



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION 12 OF 2007

DR. FLORENCE M. MUSAUAPPLICANT

VERSUS

THE MINISTER FOR HEALTH1ST RESPONDENT

THE KENYATTA NATIONAL HOSPITAL BOARD.....2ND RESPONDENT

THE ATTORNEY GENERAL3RD RESPONDENT

RULING

What has fallen for my determination is the Notice of Motion dated 17th January 2007 seeking 7 orders;

- 1) That an Order of certiorari be directed to the 1st respondent to bring into court and quash the decision of the 1st respondent reflected and represented in the letter dated 5th December 2006 signed by the Permanent Secretary Ministry of Health, appointing Dr. Jotham N. Micheni as the Director and Chief Executive Officer of the Kenyatta National Hospital.
- 2) THAT an order of certiorari be directed to the 2nd respondent to bring into court and quash the decision of the 2nd respondent reflected and represented in the letter dated 15th December 2006 signed by the Chairman of the 2nd Respondent, to offer a contract of employment to Dr. Jotham N. Micheni as the Director and Chief Executive Officer of Kenyatta National Hospital.
- 3) THAT an order of prohibition do issue staying the 1st respondent's decision to appoint Dr. Jotham Micheni, as the Director and Chief Executive Officer of the Kenyatta National Hospital.
- 4) THAT an order of Prohibition do issue staying the 2nd respondent's decision to enter into a contract of employment with Dr. Jotham N. Micheni as Director and Chief Executive officer of the Kenyatta National Hospital.
- 5) THAT an order of prohibition do issue restraining the 1st and 2nd respondents from appointing any other director and Chief Executive Officer of the Kenyatta National Hospital pending hearing of this judicial review.
- 6) That an order of mandamus do issue compelling the 1st respondent to lift the compulsory leave of the applicant, and reinstate her as Director and Chief Executive Officer of Kenyatta National Hospital.

7) That this Honourable Court be pleased to give such further orders and or directors as it may deem fit.

The applicant contends that she was appointed by the 1st respondent as the Director and the CEO to Kenyatta National Hospital on 31st January 2003. On 27th April 2005 the Hospital Board management promoted her as a Senior Medical Specialist to the grade of Chief Medical Specialist. On 6th May 2005 the applicant was sent on compulsory leave with effect from 9th May 2005. The applicant was sent on compulsory leave as a result of conclusions and recommendations in a report by the Efficiency Monitory Unit dated April 2005. The Permanent Secretary Ministry of Health was instructed by the Permanent Secretary and Head of Public Service to ask the Minister for Health to identify an appropriate person to act as a Director of the hospital pending the conclusion of the investigations.

It was submitted by **Miss Kilonzo** that by the time the applicant was sent on compulsory leave investigations in the alleged wrong doing subject of which the applicant was sent on compulsory leave, had been completed and all the documentation was in place. It is contended that the wrong doing took place when the applicant was not the Chief Executive Officer and the director of Kenyatta National Hospital. It was submitted by **Miss Kilonzo** that the applicant was merely a signatory to the accounts of the hospital and that she had no decision making authority or capacity in respect of the alleged transactions. It is also contended that the report by the Efficiency Monitory Unit was never shown to the applicant for her comments or inputs nor was she called to answer or define herself against any of the charges contained in the said report which is in breach of the rules of natural justice. It was also submitted that since May 2005 when applicant was sent on compulsory leave she has never been confronted with any formal charges of alleged corruption by either the 1st or the 2nd respondents. **Miss Kilonzo** advocate also submitted that no investigations have been conducted to the knowledge of the applicant since May 2005. No criminal or civil claim has been lodged against applicant in any court of law or in any other tribunal with regard to the allegations of, and investigations on, alleged financial management/irregularities that led the applicant to be sent on compulsory leave. The applicant's compulsory leave has never been lifted yet the 1st respondent purported to appoint **Dr. Jotham Micheni** as director and Chief Executive Officer of Kenyatta National hospital from December 2006 thereby constructively dismissing and terminating the appointment of the applicant.

It is also the case of the applicant that the 2nd respondent purported to offer a contract of employment dated 15th December 2006 to **Dr. Jotham Micheni** as a director thereby terminating the employment of the applicant. It is further contended that the actions of the respondents are improper, unreasonable, mala fides, irregular and flying in the face of logic. They have breached the applicants legitimate expectations that investigations would be conducted, concluded and action taken.

It is the case of the respondents that the applicant was employed on 29th June 1987 as a medical officer. According to the application for employment the applicant was born on 29th December 1952 and she continued to be in service until 29th December 2007 when she attained the mandatory retirement age of 55 years. It is the case of the respondents that the applicant was entitled to 3 months special terminal leave that was to commence on 28th September 2007. It is also the case of the 1st and 2nd respondents that they had nothing to do with the suspension of the applicant from office due to financial mismanagement touching on procurement procedure during her tenure conducted by the Efficiency Monitory Unit. It is contended that the hospital regulations require that officers should be notified of their impending retirement six months in advance hence the applicant was served with the retirement notice around 28th June 2007.

The contest between the parties is whether the applicant is entitled to the orders sought in the Notice of Motion under my determination. It is clear that by a letter dated 31st January 2003, the then Minister of Health appointed the exparte applicant to be director of Kenyatta National Hospital pursuant to section 3 of Kenyatta national Hospital Board order 1997. The letter of appointment does not however set out the terms and conditions upon which the applicant was appointed. It is also important to note that by then the applicant was a permanent and pensionable employee of the hospital. By way of a letter dated 6th May

2005 from the then Permanent secretary Ministry of Health the applicant was asked to proceed on compulsory leave with effect from 9th May 2005. According to the said letter the applicant was sent on compulsory leave to facilitate in the investigations into financial management of the hospital by the Kenya Anti corruption Commission.

