REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 1365 OF 2004

REPUBLIC.....APPLICANT

VERSUS

PUBLIC SERVICE COMMISSION OF KENYA.....1ST RESPONDENT

COMMISSIONER OF POLICE .....2ND RESPONDENT

THE ATTORNEY GENERAL .....3ND RESPONDENT

EX-PARTE

JULIUS ODOL NOBERTS & 27 OTHERS

RULING

By way of a notice of motion application dated 10th December, 2012 the Public Service Commission of Kenya, the Commissioner of Police and the Attorney General who are the 1st to 3rd respondents in the substantive judicial review application pray for orders:-

> **"1. That the application be certified urgent and the same be heard ex-parte in the first instance.**
>
> **2. That there be a stay of proceedings pursuant to the judgement delivered on 23/7/2012 herein pending the hearing and determination of this application.**
>
> **3. That the Hon. Court be pleased to interpret its judgment delivered on 23/7/2012.**
>
> **4. That the Hon. Court be pleased to review its judgment delivered on 23/7/2012.**
>
> **5. That costs of this application be provided for."**

The application which is brought under Order 53 Rules 3 and 6 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Article 259 of the Constitution is supported by the grounds on its face, a supporting affidavit sworn by Mathew K Iteere and annextures to the affidavit. It is also supported by the further affidavit of George Omwoyo the Director of Personnel in the National Police Service.

The grounds in support of the application are:-

"1. That the hearing and determination of the matter took nearly 8 years.

2. That as a consequence of the delay new set of circumstances including the fact that some of the applicants/respondents have reached or about to reach their retirement ages and the applicants/respondents are already in full enjoyment of their pension dues.

3. That in the application for Judicial Review the applicants withdrew the orders of Mandamus and Prohibition and only pursued the order of Certiorari which was granted by the Hon. Court.

4. The order of the Honourable Court is incapable of being implemented.

5. It is in the interest of justice that this application be granted."

Other grounds in support of the application are found in paragraph 5 of the supporting affidavit where it is averred:-

"THAT on the 26th September, 2012 I did receive a letter from the office of the Attorney General marked "MK 3" whose salient contents were as follows:-

a. **That in line with the rule of law all court judgments are binding unless overturned in an appeal or set aside through review;**
b. **That the order as granted is not capable of enforcement especially with regard to reinstatement of the applicants for the order of certiorari granted was never accompanied by an order of mandamus to which the applicants abandoned as pointed out at page 29 of the judgment thereof;**
c. **By the very fact that the applicants did not obtain the order of stay no vacancy to which the applicants could be reinstated, if at all, was ever reserved;**
d. **The reinstatement is further complicated by the fact that majority of the applicants have reached their retirement ages; and**
e. **The applicants by receiving their pension dues voluntarily did waive their right to reinstatement."**

From the application before this court, it is clear that the applicants are asking the court to interpret the judgment delivered on 23rd July, 2012. They are at the same time asking for the review of the said judgement. The 28 ex-parte applicants in these judicial review proceedings are the respondents in the current application. They vehemently oppose the application.

The respondents have submitted that this court has no jurisdiction to review its decision and the only avenue available to the applicants is to file an appeal in the Court of Appeal. The applicants cited the decisions in **REPUBLIC v CLERK COUNTY COUNCIL OF MERU [2012] eKLR**; **UNITED INSURANCE COMPANY LIMITED v C. LUTTA KASMANI T/A KASMANI AND COMPANY ADVOCATES [2005] eKLR;** and **REPUBLIC v MUNICIPAL COUNCIL OF MOMBASA & 2 OTHERS EX-PARTE ADOPT-A-LIGHT LIMITED [2008] eKLR**. The respondents are, however, of the view that this court has jurisdiction to review its decisions as was held in **REPUBLIC v THE CHIEF LAND REGISTRAR & ANOTHER, EX-PARTE JAMES NJOROGE NJUGUNA [2012] eKLR** and **ALEX MALIKHE WAFUBWA & 7 OTHERS V ELIAS NAMBAKHA WAMITA AND 4 OTHERS [2012]eKLR.**

I have read the above cited decisions and note the contradicting positions taken by the courts as regard the power of this court to review its judgement in judicial review proceedings. The decision in the **ex-parte Adopt-A-Light Limited** case was made by the Court of Appeal and I do not find any mention by the Court of Appeal that this court cannot review its decision in judicial review proceedings.

