



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 13 of 2009

IN THE MATTER OF AN APPLICATION BY FRANCIS KIMANI KIIGE FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS.

REPUBLICAPPLICANT

VERSUS

NATIONAL HOSPITAL INSURANCE FUNDRESPONDENT

EXPARTE.....FRANCIS KIMANI KIIGE

JUDGEMENT

On 16th July, 2009 Francis Kimani Kiige (the ex-parte applicant) was granted leave to commence judicial review proceedings against the National Hospital Insurance Fund (the respondent). By way of a notice of motion dated 3rd August, 2009 and filed in court on the same date the applicant therefore prays for orders as follows:-

- 1. THAT orders of Mandamus be issued compelling the respondent to give a verdict of the applicants appeal against the decision of the Respondent terminating the applicants employment with the respondent.(sic)**
- 2. THAT Orders of Mandamus be issued compelling the Respondent to pay the applicant all his dues, salaries and allowances from the date of suspension.**
- 3. THAT the costs of this application be borne by the Respondent.**

The application is supported by the following grounds:-

- 1. THAT Respondent is a public institution.**
- 2. THAT the Respondent owes the applicant a public duty to deliver a ruling on his appeal arising from the Respondent's decision terminating his employment.**

3. THAT following violation of its aforesaid public duty the respondent is under public obligation to pay the applicant all his dues, salaries and allowances from the date of suspension until a ruling is delivered on the applicant's appeal.

The application is also supported by a statutory statement filed in court on 12th January, 2009 and a verifying affidavit sworn by the applicant on 10th December, 2008 and filed in court on 12th January, 2009. The respondent opposed the application through a replying affidavit sworn on 7th December, 2011 by Millicent W Mwangi the respondent's General Manager, Human Resource and Administration.

The papers filed in court shows that the applicant was employed on permanent terms by the respondent on 19th February, 2001. On 17th September, 2003 the applicant was charged in court in Nairobi Chief Magistrate's Court Criminal Case No. 2339 of 2003. On 9th October, 2006 the applicant was discharged under Section 87(a) of the Criminal Procedure Code. As the criminal trial was in progress, the respondent started disciplinary proceedings against the applicant in respect of the same facts that had landed the applicant in court. On 17th September, 2007 the applicant was dismissed from service by the respondent. Thereafter the applicant was invited to file an appeal against the dismissal and he filed an appeal on 27th September, 2007.

It is the applicant's case that he has not received a response to the said appeal. The respondent seems to suggest that the applicant's appeal was heard and determined. That suggestion is brought out in paragraph 18 of the replying affidavit which states:-

“THAT applicant's appeal was deliberated by the Respondent's staff Advisory Committee on 28th May, 2008. The Committee addressed the issues raised in the Applicant's letter in accordance with the aforementioned Terms and Conditions of Service.”

When the application came up for inter-partes hearing on 21st February, 2012 Mr. Ngoge for the applicant submitted that the respondent breached articles 10 and 47 of the Constitution by failing to render a decision on the appeal filed by the applicant. He further argued that the issue before this court is a matter for determination through public law and not private law.

On his part Mr. Simiyu raised three points in support of the respondent's case. Firstly, he argued that the relationship between the applicant and the respondent was that of an employee and an employer thereby making any dispute between them fall in the private law regime. He cited the applicant's prayers for payment of salaries and allowances to demonstrate that this is a matter for private law solution.

Secondly, the respondent submitted that the applicant has sued the wrong party. It is the respondent's case that the Board of Management of the National Hospital Insurance Fund (NHIF) should have been sued and not NHIF itself. Mr. Simiyu submitted that the National Hospital Insurance Fund Act created a fund and a management board and the management board and not the fund should have been sued.

Thirdly, the respondent argued that the applicant was discharged under Section 87(a) of the Criminal Procedure Code and such a discharge cannot amount to an acquittal as claimed by the applicant in his papers.

Looking at the papers filed in court and the submissions made by the advocates for the parties herein, I am of the view that the issues for the determination of this court are:-

1. Whether the applicant was discharged or acquitted in Nairobi CM Criminal Case No. 2339 of 2003.
2. Whether the applicant's case is a matter to be addressed by private law or public law;
3. Whether the applicant has sued the right person; and
4. Whether the remedies sought are available.

I have looked at the proceedings in Nairobi Chief Magistrate Criminal Case No. 2339 of 2003 and it is clear that the case against the applicant was terminated in accordance with the provisions of Section 87(a) of Criminal Procedure Code. As such, the only conclusion is that the applicant was discharged and not acquitted. There is not much else to be said about this issue since it will not have any impact on the outcome of this matter.

