



REPUBLIC OF KENYA

High Court at Machakos

Civil Miscellaneous Application 213 of 2010

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW BY SAMSON MUNYOKI

AND

**IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT 212 AND CODE OF
REGULATION FOR TEACHERS 66(6) ((B) (III)**

AND

**IN THE MATTER OF TEACHERS SERVICE COMMISSIONER CASE NO.
0520/12/2009/2010/15**

BETWEEN

**REPUBLIC.....APPLICANT
VERSUS**

THE SECRETARY TEACHERS COMMISSION.....RESPONDENT

AND

SAMSON MUNYOKI.....EXPARTE

RULING

On 11th October, 2010, the Applicant, **Samson Munyoki** commenced this Judicial Review Proceedings by seeking leave to do so. In the *ex-parte* Chamber Summons application, the applicant sought leave to apply for orders of *certiorari* and *mandamus*. *Certiorari* was to quash the decision made by the respondents on 20th April, 2010 and *mandamus* was to compel and direct the respondents to reinstate the applicant in his employment. He also pleaded with the court that the order of leave do operate as stay.

The application was grounded on the fact that the decision of the respondent with regard to the applicant was in excess of its powers thus *ultra vires*, there were no grounds to dismiss the applicant, the decision and proceedings were governed by procedural impropriety and unfairness, want of jurisdiction and there were fundamental omissions and errors of law apparent the face of the record, the applicant was denied exhibits which were seized by the school investigators and lastly, that the District Education Officer seized some documents in the custody of the applicant .

In support of the application, the applicant deposed that hitherto he was a teacher at Ndooni Primary School in Kyuso District. On or about 2nd December, 2009 he was interdicted by District Education Officer over allegation that he had breached the Teachers Service Commission Act. It was alleged that he

had failed to register 8 pupils for Kenya Certificate of Primary Education. He appealed against the interdiction to the Teachers Service Commission, the respondent. Instead the respondent dismissed him from employment vide a letter dated 20th April, 2010. The reasons why the 8 pupils were not registered for the examinations was that they had not paid examinations fees on time. Thus the reason for his dismissal being that he had intentionally failed to register 8 pupils for KCPE for the year 2009 was untrue, unfounded, baseless and had no merit. By the time the registration was done in March, only 28 pupils had paid their examination fees.

Subsequently, the respondent directed that the complaint be investigated by its officers at the District Level. However, the officer who was deputed to investigate the matter demanded from the applicant Kshs. 60,000/= as a bribe to assist him. The applicant lodged the vice with Kenya Anti-Corruption Commission, whereupon the officer was arrested and charged with the vice at Embu. The case was still pending in court though. The decision to dismiss the applicant would appear was made in haste to oppress him so as not to prosecute the corruption case.

The *ex parte* application came before **Waweru, J** on the same day and he granted leave sought. However, he declined to order that leave so granted do operate as stay. On 26th October, 21st October, 2010, the applicant filed the substantive motion.

The respondent duly answered the application through **Nancy N. Macharia**, its director in charge of discipline matters. She deponed that the respondent was conferred with inherent power to institute disciplinary processes against an errant teacher in public service. Such disciplinary process may be initiated directly or through an authorized agent. Sometimes in December, 2009, the District Education Officer, Kyuso received information to the effect that the applicant while serving as a head teacher at Ndooni Primary School had engaged in acts which infringed on the provisions of Code of Regulations for teacher in that he had neglected his duties by purposely failing to register 8 pupils for the 2009 Kenya Certificate of Primary Education Examinations. Those pupils were **Nzangi Mwinzi, Syuungu Muneeni, Syombua Munyoki, Kalunda Kilonzo, Kilimi Musembi, Mwanziu Muku, Kavuta Musyoka** and **Muthui Muku**. Acting on these allegations, the said District Education Officer, who also doubled as an agent of the Respondent despatched a team of officers to the school with a view to conducting investigations to ascertain the allegations. The investigations revealed that the pupils were indeed not registered for the 2009 KCPE examination despite having paid the examination fees in good time. The report confirmed that the applicant had intentionally and without any justification failed to register the pupils which was contrary to regulation 65(1) (a) of the Code of Regulations and disciplinary action was recommended against the applicant. The decision was therefore reached to interdict the applicant. The applicant having been served with interdiction notice was given 21 days to answer to the allegations pursuant to which he wrote a letter dated 18th January, 2010. The respondent convened a disciplinary panel on 20th April, 2010 to which the applicant was invited to appear and rebut or answer to the adverse allegations against him. The notice for the meeting was served on the applicant in good time to enable him adequately prepare his defence. The applicant did appear before the panel, was accorded the opportunity to present his case, cross-examined witnesses and presented documents in support of his defence which were duly considered by the respondent. The panel too interrogated witnesses who included 2 of the affected pupils, **Syombua Munyoki, Mwanzia Muku**, parents of **Syombua Munyoki** and **Senior District Quality Assurance officer**. As a result of the applicant's negligence, 3 of the pupils **Nzangi Mwinzi, Syombua Munyoki** and **Kalunda Kilonzo** had dropped out of school. Indeed two of the pupils resorted to early marriage.