In my view, this court can review its decision under the guidelines of Order 45 of the Civil Procedure Rules. This court has inherent jurisdiction to do that which is just. It cannot be said that the court is powerless to assist a party who, for example, has clearly identified an error or mistake apparent on the face of the court's decision. I therefore agree with the proposition by Majanja, J in **REPUBLIC v CHIEF LAND REGISTRAR & ANOTHER EX-PARTE JAMES NJOROGE NJUGUNA [2012] eKLR** that this court can set aside its decision where it is just to do so. This is what the learned Judge said:-

> "**30. I also take a contrary from their lordships in the *Kuria Mbae case* (Supra) for several reasons. First, section 8(3) and (5) or the *Law Reform Act* does not specifically exclude either the inherent power of the court to do justice and prevent an abuse of its process. Secondly, Order 53 rule 2 of the *Civil Procedure Rules* which gives practical effect to prerogative orders requires that all persons directly affected be served with the motion. In the event a party is not served, is the court to remain powerless to act? In my view, the rules of natural justice are so well entrenched in our jurisprudence and cannot be ignored. Apart from their constitutional underpinnings, various decisions of our courts are testimony to this position. Thirdly, the applications before the court seek to set aside proceedings for want of service. I do not think that the law intended the Court of Appeal to exercise original jurisdiction to set aside what are in essence *ex-parte* proceedings. The jurisdiction of the appellate court is to hear appeals from the High Court and not applications for aside *ex-parte* proceedings.**
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> **31. The court exercising judicial review jurisdiction has inherent jurisdiction to set aside a judgment wrongly entered. (See generally *Magon v Ottoman Bank* [1967] EA 609, *Mulira v Dass* [1971] EA 227, *Ali Bin Khamis v Salim Kirobe* [1956] EACA 1956]. I would also adopt the words of Justice Nyamu in *Kenya Bus Service Ltd and Others v Attorney General and the Minister for Transport and Others* Nairobi HC Misc 413 of 2005 where he stated that, *"Where there is no specific provision to set aside, the courts power or jurisdiction would spring from inherent powers of the court. Whereas ordinary jurisdiction stems from Acts of Parliament or statutes, the inherent powers stem from the character and the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations."***
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> **32. The courts have not remained powerless and in many cases have acted to do justice to parties. In the case of *Republic v Registrar of Titles and Another ex parte Saida Twahir Mohamed Hatimy Mombasa* HC Misc. Appl. No. 46 of 2005 (Unreported) [2005] eKLR the court dealt with the issue of the effect of non-service. Justice Mwera stated that, *"the duty is on the applicant to serve such affected parties ….. if the applicant omits or fails to serve such persons directly affected, then, they are entitled to come before the court and seek that the orders obtained without due service be set aside as being a nullity.""***

One can argue that in the above case the Judge was addressing a situation where parties who had been affected by the decision of the curt had not been served with the application for judicial review orders. In my view, the need for the court to do justice also extends to a situation where grounds for review of a decree have been established. The respondents' argument that this court has no jurisdiction to entertain this application is therefore misplaced and the argument is dismissed. I will therefore proceed to consider the application on its merits.

I will start by considering the application for review of the judgment before proceeding to consider the request to interpret the judgment. Although judicial review proceedings are guided by the provisions of Order 53 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act, it is noted that in dealing with judicial review proceedings the court will always be guided by the general principles of law. This being a case for review of the court's order, the guiding principles are those found in Order 45 of the Civil Procedure Rules. The grounds for review are found in Rule 1(1) which provides that:-

> **"1. (1) Any person considering himself aggrieved—**

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

The review of a court's decree or order is therefore limited to a situation where an applicant has discovered new and important evidence which was not available at the time the decree was passed or where there is a mistake or error apparent on the face of the record or for any other sufficient reason.

The applicants have not placed before this Court anything to show that they have now come across new and important evidence which was not available to them at the time the substantive notice of motion was heard or at the time the Court delivered its decision. The first ground for reviewing a decree is therefore not available to the applicants.

The second ground for review of a decree or order is where there is an error or mistake apparent on the record. In **MICHEAL MUNGAI v FORD KENYA ELECTIONS AND NOMINATIONS BOARD AND ANOTHER, NAIROBI HIGH COURT JR MISC. APPLICATION NO. 53 OF 2013** the Court observed that:-

"The Applicant's application is also anchored on the ground of mistake or error apparent on the face of the record. The Court of Appeal in the case of MUYODI V INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER E.A.L.R [2006] 1 EA 243 at pages 246-247 described an error or mistake apparent on face of the record thus:-

"In Nyamogo and Nyamogo v Kogo [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

We agree with this opinion. For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal. The Applicant before us has not established that there is an error or mistake in the decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in that decision. He has just told us to review the Court's decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground."