The respondent argued that the wrong body has been sued by the applicant. It was the respondent's case that the National Hospital Insurance Fund Board established under Section 4 of the National Hospital Insurance Fund Act ought to have been sued. Looking at the Act it is clear that Section 3 establishes the National Hospital Insurance Fund "which shall vest in and be operated and managed by the board" of management established under Section 4 of the Act. Strictly speaking, the applicant ought to have commenced his case against the National Hospital Insurance Fund Board of Management. This is however a judicial review matter and it is clear from the papers filed in court that the applicant seeks orders against his former employer (the National Hospital Insurance Fund). The court should always endeavor to do justice without undue regard to technicalities. The respondent will not suffer any prejudice owing to the fact that the management board has not been mentioned by the applicant in his papers.

Another issue for the determination of this court is whether the applicant has addressed his application to the correct court. Counsel for the respondent submits that the applicant's case ought to have gone to the Industrial Court. He cited the decision of the Court of Appeal in **KADAMAS VS. MUNICIPALITY OF KISUMU (1985) KLR 954** where one of the holdings was that:-

"It would be wrong for an employee of a public body to be clothed with exceptional legal rights, by allowing them to apply for prohibition. They are ordinary private civil rights of contract between an employer and his employee."

I have had the benefit of reading the Judgement of the Court in the **KADAMAS** case and my understanding of the same is that not all cases between employers and employees fall into the private law realm. Some cases like that of the appellants in the **KADAMAS** case raise public law issues and the remedies available in the public law arena can be availed to an applicant deserving of such orders. To demonstrate this, I will reproduce the 8th and 9th holdings in the **KADAMAS** case which read as follows:-

"8. The appellants as employees of the council, a public body, were in a class of employees who could be dismissed only if there was something against them to warrant dismissal. The appellants were therefore entitled to apply for an order of a prohibition to issue and that prohibition lies.

9. The making of recommendation to dismiss, without the presence of the appellants was a breach of the rules of natural justice. "

In my understanding therefore, the actions of public bodies in relation to their employees can sometimes remove those actions from the private law arena and place them squarely in the public law province. The circumstances of each case will therefore determine whether the issue before the court is one of private law or public law.

Looking at the applicant's case, it is clear that this is a case for the public law province. The applicant filed an appeal with the respondent against his dismissal. He says he has not been informed about the outcome of that appeal. The respondent does not dispute the fact that no decision has been made on the applicant's appeal. In fact the replying affidavit only shows that the appeal was heard. There is no evidence that the outcome of the appeal has been communicated to the applicant. When a citizen of this country approaches a public body on any issue, the public body should be ready to give a response without undue delay. The applicant filed an appeal on 27th September, 2007 and by the time this judgment is being written the applicant knows nothing about the outcome of that appeal. The behavior of the respondent cannot be tolerated in a just and democratic society. If indeed the appeal had been decided on 28th May, 2008 as alleged by the respondent then the respondent has not given any reason for sitting on that decision for over four years. Communication is a key tenet of good administration. The

applicant's counsel correctly pointed out that the respondent's actions are not in conformity with the spirit of the Constitution.

For the benefit of the respondent I will reproduce articles 10 and 47 of the Constitution and thereafter demonstrate why I think the respondent has contravened these articles of the Constitution. Article 10 states:-

“10(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of good governance include –

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.”

Article 47(1) & (2) provides that:-

“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative act, the person has the right to be given reasons for the action.”

Looking at the respondent's inaction one can say that there is lack of transparency and accountability. The administrative action which the applicant has been subjected to is also not expeditious and neither is it efficient. The respondent is therefore acting in contravention of the Constitution by failing to make a decision on the applicant's appeal.

The final issue is whether the remedies the applicant seeks are available to him in the circumstances of this case. The applicant's first prayer is for an order of mandamus directed at the respondent compelling the respondent to deliver a ruling on the applicant's appeal. After telling the applicant that he had a right of appeal and after accepting the applicant's appeal, the respondent has a duty to render a decision on that appeal. It follows therefore that the respondent should be compelled to perform the duty it owes to the applicant.

In the second prayer the applicant prays for an order of mandamus compelling the respondent to pay the applicant his dues, salaries and allowances. This prayer cannot be granted for two reasons. Firstly, this particular prayer is essentially a dispute between an employer and an employee and the applicant's remedy, if any, lies in the private law arena. Secondly, there is no basis for granting this particular prayer. The applicant has already been sacked and he is therefore not entitled to any salary or allowances. Granting this prayer would amount to this court descending into the arena and overturning the respondent's decision to dismiss the applicant. Such an act would result in this court stepping outside its judicial review mandate and this cannot be allowed to happen.

In summary, I therefore allow the applicant's first prayer in the notice of motion and direct the respondent to give the applicant a decision on his appeal against his dismissal. The said decision should be given to the applicant within 60 days from the date of this judgment. The applicant's second prayer in the notice of motion is rejected and dismissed. The applicant will get costs from the respondent.

Dated and signed this 27th day of March,2012

W. K. KORIR

JUDGE