REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 648 of 2009

IN THE MATTER OF AN APPLICATION BY DONALD O. RABALLA FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF JUDICIAL SERVICE COMMISSION (JSC)

BETWEEN

REPUBLIC……..……..APPLICANT

VERSUS

THE JUDICIAL SERVICE COMMISSION…….....…1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL…….....…2ND RESPONDENT

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 27th November 2009 filed the same day, the *ex parte* applicant herein, **Donald O. Raballa**, seeks the following orders:

1. THAT orders of Prohibition directed to the 1st Respondent, its servants or agents from implementing and/or execution of its decision dated 13th May 2009 terminating the Applicant herein be issued.

2. THAT orders of Certiorari to remove into the High Court and quash the decision of the 1st Respondent dated 13th May 2009 together with the proceedings thereof be issued.

3. THAT an order of Mandamus do issue against the Respondents directing the payment of due emoluments, salary, remuneration, benefits and such other allowances to which this Applicant is entitled to and further reinstating the Applicant to his position of Resident Magistrate (RM).

4. THAT the costs of this application be paid by the 1st Respondent.

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

2. The Motion is based on the following grounds:

(i) The Applicant has been condemned unheard and in breach of Rules of National justice.

(ii) The decision of the Judicial Service Commission did not give reasons and/or answer the Applicant's case as required in law.

(iii) The 2nd Respondent acted *ultra vires* and in excess of its powers and/or jurisdiction.

(iv) The 2nd Respondent acted in breach of the Wednesburys Principles, being unreasonable.

(v) No response to this Applicant's Appeal has been received, so far, and refusal to respond depicts bad faith and unreasonableness on the respondent's part.

(vi) **The Applicant's Right to challenge this decision will be diminished by effluxion of time hence violate the Applicant's constitutional rights to access to the High Court for remedy**.

(vii) **The decision of the Respondent terminating the Applicant was made arbitrarily and capriciously**.

(viii) **The decision of the Respondent was made contrary to and in breach of regulations, to wit**: **Service Commission Act, regulations thereunder terms conditions of service governing the Applicant's appointment among other laws.**

(ix) **The Respondents decision and attendant proceedings is irregular and made illegally and without following the laid down regulations applicable.**

(x) **Due process in accordance with the regulations guiding the operations of the Judicial Service commission was not adhered to.**

(xi) **The termination letter of the Applicant is vague and ambiguous, as reasons for termination have not been defined or particularized to enable the Applicant respond.**

(xii) **That in the interest of Justice, the Applicant is entitled to protection of this Honourable Court to prevent abuse of previous capricious exercise of discretion and to the interests of the public policy and Rule of Law.**

3. The said Motion is supported by Statement filed 9th November 2009 and Verifying Affidavit sworn on 9th November 2009 by the applicant.

4. According to the applicant, he is a former Resident Magistrate in various stations in the Republic of Kenya until 13th May 2009 when he was irregularly terminated. According to him prior to his appointment as a magistrate he was a State Counsel a post to which he was appointed on 20th March 2000 vide a letter dated 11th January 2002 by the 2nd Respondent. After his elevation to the position of State Counsel II a post in which he was in due course confirmed, he was subsequently promoted to the position of Litigation Counsel vide a letter dated 16th June 2003. His appointment as Resident Magistrate was effective from 23rd June 2005 and vide a letter dated 28th November 2005 his service was transferred from the 2nd Respondent to the 1st Respondent on permanent and pensionable terms a post in which, according to him, he has diligently and competently served in accordance with the terms and conditions of service governing his appointment.

5. However on 26th January 207 he received a letter from the Hon. Chief Justice in which allegations of gross misconduct were made against him to which he responded. Despite the said response he has never received any response from the 1st Respondent. According to him the said allegations were false and unsubstantiated. Thereafter he was vide a letter dated 26th January 2009 invited for an interview for the position of Senior Resident Magistrate an interview which he attended. He was, however, shocked when

on 15th May 2009 he received a letter dated 13th May 2009 terminating his appointment from the 1st Respondent's service an allegations which, according to him, were vague, ambiguous, unfounded, false and a violation of the rules and Regulations governing his service.

6. In his view, he was terminated without being heard and the 2nd Respondent has todate failed to respond to his appeal against the said dismissal despite reminders from him. According to his affidavit, he filed an appeal against the decision to dismiss him vide an appeal dated 22nd May 2009.