The applicants have not pointed out any error or mistake in the decision they are asking this Court to review. There is therefore no basis for allowing the application on this ground.

The third ground for review of a decree or order is "for any sufficient reason." The applicants believe that since the judgement was delivered eight years after the application was filed and since some of the respondents have attained the retirement age then this is sufficient reason for reviewing the judgment.

In the **Micheal Mungai** case already cited, the Court had this to say on what sufficient reason is:-

> **"A decree or order may also be reviewed for any sufficient reason. In our opinion, sufficient reason can only be deduced from the facts and circumstances of a particular case before the court. For example, in the case of NGORORO v NDUTHA & ANOTHER [1994] KLR 402 the Court of Appeal held that any person, though not party to a suit, whose direct interest is affected by a judgement is entitled to apply for review. Such a reason can be 'sufficient reason' for the purposes of Order 45 Rule 1(1) for reviewing a decree or an order. An applicant must indeed place convincing evidence before a court for the court to be satisfied that there is sufficient reason to review its decision. In this case, the Applicant has not given any reason to warrant the review of the impugned decision on the ground of 'sufficient reason'."**

An applicant must therefore demonstrate that there is good reason for the court to tamper with its decision. The reasons the applicants have given are not sufficient to warrant interference with the judgment of the Court. Those are issues to be addressed during the implementation of the judgment. The respondents have indeed admitted that those who have reached the retirement age do not expect to be taken back to their jobs. The judgement can therefore be implemented subject to the facts prevailing at the time of implementation. A party should not be heard to say that a decision of the court cannot be implemented. If indeed a decision cannot be implemented, then that would be a good reason for filing an appeal.

The applicants have also asked this court to interpret the judgment of the Court. There is nothing to interpret in the judgment for it speaks for itself. On the question as to whether the applicants were entitled to an order of certiorari, M. K. Ibrahim, J (as he then was) answered as follows:-

> **"The answer is clearly in the affirmative. The first principle ground for the grant of the order of Certiorari is that the 1st Respondent, the Public Service Commission did not have the jurisdiction to retire the applicants on any of the purported two grounds they cited in its decision. There is no provision for the retirement of the applicants on grounds of Re-organization of Government. Secondly, the Public Service Commission has no mandate to abolish an office in Public Service. This is the exclusive realm and preserve of the President of the Republic of Kenya. The letter dated 5th May, 2004 was a nullity ab initio.**
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> **The Respondents submitted that Certiorari should not issue as the challenged decision has not been produced as required by law. I do not comprehend this as it is clear to me that it is the letter dated 5th May, 2004 to each Applicant which is impugned and challenged. It has been annexed to the verifying Affidavits and it is extrinsic and speaks for itself. It is capable of being called up and removed in the High Court and quashed by an order of Certiorari.**
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> **If the issue of jurisdiction had not arisen, I certainly would have still given the order of Certiorari on the ground that the rights of the Applicants were violated by the 1st and 2nd Respondent i.e. breach of their fundamental rights to Natural Justice. If I am wrong on jurisdiction, which I doubt, I hereby grant the orders on this basis.**
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> **As a result, without any hesitation for the reason given herein, I do grant an order of**

> **Certiorari as prayed in the Notice of Motion dated 21st October, 2004. As stated earlier, the Applicants abandoned the prayers for Orders of Mandamus and prohibition."**

Just in case the applicants do not know what an order of certiorari does, I will refer them to the celebrated case of **KENYA NATIONAL EXAMINATION COUNCIL EX-PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS Nairobi Civil Appeal No. 266 of 1996** where the Court stated that:-

> **"To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then madamus is the wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

There is nothing to interpret in so far as the decision is concerned. An order of certiorari obliterates a decision and what happens thereafter is that the parties are returned to the position in which they were before the impugned decision was made.

At the end of the day I agree with the respondents that this application is merely meant to delay the implementation of the decision of the Court. The applicants should bite the bullet and implement the decision of the Court or take other appropriate steps availed to them by the law. The application is therefore dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 26th day of Sepember, 2013

W. K. KORIR,

JUDGE