



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT
MISCELLANEOUS CIVIL APPLICATION
JUDICIAL REVIEW 259 OF 2009
**IN THE MATTER OF AN APPLICATION BY JANE FLORENCE OTIENO ORDERS OF
JUDICIAL REVIEW BY WAZY OF CERTORARI AND PROHIBITION
AND
IN THE MATTER OF THE INSURANCE REGULATORY AUTHORITY
AND**

IN THE MATTER OF THE INSURANCE ACT, CHAPTER 487 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF THE ILLEGAL AND IRREGULAR DISMISSAL OF JANE FLORENCE
OTIENO**

BETWEEN

REPUBLICAPPLICANT

AND

THE INSURANCE REGULATORY AUTHORITYRESPONDENT

EX-PARTE JANE FLORENCE OTIENO

JUDGMENT

The ex-parte applicant, Jane Florence Otieno was employed as a Corporation Secretary/Legal Affairs Manager on 12th June, 2008 by the respondent, the Insurance Regulatory Authority. On 3rd November, 2008 the respondent terminated her employment citing her arraignment in court on 29th October, 2008 by the Kenya Anti –Corruption Commission. It is this decision that the applicant challenges through these judicial review proceedings. Following the withdrawal on 18th November, 2010 of her second prayer in her notice of motion dated 19th May, 2009 the applicant’s remaining prayers are:-

a) An Order of certiorari directed at the Commissioner of Insurance to remove into this court and quash his decision of 3rd November, 2008 purportedly terminating the employment of the applicant with the Insurance Regulatory Authority.

b) That the costs of this application be provided for.

The application is supported by a statutory statement and a verifying affidavit sworn by the applicant at the leave stage. The grounds in support of the application are.

(a) That the purported termination of the Applicant’s employment with the Insurance Regulatory Authority is without basis in law, amounts to abuse of office and is prejudicial to the applicant

(b) That the applicant was not on a probationary contract within the meaning of the Employment

Act, 2007.

- (c) That the applicant having been duly charged under the Anti-Corruption and Economic Crimes Act 2003 cannot stand suspended from her employment with the Insurance Regulatory Authority.**
- (d) That the purported termination of the Applicant's employment with the Insurance Regulatory Authority is null and void having been based on irrelevant considerations.**
- (e) THAT the suspension of a public officer as under the Anti-Corruption and Economic Crimes Act, 2003 can only be upon the conviction of the said public officer pending any appeals.**
- (f) That the purported termination of the Applicant's employment with the Insurance Regulatory Authority was in breach of the rules of natural justice.**
- (g) That the applicant was denied the right to be heard by the Insurance Regulatory Authority.**

The application was opposed through a replying affidavit sworn on 19th June, 2009 by Sammy Makove the Commissioner of Insurance and the Chief Executive Officer of the respondent. It is the respondent's case that the applicant's employment was terminated in accordance with the terms of the letter of offer of employment which terms the applicant had accepted. The respondent argues that contracts of employment fall under the ambit of private law and they cannot be amenable to judicial review. The respondent further argues that the applicant was on contract as per the definition of the Employment Act, 2007 and she was therefore not entitled to a hearing in accordance with the provisions of section 42 of the said Act. The respondent argues that its decision was never based on the provisions of the Anti-Corruption and Economic Crimes Act.

From the evidence placed before the court it is clear that the applicant was indeed an employee of the respondent from 6th June, 2008 and her employment was terminated on 29th October, 2008. For purposes of record, it should be noted that the Director of Public Prosecution through a nolle prosequi dated 10th February, 2010 terminated the proceedings against the applicant in Nairobi Chief Magistrate Anti Corruption Case No. 35 of 2008. There is also evidence on record that the applicant's claim in Industrial Court Cause No. 719 of 2010 was dismissed on 29th October, 2010.

In my understanding the issues to be addressed by the court are:-

- (a) Whether the respondent acted ultra vires the Anti-Corruption and Economic Crimes Act, 2003 in terminating the applicant's employment.
- (b) Whether the applicant's dismissal was in breach of the rules of natural justice.
- (c) Whether applicant is entitled to judicial review remedies.

Let me start by reproducing the first four sub-sections of Section 62 of the Anti-Corruption and Economic Crimes Act, Cap 65 which state as follows:-

“62 (1) A Public Officer who is charged with corruption or economic crime shall be suspended at half pay, with effect from the date of the charge.

(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.

(3)The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

(4)This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.”