7. The applicant contends that his dismissal and/or termination is contrary to public policy, interests and has ruined his career, profession and future and unless this application is heard and determined, he will suffer irreparable loss and damage since the said action is irregular, illegal and made in total disregard of the terms, conditions and regulations applicable. As a consequence of the said action, he states that the 1st Respondent has not paid his dues, benefits and/or salary.

8. In a further affidavit sworn by the applicant on 17th August 2012, the applicant contends that the decision of the Judicial Service Commission to have the Resident Judge, Kericho, instead of Resident Judge Eldoret was prejudicial. In his view, the issues regarding irregular orders are matters that ought to be subject of appeal, review or setting aside, and in any case, the Respondents have not provided proof of the case in question and that there was no complaint in respect thereof and the same was not the subject of the letter of dismissal which letter neither specified the complaint nor the gross misconduct for which his appointment was terminated. According to him pension is a right that accrued to him on appointment and hence the translation of terms should not in any way affect his rights which rights cannot be extinguished by dismissal or termination. In his view his second appeal has not elicited any response from the judicial Service Commission and the replying affidavit is ambiguous and evasive as to the real reason for his termination and has no annextures to prove the claims of any impropriety on his part to show that the indeed the due process and the rules of natural justice were adhered to.

RESPONDENTS' CASE

9. In opposition to the application, **S M Kibunja**, the Chief Court Administrator swore a replying affidavit on2nd December 2010. While confirming the ex parte applicant's employment in the Civil Service, it is deposed that the applicant joined the judiciary on 18th July 2005 as a Resident Magistrate upon appointment on temporary terms of service. According to him while in the judicial service complaints were made against the ex parte applicant in respect of criminal case number 2614/06 and 2609/06 amongst other complaints. The Judicial Service Commission subsequently decided that the ex parte applicant's temporary appointment be terminated with immediate effect from 8th May 2009 on account of gross misconduct. It is reiterated that the employment offered to the ex parte applicant which was accepted was on temporary basis. It is deposed that the ex parte applicant's case for translation of his terms of service and adoption of the date of confirmation of appointment in civil service was placed before the 1st respondent on 24th October 2008 but was deferred due to the disciplinary case that he was facing. In any case, it is deposed that the translation of terms is rendered difficult by Gazette Notice 3801 of 8th March 1985 delinking the judiciary from civil service with effect from 14th July 1993 and therefore the judiciary is not bound by the terms of service in the Attorney General's Chambers, hence at the time of termination of his employment, the ex parte applicant was serving on temporary terms. With respect to the ex parte applicant's appeal, it is deposed that the same was rejected by the Judicial Service Commission on 23rd October 2009 for lack of sufficient grounds and he was informed on 26th October 2009 to exercise his right of second appeal within one year with effect from that date but has not done so but has abandoned the administrative process in favour of a legal suit.

10. It is the deponent's view that the orders sought should not therefore be granted and that the application be dismissed with costs since in any event employment matters are not amenable to judicial review.

EX PARTE APPLICANT'S SUBMISSIONS

11. On behalf of the applicant it is submitted that the Respondents did not adhere to the rules of natural justice during the determination of the applicant's dismissal and even during the appeal process contrary to Article 50 of the Constitution which provides that every person is entitled to a fair hearing, an ingredient of natural justice. It is further submitted that the Respondents' contention that the applicant was serving a temporary term would be inconsistent with Regulation E20 of the Public Service Regulations, 2005 as well as the Employment Act which provides that the period of temporary appointment should not exceed 12 months since the applicant had served 4 years. This contention, it is submitted, is contrary to the applicant's terms which were indicated as permanent and pensionable. This was confirmed by his invitation for interview for promotion to the position of Senior Resident Magistrate.

12. It is therefore submitted that the applicant being a permanent employee was under Article 47 of the Constitution entitled to fair administrative action and to be informed of reasons for the action against him and for courts to review administrative actions of other bodies. According to him there were no sufficient grounds to warrant his dismissal which dismissal was based on vague complaint and gross misconduct which was not explained to him. According to him, his channels of appeal were similarly frustrated.

13. Based on **O'Reilly vs. Mackman [1983] 2 AC**, **Republic VS. Kenya National Commission on Human Rights *ex parte* Uhuru Muigai Kenyatta [2010] eKLR** and **Republic vs. Judicial Service Commission & Another *ex parte* Joyce Manyasi [2012] eKLR** it is submitted that the two fundamental rights accorded by the rules of natural justice or fairness, to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and in the absence of personal bias on the part of the person by whom the decision falls to be made and further that the applicant has legitimate expectation of being taken through a fair administrative process whenever there is contact with the administration. According to the applicant, his termination without well founded reasons was unreasonable and relies on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] EWCA Civ. 1**, **Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374** and **Republic vs. Permanent Secretary, Ministry of Regional Development Authorities *ex parte* Engineer Charles Mwanda [2012] eKLR**.