The Respondent went on to depone that following the intervention by Kenya National Union of Teachers, a meeting was held on 16th September, 2009 involving Ministry of Education and parents of the affected pupils. At the said meeting, the applicant owned up and was remorseful for his action and omissions. He undertook to refund the aggrieved parents double the amount they had paid. The applicant's failure, refusal or neglect to register the pupils was not only a gross contravention of the Code of Regulations for teachers but also had an effect on the rights of the pupils and their parents who had psychologically and painstakingly prepared themselves for the examination for 8 years. Upon evaluation both the oral and statements of the witness and all the evidence presented, the panel arrived at a decision

to dismiss the applicant from service. The allegations of bribery if at all, do not in any way exonerate or affect the substance of the applicant's blatant violation of the code of regulations and did not in any way influence the respondent in arriving at its decision to discipline the applicant. The dismissal of the applicant was lawfully effected in pursuit to the spirit and the letter of the law, specifically, Teachers Service Commission Act and Code of Regulations for teachers.

When the application came before me for *interpartes hearing* on 2nd February, 2012, parties agreed to canvass the same by way of written submissions. However, it was not until 22nd May, 2012 that the respective written submissions were on board. I have carefully read and considered them alongside cited authorities.

It is common ground that the applicant was an employee of the respondent and at the time of his dismissal, he was a head teacher at Ndooni Primary School in Kyuso District. It is also common ground that for one reason or another, the applicant failed to register 8 pupils for 2009 Kenya Certificate of Primary Education Examinations. Consequently, the respondent interdicted him and commenced disciplinary proceedings that culminated in his dismissal from service for breach of the Code of Regulations for teachers. Lastly, it is not in dispute that the depositions by the respondent in its replying affidavit have neither been challenged and or rebutted by the applicants. Accordingly those depositions must be taken as true.

The applicant's case is that the decision of the respondent to sack him was in excess of its powers and therefore *ultra vires*. That there were no proper grounds to dismiss him. That the decision was governed by procedural impropriety, unfairness, lack of jurisdiction and there were fundamental errors apparent on the face of the record, that the applicant was denied exhibits as they had been seized by the District Education Officer.

However, the applicant has not given or provided details as to how the respondent exceeded its jurisdiction. The grounds advanced in support of the respondent's decision to terminate the services of the applicant were that he negligently failed to register 8 students for their KCPE examination. The applicant concedes that much but hastens to add that he failed to do so because those pupils had not paid the examination fee on time. However, the respondent has deposed that in fact the pupils paid the examination fees in good time as follows:-

<u>NAME</u>	<u>Date of payment</u>
• Nzangi Mwinzi	- 5 th February, 2009
• Kavolya Musyoka	- 25 th March, 2009
• Syombua Munyoki	- 13 th February, 2009
• Mwanziu Muku	- 1 st February, 2009
• Muthiu Muku	- 1 st February, 2009
• Kalunda Kilonzo	- 5 th February, 2009
• Musembi Kalemi	- 24 th April, 2009
• Muneeni Syungu	- 5 th March, 2009

The respondent has further deposed that the Kenya National Examinations Council had issued a general circular dated 13th January, which set the registry deadline as 31st May, 2009. Accordingly the issue of the pupils not paying examination fee in good time does not wash

The applicant also alludes to the fact that the decision was arrived at through procedural impropriety lack of jurisdiction and with fundamental errors on the face of the record. Once again the applicant does not offer any evidence to back up his aforesaid assertion. Having gone through the record, I do not discern any such misgivings. What is not in doubt is that the applicant was at the earliest opportunity informed of the allegations levelled against him and invited to submit his defence.

The applicant responded by presenting his defence which was duly considered by the panel. The applicant further appeared before the panel, heard the evidence presented against him and was given opportunity to cross examine witness presented. The applicant was accorded opportunity to present his case and call witnesses. The applicants evidence was duly considered prior to the respondent's decision. The respondent duly communicated its decision to the applicant. The applicant's case was timeously heard in my view by an independent, unbiased and impartial disciplinary panel. It would also appear that the applicant's dismissal from service was arrived at after careful evaluation of the issues of fact and was not influenced or actuated by bad faith as alleged. I think that the procedure prescribed under the Teachers Service Commission and Code of Regulations for teachers was strictly followed in the case of the applicant.

