REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 420 OF 2009

IN THE MATTER OF AN APPLICATION ON JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, PHABITION AND MANDAMUS

AND

IN THE MATTER OF THE CIVIL PROCEDURE AT AND RULES IN THE MATTER OF THE SERVICE COMMISSIONS ACT CAP 185 LAW OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT (CAP 26) SECTION 8 & 9

BETWEEN

REPUBLIC .....APPLICANT

VERSUS
THE PERMANENT SECRETARY MINISTRY OF INFORMATION & COMMUNICATIONS .....1ST RESPONDENT

THE CHAIRMAN PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE PRINCIPAL KENYA INSTITUTE OF MASS COMMUNICATION.....3RD RESPONDENT

EX-PARTE

HILLARY KIPKEMOI SANG.....APPLICANT

JUDGEMENT

The ex-parte applicant Hillary Kipkemoi Sang has brought this case to challenge a letter dated 25th February, 2009 addressed to him on behalf of the Permanent Secretary in the Ministry of Information and Communications, the 1st respondent herein. The said letter spoke to the applicant as follows:-

"RE: RETIREMENT IN THE PUBLIC INTEREST

Further to this office letter Ref. No. MIC/1991083596/(30) dated 13th November, 2008, I am directed to inform you that the Public Service Commission considered out of time but disallowed an application for review of the commission's decision regarding your retirement from the service in the Public. (sic)

The earlier decision by the Public Service Commission that you be retired in Public Interest therefore stands.

The case is treated as closed."

As a consequence of the said letter the applicant moved to court on 15th July, 2009 and obtained leave to commence judicial review proceedings. Through a notice of motion dated 29th July, 2009 and filed in court on 5th August, 2009 the applicant seeks orders as follows:-

(i) THAT the Honourable court be pleased to issue an order of certiorari, removing unto this Honourable Court for purposes of being quashed forthwith the decision of the 1st Respondent's letter dated 25th February, 2009 and all prior letters or reports which are the subject of the decision.

(ii) THAT the Honourable court be pleased to further prohibit the respondents from recommending the applicant's retirement in public interest on the basis of the 3rd Respondent's report dated 30th July, 2007.

(iii) THAT upon the quashing of the said decision and the prohibition of the respondents as aforesaid hereinabove the Honourable court be pleased to issue an order compelling the respondents to reinstate the applicant to his former employment.

(iv) THAT the costs of the application be provided for.

In the application, the Chairman of the Public Service Commission and the Principal of Kenya Institute of Mass Communication are named as the 2nd and 3rd respondents respectively.

The application is supported by a statutory statement, a verifying affidavit sworn by the applicant on 7th July, 2009 and annexures thereto. All these documents were filed together with the chamber summons brought under certificate of urgency on 15th July, 2009 at the time the applicant was seeking leave to commence judicial review proceedings.

The applicants' grounds in support of the application are:-

1. THAT the said decision was taken by the Respondents despite the earlier resolution of the Ministerial Human Resource Management Committee held on 27th March, 2007 which recommended the lifting of the suspension of the Applicant and the immediate release of his salary with effect from the date he was suspended.

2. THAT the decision was made without due process.

3. THAT the decision borders on abuse of the power by the Respondents for failure to exercise their mandate within the confines of the law.

4. THAT the decision is in breach of the principles of natural justice in that the applicant has been condemned without a proper hearing.

5. THAT the decision is founded upon flawed conclusion of facts which negates the fact that the validity of a decision hinges upon the proper appreciation and interpretation of facts in regard to

the factual circumstances of the case.

6. THAT the Respondents' decision is in bad faith and the same is actuated by unexplained vindictiveness.

7. THAT the decision is unreasonable, oppressive and void.

8. THAT the decision is inconsistent with the provisions of the Constitution of Kenya.

9. THAT the decision is irrational and the same is tainted with unreasonableness and absurdity for lack of procedural fairness.

10. THAT the decision of the respondents in regard to retirement should be subject to meritorious evaluation and upon a consistent due process and the same should not be whimsical and or capricious but founded on a contestable systematic criteria that ensure all statute conferred power is exercised within the confines of the law.

11. THAT the decision is inviolation of the applicant's fundamental rights and freedoms.

12. THAT the decision is prejudicial to the Applicant and he is likely to suffer irreparable loss and damages which might not be adequately compensated in monetary terms.

13. THAT the decision was reached without proper judicial reasoning hence bad in law.

14. THAT the respondents are guilty of procedural impropriety.

The application was opposed by the respondents through a notice of preliminary objection dated 29th September, 2009, a replying affidavit sworn on 29th September, 2009 by Alice Atieno Otwala the Deputy Commission Secretary with the Public Service Commission and a replying affidavit sworn on 29th September, 2009 by Jacinta W Mwaniki the Principal Human Resource Management Officer with the Ministry of Information and Communications. Jacinta W Mwaniki annexed various documents to her application. In the preliminary objection the respondents submit that the application offends the mandatory provisions of Section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules. Through the replying affidavits the respondents argue that due process was followed in retiring the applicant from public service in public interest.

The fact that clearly stands out is that through a letter dated 13th November, 2008 the 1st respondent informed the applicant that he had been retired in public interest by the 2nd respondent. The applicant was by the same letter informed that he could ask for a review of the decision by the 2nd respondent through the 1st respondent. The applicant wrote a letter asking for a review and through the letter dated 25th February, 2009 already reproduced in this judgement the applicant was informed that the decision to retire him in public interest stood.

After carefully going through the papers filed by the applicant and the respondents I have come to the conclusion that there are three main questions to be answered in this judgment namely:-

(1) Is the applicant's application properly before the court?