RESPONDENTS' SUBMISSIONS

14. On behalf of the Respondents it is submitted that the decision to dismiss the applicant was anchored in the law and more specifically the power to discipline and punish judicial officers specified in Regulation 20(1)(a) of the Judicial Service Regulations. While conceding that a reading of Articles 47 and 50 of the Constitution calls for any body exercising administrative or quasi-judicial functions to hear both parties and give reasons for any decision made or any steps to be taken, it is submitted that the said ingredients were fully complied with since the *ex parte* applicant was not only informed of the myriad of complaints/allegations against him but also given an opportunity to file a response to the same within 21 days which the applicant did which response was considered and a decision arrived at. Thereafter the applicant was given a right of appeal.

15. It is submitted based on ***Michael Fordham in Judicial Review Handbook***; 4th Edn. At page 1007 that hearing does not necessarily connote personal hearing and that written representations depending on the circumstances of the case and the dictates of the law suffice. According to the Respondents, regulation 26 of the Judicial Service Regulations was complied with. In their view, interviews and promotion were and cannot be a substitute to vetting and investigation process since gross misconduct cannot be waived by mere interviews and promotions. According to the respondents the applicant has merely cited decisions setting out principles applicable in judicial review without demonstrating the nexus and their relevance based on factual allegations hence the application ought to be dismissed.

16. It is submitted on behalf of the respondents that the application and the orders sought herein cannot be amenable to Judicial Review for the reasons that firstly, the fact of averments are referable to evidential veracity best handled through a civil suit; the fact of suitability of judicial review application as opposed to an appeal and thirdly, the tent to which the subject matter is on labour relations. In support of these submissions the respondents rely on **Republic vs. Judicial Service omission *ex parte* Pareno Misc. Civil Application 1025 of 2003**, **Republic vs. National Environmental Management Authority**

[2011] eKLR.

DETERMINATIONS

17. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

18. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

19. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

20. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

21. The reasons for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi**

HCMISC. Application No. 1235 of 1998:

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

22. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is 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 stems 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. It has been said 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.

23. That the 1st Respondent has powers and jurisdiction to discipline judicial officers is not in dispute. Its powers to terminate the *ex parte* applicant's employment cannot therefore be contested. The question to be determined is whether in arriving at its decision the due process of the law was adhered to. Article 47(1) and (2) of the Constitution provide:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

24. It is the *ex parte* applicant's position that the decision made by the Respondents to terminate his employment was not fair in that he was not afforded an adequate opportunity to defend himself. This is based on the fact that the grounds upon which allegations were made against him were vague and ambiguous. In the letter dated 26th January 2007, it was expressly alleged that the *ex parte* applicant had sentenced an accused person to three months without an option of a fine while in the second case, he had sentenced the accused to a fine of Kshs 8,000.00 in default of which he was to serve three months jail sentence. A few days later it was alleged that the applicant altered the original court record in both cases and fined the accused persons Kshs 5,000.00 in default of which they were to serve three months imprisonment when he had no powers to review or amend his earlier decisions. It was further contended that it had been ***"established"*** that the said reversal was occasioned by the payment of Kshs 5,000.00 by a relative of the accused persons through an advocate. He was therefore called upon to show cause why he should not be punished for the said conduct. The use of the word ***"established"*** by the **Hon. Chief Justice** would on the face of it indicate that the allegations against the applicant had been determined before he was given a hearing. Had that been the position, the Court would have had no difficulty in

finding that the applicant was denied a right to be heard. However, a reading of the letter in full shows that despite the use of that unfortunate word, the applicant was in effect being called upon to respond to the allegations made against him. Whereas the particulars of the cases mentioned were not specified and ordinarily the same ought to have been specified, in his letter dated 12th February 2007, the *ex parte* applicant did deal with the said cases while citing particulars thereof an indication that the applicant was well aware of the cases that were being referred to. While ordinarily the failure to furnish adequate particulars of the charges may vitiate the disciplinary proceedings if as a result of lack of the said particulars a person is unable to answer the charges levelled against him, where it is clear that the applicant was aware of the charges and did deal with the same adequately, the grant of judicial review orders being discretionary the Court will not quash the decision based on the mere failure to furnish the particulars. It is my view therefore that the allegations which were made against the applicant were adequately made known to him and he did respond thereto.

