



NO. 53/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION 77 OF 2012

SAUL BENARD NZEKI WAMBUA ALIAS

BENARD SAUL NZEKI.....EXPARTE APPLICANT

VERSUS

THE PERMANENT SECRETARY

MINISTRY OF FINANCE.....1ST RESPONDENT

THE SECRETARY PUBLIC SERVICE

COMMISSION OF KENYA2ND RESPONDENT

JUDGMENT

1. Saul **Benard Nzeki Wambua** alias **Benard Saul Nzeki** was an employee of the Public Service Commission represented by the 2nd Respondent. He was dismissed from employment on the 17th May, 2006. He now seeks orders of *certiorari* to remove into this court for purposes of quashing the decision of the Permanent Secretary, Office of Deputy Prime Minister and Ministry of Finance dated 4th April, 2011 communicated on 27th February, 2012 and any subsequent orders issued and; a *mandamus* order to issue commanding the respondents to accord the applicant a fair trial.
2. The application is supported by the statement of facts and the affidavit of **Benard Nzeki Wambua** alias **Benard Saul Nzeki**. Leave to apply for orders of *certiorari* and *mandamus* against the decision of the Permanent Secretary, Deputy Prime Minister and Ministry of Finance was granted by Hon. Justice Dulu on the 7th June, 2012. His appeal against the dismissal was never heard. He was not accorded a fair hearing in accordance with the rules of natural justice.
3. In a response thereto the 2nd Respondent stated that the relief sought was not available since six (6) months had lapsed since the decision sought to be quashed was made. The case emanates from an employment contract, and according to the Constitution the court seized of jurisdiction to hear it is the Industrial Court. The suit is time barred as it is a suit against the government that arises from contractual obligation which should have been filed within three (3) years. The applicant was accorded a hearing by being issued with a letter to show cause as it was the practise then.
4. He responded to the letter dated 16th March, 2006. That the applicant did not deny the charges or misappropriation of funds levied against him, but instead he indicated that he had refunded part of the misappropriated funds. His appeal was disallowed. It had no merit.
5. Counsels in this matter agreed to have the application canvassed by way of written submissions.

Subsequently, only counsel for **Saul Bernard Nzeki Wambua** alias **Bernard Saul Nzeki** filed submissions.

6. It was submitted that the respondent's acts were amenable to judicial review, but, even if the matter was purely a labour issue, an alternative remedy should not be a bar to the granting of the order sought of *certiorari*, and *mandamus* compelling the Respondent to accord him a fair hearing.

To back his argument he cited the case of **David Mugo** t/a *Manyatta Auctioneers versus Republic C.A. 265/1997* which stated thus:-

“The existence of an alternative remedy is not a bar of the grant of an order of certiorari”

It was further submitted that the respondents acted procedurally and ultravires their mandate. They blatantly ignored the cardinal rules of natural justice by declining to give the applicant an opportunity to be heard.

7. Looking at the nature of the order sought to be reviewed, it is a dismissal order by the Respondent. The appeal thereto was determined and the results communicated to the aggrieved party on the 27th February, 2012. The suit therefore emanates from an employment contract. When the **David Mugo** case was decided in 1997, the High Court was the only court seized of jurisdiction to grant prerogative orders.
8. An employment and labour relations court which is a superior court with a status of the High Court has now been established pursuant to the provision of Article 162(2) of the Constitution of Kenya, 2010. The High Court is established by Article 165 of the Constitution of Kenya 2010. Matters falling within the jurisdiction of the Employment and Labour Relations Court ought not be heard by the High Court. Disputes arising out of employment between an employer and employee are determined by the Industrial Court. (*see Section 12 of the Industrial Court Act*).
9. That notwithstanding, the issue to be determined is whether orders of *certiorari* and *mandamus* can issue in the instant case.
10. When the application for leave to apply for judicial review was made and granted to **Saul Benard Nzeki Wambua** alias **Bernard Saul Nzeki** described himself as the applicant. That was procedural. As an individual he felt his rights had been violated. He therefore had to apply to the court to have the order made quashed. He did set in motion the action by seeking leave. The Republic which however has the mandate to check powers of public authorities to ensure they act legally had to take over the matter. Therefore, at the point of filing the substantive motion following leave obtained the application must have been made in the name of the Republic.
11. It is trite law that judicial review proceedings are a special jurisdiction that is neither criminal nor civil. An individual cannot seek orders of judicial review. This is because juridical review orders sought are issued in the name of the State. In the case of *Kenton Kijabe Hill Farmers Co. Society versus the District Officer (Naivasha) H.C. Misc. No. 280 of 1996(UR)*, Justice Aganyanya stated as follows:-

“Prerogative orders are issued in the name of the Crown (now Republic) and the application for such orders must be correctly instituted...application for prerogative orders are totally different from ordinary proceedings in Civil matters and the court cannot deal with the present application in the form in which it is as it is incompetently before court...”

12. In the famous case of *Farmers Bus Service and Others versus the Transport licensing Appeal Tribunal [1959] E.A. 779* the court held:-

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted.”

13. That position of law was also enunciated in the case of *James Kega Kangau & Others versus the Electoral Commission of Kenya & Another [2006] eKLR* where the court held that:-

“The practice which has acquired the fame of the law though judicial precedent is that prerogative orders are issued in the name of Republic. The application has to be intituled like the Farmers Bus case and the Welamodi case”.

14. From the foregoing, it is apparent that there is no applicant in this matter. The application is therefore incompetent, incurably defective and bad in law. Accordingly, I strike it out.

15. Each party to bear its costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of JUNE, 2013.

L.N. MUTENDE

JUDGE