Counsel for the applicant argued that the provisions of the Anti-Corruption and Economic Crimes Act were not followed when the applicant was dismissed. The said Act does not provide the procedure for the dismissal of a public officer who has been charged for committing an offence under the Act. It only says what should happen once a public servant has been charged in court. Counsel for the respondent argued, and I must say correctly, that the fact that the applicant had been charged under the said Act did not mean that she could not be dismissed before her case was finalized by the court. In fact Section 64 (4) clearly provides that a public servant can be suspended without pay or dismissed using power provided by any other law. I therefore agree with the respondent that it did not breach the provisions of the said Act by dismissing the applicant when the matter was still pending before the court.

Another argument by the applicant is that she was not employed on probationary terms as defined in the Employment Act. On this issue the respondent argued that the applicant was on employment on probation terms at the time she was dismissed.

The Employment Act at Section 2 defines probation or contract as follows:-

“A contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.”

One of the elements of a probationary contract is found in Section 41(2) of the said Act which provides that:-

“A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.”

It is only the applicant’s letter of offer which can clearly show the nature of employment she had entered into with the respondent. The letter of offer dated 12th June, 2008 addressed to the applicant by the respondent reads in part that:-

“You shall join the Authority’s service on probationary terms for a period of six (6) months at which point the Authority may consider taking you on permanent and pensionable terms of service. This period may be reduced or extended at the discretion of the Authority. Termination of service during the probation period by either party is by giving one month’s notice or payment of one month’s salary in lieu of notice.”

The said letter clearly shows that the applicant was on probationary contract at the time her employment was terminated. Looking at the letter of offer, it is clear that the probationary contract was in the terms envisaged by the Employment Act. In fact at page 2 of the letter of offer the applicant is informed about what may constitute grounds for summary dismissal as provided by the Employment Act. That means the parties entered into the contract in the spirit of the Employment Act. The applicant cannot therefore be heard to say that the probationary period referred to in her letter of offer is not one and the same thing with a probationary contract as envisaged by the Employment Act.

Did the respondent breach any rules of natural justice when dismissing the applicant? Counsel for the respondent argued that the right to a hearing provided by Section 41 of the Employment Act was not available to the applicant since she was on probationary terms. The argument sounds enticing when one looks at Section 42 of the said Act. In my view however once an action adverse to the rights of a citizen is contemplated by a public body such a body should avail the potential victim an opportunity to put forward his/her side of the story. That is what fairness demands. In some cases however, the right to a hearing is not availed due to the kind of relationship between the parties. An example is the case before me. The applicant and the respondent had entered into a clear contract in which each party was at a liberty to terminate the contract upon giving one month’s notice or payment of one month’s salary in lieu of notice. The applicant cannot turn around and say that her dismissal was unfair yet that dismissal was done

in accordance with the conditions of her employment letter.

Let us assume that the applicant had indeed succeeded in establishing that she deserves to be granted her prayer for an order of certiorari. What would have been the outcome of such an order. It would have amounted to fostering a demoralized employee on a distrustful employer. In his judgment in Meru H.C. Misc. Civil Case No. 1 of 2006 Anyara Emukule, J discussed at length the efficacy of judicial review remedies in employment contracts and concluded at pages 40 and 41 of his judgment that :-

“where an employer has for whatever reason, lost trust or confidence in an employee, the employer or master is at liberty to terminate those services in accordance with the terms of either the contract or the applicable law governing such terms of employment or engagement.

The reverse or corollary is equally valid that where an employee, no matter the terms of service, statutorily underpinned or merely contractual, who again from whatever reason wishes to terminate his employment or engagement with his employer is at liberty to do so, either in terms of his contract or statutory regulation.

The rationale behind this principle is clear, a contract of personal service cannot be enforced. In other words no order of specific performance can be made in a contract for personal service.”

I agree with Anyara Emukule,J that it would not been in the interests of parties whose marriage has come to an end to force them to cohabit by dangling a court judgment at them. Where an employee believes that his/her employment has been terminated without following the procedure provided by the contract or statute for termination of the contract, the best remedy is to sue for damages. The orders available by way of judicial review are not the most efficacious remedies in such circumstances.

In summary, I have found that the applicant was properly dismissed in accordance with the conditions of the contract she entered into with the respondent. Even if I had found that the applicant for whatever reason deserves the orders she seeks, I would have still found that judicial review remedies are not the best remedies in the case the applicant has placed before the court. I would still have exercised my discretion and declined to grant her the prayers sought. The end result is that the applicant’s case stands dismissed.

In the circumstances of this case it would be unjust to burden the applicant with costs. I therefore make no orders as to costs.

Dated and signed at Nairobi this 23rd day of February,2012.
W.K KORIR

JUDGE