(2) Was the applicant given a hearing before the decision against him was reached?

(3) Are the remedies asked for by the applicant available to him?

The answers to the above questions are interlinked. The best way is therefore to apply the law to the facts and find the answers therein.

The respondents argued that leave to commence judicial review proceedings ought not to have been granted to the applicant in that among the orders he seeks is an order of certiorari seeking to quash a decision that had been made over six months before he came to court. An application for an order of certiorari ought to be made within six months from the date of the decision being challenged. In the case before me the applicant challenges the decision conveyed by the letter dated 25th February, 2009. He came to court 15th July, 2009 and that was within six months from the date of the decision he is challenging. The respondents' objection to the applicant's suit on this ground is therefore rejected.

Was the applicant given a hearing? In his papers the applicant clearly demonstrates that he was given a hearing. He was asked to show cause and he did show cause in writing. His papers actually supports the position of the respondents that he was given a hearing and due process was followed.

There was an argument by the applicant that the decision by the respondents was irrational. I think this argument is based on the attached minutes of the meeting of the Ministerial Human Resource Management Advisory Committee (MHRMAC) held on 27th March, 2008. Through paragraph 8 of his verifying affidavit sworn on 7th July, 2009 the applicant annexes the retirement letter dated 1st July, 2008 and the minutes of the meeting held on 27th March, 2008 by the MHRMAC.

According to the minutes presented to court by the applicant the committee resolved in respect to the applicant's case as follows:-

"The committee deliberated on the case and recommended to the Authorised officer that :

(a) Mr. Sang's suspension be lifted and salary released with effect from the date it was stopped.

(b) He loses one (1) year annual increment.

(c) He be given severe reprimand that repetition of the same offence will lead to summary dismissal from public service with loss of all terminal benefits."

Looking at the said minutes it would be easy to agree that the 2nd respondent acted irrationally by retiring the applicant contrary to the recommendation of the MHRMAC. The court would in such a situation acting on its judicial review powers step in to rectify the irrational decision by the 2nd respondent.

The minutes of the MHRMAC meeting of 27th March, 2008 placed before the court by the respondents are however different. The copies of the minutes were placed before the court by paragraph 10 of the verifying affidavit of Jacinta W Mwaniki. The resolution of the committee is found at Page 9 of the minutes and it states as follows:-

"the Committee deliberated on the case and recommended to the Authorised officer that Mr. Sang be retired on Public Interest."

The question would then be: Which of the two sets of minutes contain the true proceedings of the meeting? The applicant did not inform the court how he accessed copies of the minutes of the meeting that took place on 27th March, 2008. The presumption is that if the minutes were doctored then he is most likely to have been the one to doctor the minutes. The officers of the respondents had no personal interest in the outcome of the case against him. He however had an interest in the contents of the minutes. The applicant did not attach page 1 which contains the names of those who were in attendance. Looking at the two sets of minutes pertaining to the same meeting I am inclined to conclude that the minutes tendered by the applicant do not reflect the true proceedings of the meeting. The minutes tendered by the respondents show what happened in the meeting.

The other issue is whether the remedies the applicant seek are available. The application for an order of certiorari is in order. The applicant seeks to quash the decision rejecting his application for review of the

decision of the 2nd respondent. The prayer for an order of prohibition is misplaced. What the applicant seeks to prohibit i.e. his retirement is already done. It is said that prohibition looks to the future and does not act on events in the past. The applicant had been retired by the time he came to court and there is nothing to prohibit at this stage.

The applicant also asked for an order of mandamus. The respondents argued that the applicant has not established a statutory duty owed to him by them so that they could be compelled to perform that statutory duty. To me, the order of mandamus the applicant seeks presents a challenge. How can an employee be forced upon a distrustful employer? It would be difficult for the respondents to work with the applicant.

Looking at the entire process under which the applicant was taken before his retirement , I find that there was no unfairness, irrationality or breach of the law. May be the applicant was dissatisfied with the outcome of the disciplinary proceedings but that does not of itself make him a beneficiary of judicial review orders. It is important to remind ourselves of the scope of judicial review orders. In **REPUBLIC VS. ISAAC THEURI GITHAE & ANOTHER (2007) eKLR** at page 5 the Court of Appeal (S.E.O. Bosire, E.O. O'kubasu & W.S. Deverell) stated that:-

"The purpose and purview of judicial review proceedings is confined to the decision making process. The Court in an application for an order of judicial review is not concerned with the merits or otherwise of the decision or threatened action. It is intended to ensure that an inferior tribunal or authority he had been subjected to has given the individual affected fair treatment. The authority is the one mandated to make a decision on the merits and the court should not attempt to substitute its decision or opinion in place of that of the tribunal or authority constituted by the law to decide the matters in issue.

The court intervenes where the authority has acted in excess of its jurisdiction or without jurisdiction, where there is an error of law on the face of the record, where it has failed to observe rules of natural justice or where the authority has acted unreasonably. In those circumstances the court will call for the decision for purposes of quashing it by an order of certiorari. But normally where there is a threatened breach of any of the foregoing principles the court will issue an order of prohibition to prevent the threatened breach."

The Court of Appeal clearly enunciated the four corners of judicial review remedies in their said decision. The remedies of judicial review are limited in nature and before a party decides to file his case he should carefully weigh his options. For the applicant before me, I find that his case does not fit into the docket of judicial review. As such his application is dismissed. In the circumstances of this case it is in the interests of justice that each party should bear own costs and I so order.

Dated and signed at Nairobi this 15th day of February , 2012

W.K. KORIR
JUDGE