari should be issued to quash the decision of the respondent.
12. Since the applicant on receipt of his deployment letter reported to the new station, it is submitted that that amounted to acceptance of the deployment hence the orders sought have been overtaken by events. Since a public servant can be deployed to work anywhere in the Republic of Kenya the applicant's posting to Nyeri is a non-issue. Since the applicant has not shown that the Respondent has acted contra statute, it is submitted that the judicial review remedies cannot issue hence the application ought to be dismissed.

### **DETERMINATIONS**

15. I have considered the foregoing. In **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194, Platt, JA** expressed himself as follows:

**“Employment by a public authority *per se* does not inject any element of public law. Nor does the fact that the employee is in a higher grade or is an officer as distinct from the holder of an office; this only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment. A reinstatement made under the Trade Disputes Act is a “private law” matter and a breach of such an order would not give rise to a “public law” remedy. A new cause of action created by a statute and consequent remedies for employees who have been “unfairly” dismissed is by no means simultaneously wrongful dismissal under common law. This new cause of action, however and statutory remedies that go with it, are not enforceable by ordinary action, nor indeed by judicial review; they are only available to an employee on a successful application to an industrial tribunal.”**

16. With respect to the remedy for mandamus sought in prayer (a) of the Notice of Motion, it is clear from the submissions that the limb dealing with reinstatement of the applicant to employment is no longer a live issue since the applicant has already been reinstated. The applicant, however, seeks reinstatement to a particular station. As rightly submitted on behalf of the respondent and conceded by the applicant, public servants may be deployed to any part of the country hence the decision where to deploy a public servant is in the discretion of the employer. Mandamus, it is trite law does not lie to enforce an exercise of discretion. In **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** it was held by the Court of Appeal that:

**“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which**

**imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”**

17. In this case, not only does the applicant pray that the Court directs the respondents to exercise a discretion but to do so in a specific way by deploying the applicant to a particular station. That the Court cannot do. The Court is, however, well aware that it 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. However, as was held in **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, 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 since mandamus cannot issue to compel the exercise of discretionary power let alone its exercise with a view to arriving at a particular result.
18. The applicant also seeks an order for payment of his monthly salary and all accrued salary arrears since 1<sup>st</sup> August 2005, and acting allowance since April 2005 when he was acting Chief Drugs Inspector. The applicant has extensively cited legal provisions in support of this aspect of the claim. Whereas the applicant’s position on the said claims is not without some merit, to grant a blanket order for payment of the said emoluments without the same being quantified would, in my view, be an exercise in futility. The applicant was expected to quantify his said claims so that an order capable of being executed would be issued by the Court. Quantum of damages is a factual matter and ought where the same has not been determined to be claimed in ordinary suits. In **Municipal Council of Kisumu vs. Madowo [1986-1989] EA 373**, it was held that:

**“Where no decision had been made as to the respondent’s entitlement under the contract of employment, an order of *mandamus* directing the council to pay the claim was inappropriate...The proper procedure would have been for the respondent to file a proper suit by way of plaint where the appellant could have filed its defence and the plaintiff had to prove his claim according to law. Only then if he was successful would he obtain judgement in his favour after which an order for the Council to pay could have been made, but could not have been necessarily by prerogative order.”**

19. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

**“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.”**

20. The 2<sup>nd</sup> prayer seeks the quashing of the decision to post the Applicant to Nyeri. As already stated hereinabove that remedy cannot be granted for reasons set out hereinabove.
21. With respect to the third prayer, it is not contended that the applicant had been confirmed in the position of Chief Drugs Inspector. The decision whether or not to confirm an employee in a certain post depends on a number of factors. The Court is not aware of the considerations that are taken into account by the respondent before it confirms an employee to a particular post. If the court were to accede to the ex parte applicant’s application and grant the said prayer as sought the Court would have confirmed and compelled the respondent to post the applicant to the said acting position almost permanently without giving room to the respondent to exercise its discretion whether or not to confirm him. That would be tantamount to the Court imposing its will and power over that of the respondent and thereby purport to perform the functions of the respondent in exercising the discretion whether or not to confirm the applicant. The court must decline the invitation by the ex parte applicant to do so as it would be improper and even unconstitutional.

22. In deciding whether or not to grant orders of judicial review, the Court must consider whether or not the orders sought by the applicant are the most efficacious remedies in the circumstances. As stated in *Halsbury's Laws of England 4<sup>th</sup> Edition Vol. II page 805 paragraph 1508*, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles would dictate where to grant the orders of judicial review even if merited is likely to affect the process, the Court would be reluctant to accede to the applicant's prayers. See **Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 [2004] 1 KLR 203.**
23. I agree with the decision in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** that the court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice.
24. In **Raichand Khimji & Co. vs. Attorney-General Civil Appeal No. 49 of 1972 [1972] EA 536** the East African Court of Appeal held that the High Court's supervisory powers over administrative and quasi-judicial tribunals are discretionary and should only be used in exceptional cases, for instance if there has been a failure of justice or want of good faith.

### **ORDER**

25. Having considered the foregoing, I am unable to grant the orders sought in the Motion dated 20<sup>th</sup> December 2011 which is hereby dismissed with costs to the respondent.

**Dated at Nairobi this day 14<sup>th</sup> day of March 2013**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of Mr Staussi for Mr Kamau for the Applicant and Mrs Sirai for the Respondent