On 5th December 2006 while the applicant was serving her compulsory leave, the then Minister of Health appointed **Dr. Jotham Micheni** as a director of Kenyatta National Hospital. The letter of appointment which was given to **Dr. Micheni** was in line with guidance and conditions of service for State corporations Chief Executive officers contained in the letter dated 23rd November 2004 issued by the Permanent Secretary/Secretary to the Cabinet and Head of public service. Definitely the applicant was aggrieved by substantive filling of her position and sought leave on 16th January 2007 to commence judicial review proceedings. The first prayer in the Notice of Motion is an order for certiorari to quash the decision of the 1st respondent appointing **Dr. Jotham Micheni** as a director and Chief Executive Officer of Kenyatta National Hospital.

In my view an order of certiorari is available whenever a person having legal authority to determine questions affecting the rights of an individual and having a duty to act judicially acted in excess of legal authority. It is not true that at the time of appointment as a director of Kenyatta National Hospital the applicant was a Chief Medical specialist. The applicant was indeed promoted by the board of Kenyatta National Hospital to the position of Chief Medical specialist on 3rd may 2005 long after her appointment as director of the hospital. It is therefore not true that the applicant was relieved of her engagement with the board of Kenyatta National Hospital as a Chief Medical Specialist.

It is also clear that on 29th December 2009 the applicant attained the age of 55 years and that she was due for retirement upon attaining the age of 55 years in terms of her scheme of service. The letter of 4th July 2007 was written on behalf of the board of Kenyatta National Hospital solely in relation to her engagement as the chief Medical specialist and in the ordinary course of business in discharge of board's mandate under section 4 (1) of Kenyatta National Hospital Order 1987 legal Notice No.109. It is therefore clear that upon her appointment as a director of Kenyatta national hospital the applicant did not enter into a formal contract with the board as envisaged in the guidelines on terms and conditions of service for State corporations. Consequently the granting the order of certiorari is disproportionate from any good it could do as it would be detrimental and definitely made in vain.

In **Wales Police vs Evans(supra)**, **Lord Hailsham**, the **Lord Chancellor** said inter alia-

“.....the remedy of judicial review (provided under R.S.C. 53) is intended to protect the individual against the abuse of power by a wide range of authorities, judicial quasi-judicial and administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.”

The Lord Chancellor, continued at page 16 –

.....Since the range of authorities and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by law.

.....At page 161 the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the

court.”

In the case of **Consolata Kihara & 241 others vs Director of Kenya Trypanosomiasis Research Institute [2003]232 Kuloba J.** held:-

“It is an elementary principle of law in cases of master and servant (that) if any employer wrongfully dismisses an employee or servant, the employment is effectively terminated albeit in breach of contract. An employer can terminate an employment contract with his employee at any time, and for any reason or none.”

If an employer terminates the employee’s contract in a manner not warranted by the contract, he must pay damages for breach of contract.

The law is settled that where there is an ordinary contractual relationship of master and servant the master terminates the contract, the servant cannot obtain an order of certiorari.”

In the case of **Republic vs Judicial Service Commission [2004] K.L.R. 2003**, it was held-

“If the court were to quash the decision and remit the matter (to the Judicial Service Commission) with a direction that the Regulation 26 be followed, there was no guarantee that the decision in the second instance would be different.

In a judicial review hearing on an application such as this one where the single remedy, merely, an order of Certiorari, the court would not grant any other relief not prayed for in the statement.

The reason for dismissal having been given the statutory underpinnings of the Regulations relied on could not *per se* prevent the court from finding that ultimately there was a contract for personal services, and the most efficacious remedy for the Applicant would be a claim for damages which had not been claimed in these proceedings.”

It is basic that a court will not issue an order in vain under the dispute between the applicant and the respondent is that of employer/employee relationship. The applicant was appointed as a director on 31st January 2003 by then Minister for Health. She served in that position until 6th May 2005 when she was sent on compulsory leave to pave way for investigations on corruption at the hospital. It is contended that the suspension was in interim basis and that the investigations have not been completed at the time when she was retired by the hospital. It is also clear that the applicant was born on 29th December 1952 and was due for compulsory retirement on 29th December 2007 as a Chief Medical Specialist.

There is no dispute the appointment of the applicant as a director was not statutorily underpinned as the letter of appointment did not give a specific period for her to serve in the position of a director. The mode of termination is not clear. In essence the applicant was not given a fixed contractual term and therefore was only entitled to a reasonable notice of three months before she could be retired or removed from the position of a director. It is also clear that on 5th December 2006 the then Minister for health appointment **Dr. Jotham Micheni** to act as director to take effect on 5th December 2006. It is a matter of public knowledge that the said person was removed as a director and the position taken by somebody else. It is therefore my findings that the relationship between the applicant and the respondent is one of master and servant, the same authority which appointed her can terminate her services and that there was no contractual or statutory underpinning about her employment to the hospital. The hospital cannot be forced and/or compelled to readmit the applicant to serve in the position of a director when the position has been filled severally after she was removed.

In conclusion, it is my view that the applicant is not entitled to any of the orders sought and this court cannot grant her the orders which would be in vain and superfluous. The application is therefore dismissed with no orders as to costs.

However, in view of the disclosure that the applicant has not been paid her dues and entitlement, I direct that she be paid all her dues up to and including the time she was retired as per her retirement age. Orders Accordingly.

Dated, signed and delivered at Nairobi this 7th day of February 2012.

M. WARSAME
JUDGE