The applicant too has complained that he was denied exhibits as they had been seized by the District Education Officer. To my mind this complaint is an afterthought. I am certain that if he had raised it with the panel it would have been assisted.

Lastly, the applicant talks of the respondents' employee who attempted to extort Kshs. 60,000/=. Whether the allegations are true or not is immaterial for purpose of determining this application. In any event, the said allegations of bribery, if at all, do not in any way exonerate or affect the substance of the applicant's violation of the provisions of the code of regulations for teachers. It did not change the fact that the applicant had failed to register pupils who had paid examination fees on time. The acts of bribery happened long after the applicant had committed the act complained of. It is also instructive that at no time did the applicant challenge the manner in which the disciplinary proceedings were conducted

The respondent is a creature of the Constitutional. By virtues of Article 237(1) of the Constitutions of Kenya, the respondent is created with the Principal functions being, the registration, recruitment, termination and assignment of teachers to public schools in the country. Article 237 (2) (e) grants the respondent powers to exercise disciplinary control over teachers. In addition to the constitution, operations of the respondent are further governed by the Teachers Service Commission and the provisions of the Code of regulations for teachers. The code empowers the respondent to *inter alia*

- Receive and consider complaints about its employers
- Investigate any allegations touching on the professional misconduct of an employee
- Terminate employment of its employees
- Retire its employees
- Dismiss any unsuitable and or unfit teacher after due disciplinary process

Pursuant to the foregoing the respondent had mandate to undertake the disciplinary action against the applicant and that the same was exercised within the boundaries of its mandate. It cannot therefore be accused of having exceeded its mandate and therefore acted *ultra vires*.

The applicant held a position of responsibility as a head teacher. He was expected to demonstrate transparency and accountability while handling examination fees paid by the parents for the young pupils. As already stated, the applicant received examination fees. The examination fee was paid in good time, yet the applicant intentionally failed and ignored to register the 8 pupils. Indeed in his own letter to the respondent dated 18th January, 2010, he makes this rather startling revelation:-

“...on the other hand, I own up that I did not register the 4 pupils although they had all paid in the month of May, 2009 but if fairly investigated free from pressure, (as was expressed by Mr. Syengo on 25th November, 2009) it would have been discovered that the circular released to schools that year, from KNEC never indicated the time frame...”

The applicant has not explained himself well as to why he did not register the 4 pupils, leave alone 8. The irresistible conclusion must be that he must have misused the money. Based on the foregoing the respondent's finding that the applicant conducted himself in unprofessional manner cannot be faulted. Indeed as a result of the applicant's acts of omission and or commission, the future of the pupils have been put in jeopardy. Their right to education was violated. Some of them ended up marrying prematurely. On this score, the applicant cannot be heard to say that here were no proper grounds for the decision.

The applicant has sought orders of *certiorari*. It is well settled law that Judicial Review is not an appeal from a decision, but a review of the manner in which the decision was made or arrived. Similarly the purpose of *certiorari* is to ensure that an individual is given a fair treatment by authority to which he is subjected. It is concerned with the decision making process and will issue only when the court is satisfied or convinced that the decision challenged was reached without or in excess of jurisdiction or in breach of rules of Natural justice. Hence, where an administrative body has complied with rules of natural justice, the courts will be reluctant to interfere with the proceedings. See **Republic vs Egerton University ex-parte Robert Kipkemoi Koskey [2006] eKLR**. In this case, the respondent cannot be faulted in the procedure it adopted in entertaining the proceedings. In my considered view, all the ingredients of natural justice were met. Further the respondent did not go outside its mandate. It acted *intra vires* as opposed to *ultra vires*. In those circumstances, I do not think that the order of *certiorari* is available to him.

Lastly, the application has sought for an order of *mandamus*. Ordinarily, the order of *mandamus* is a command issued by this court to an administrative authority or interior tribunal directing it to perform a peremptory duty imposed on it by law. It is trite law that a party must satisfy the court that he has a right to compel the public body to perform the duty in question. In this case and as correctly submitted by the respondent, the applicant was an employee of the respondent and was subject to the terms and conditions of his service. In employment contract, the Principle of **“mutuality and freedom of contract”** is paramount. A party cannot be forced to employ a person when their relationship has irretrievably collapsed. Again, orders of *mandamus* will only issue where it is proved that an administrative body acted outside the law and the rules of natural justice. In this case, the applicant complied with the law in dealing with the applicant. Accordingly, the remedy of *mandamus* is similarly not available to him.

For all the foregoing reasons, I find the application unmerited. It is dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at MACHAKOS his 31ST day OCTOBER, 2012.

**ASIKE-MAKHANDIA
JUDGE**