25. It is also alleged that since the *ex parte* applicant adequately answered the charges made against him, it was unreasonable for the 1st respondent to terminate his employment based thereon. As already indicated, this Court in the exercise of its judicial review jurisdiction is not concerned with the merits of the decision but the decision making process. The matter before the Court is not an appeal against the 1st respondent's decision and therefore whether or not the decision of the 1st respondent is merited is not the concern of the Court. Whereas the Court may disagree with the conclusion arrived at by the concerned body taking into account the totality of the evidence presented, the mere fact that the Court would have arrived at a different decision is not a ground for quashing the decision. That is a matter that can only be dealt with by an appellate court or a court dealing with a claim for wrongful dismissal. Rather the Court in the exercise of its judicial review jurisdiction proceedings would be concerned with the Irrationality of the decision in that whether there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. In other words such a decision is usually in defiance of logic and acceptable moral standards. It should be a decision that is so outrageous that no reasonable authority would reasonably be expected to arrive at. Unfortunately, in this case apart from saying that the decision was not merited based on the applicant's answer to the allegations, no attempt has been made to show that no reasonable authority, addressing itself to the facts and the law before it, would have made the decision to dismiss the applicant.

26. I agree that an opportunity to be heard must not necessarily be by way of oral hearing as is usually the position when one is charged before a court of law. However, where witnesses are to be called, the applicant ought to be afforded an opportunity to cross examine the said witnesses. Here there is no indication that any witness was called whose examination the applicant was to undertake. I agree with Michael Fordham in ***Judicial Review Handbook*** (supra) that:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

1. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."

27. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

28. In my view, reference to hearing the other side must have been with respect to oral representation since I do not see how a decision affecting a person can be made without affording that person an opportunity to present his case either orally or by in writing in light of the provisions of Article 47 and 50 of the Constitution. However, the law is clear that where a tribunal decides to hear one party then it must hear all the parties. See **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR .**

29. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

30. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

31. In this case the 1st respondent had the powers to either believe or disbelieve the applicant's explanations. If there was no sufficient evidence upon which it could find the applicant culpable, that would be a matter for ordinary civil litigation rather than judicial review.

32. The Respondents have, however, contended that since there is a right of appeal the orders sought ought not to be granted. I associate myself with the decision in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited** (supra) that availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief. I also agree with the decision in **Republic vs. National Environment Management Authority** (supra) that where the avenue for appealing is available, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it is necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.

33. In the result, I am not satisfied that the *ex parte* applicant has brought his case within the ambit of judicial review jurisdiction. Whereas he may have a case on the merits of the determination made by the 1st applicant, that does not justify the grant of the orders sought in these proceedings and those grievances are better ventilated in a normal civil claim or before the labour relations court.

34. Before I conclude this Judgement, it has been submitted, based on **Republic vs. Judicial Service**

Commission *ex parte* Pareno (supra) that judicial officers of all categories are like virgins and that virginity is lost once and can never be restored and that to judicial offices of whatever category, perception is everything and once lost can never be restored since the sensitivity and the high regard reposed in judicial offices contributes greatly to this phenomenon and very often public interest considerations do not give them a second chance. Thus where an officer has already left office for some time it would not be desirable to force the parties together again because it would be contrary to the policy of the law and not in public interest and the principle of master and servant clearly apply. Whereas I generally agree with the foregoing proposition, the same must be applied with caution so that it is not deemed to be the legal position. In my view, that consideration only applies where there are available options which are similarly effectual. To deny a party a well deserved remedy when there are no options available to vindicate his grievance would in my view be a miscarriage of justice perpetrated by the Court and a Court of law, it has been held, has no jurisdiction to knowingly perpetrate injustice. In my view public appointments ought not to be strictly equated to a relationship between master and servant since appointments in public service are not personal appointments and in most cases personal attachment is not as important as in purely private undertaking or venture. Whereas the consideration whether or not it is desirable to force an employee on an employer is a consideration when determining the type of remedy to grant it ought not to be the sole or even the dominant factor. Therefore the fact that an employee has been out of employment is just one of the many factors to be taken into account in considering whether or not to quash the decision.

ORDER

35. Having said that it must now be clear that the Notice of Motion dated 27th November 2009 lacks merit and the same is dismissed with costs to the Respondents.

Dated at Nairobi this day 13th of May 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kaumba for the respondents and holding brief for Mr Muruiki for the Applicant.