REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 1069 of 2007

RAPHAEL OBIERO NYANGORO…….……APPLICANT

VERSUS

CONTROLLER AND AUDITOR GENERAL…….…1ST RESPONDENT

PUBLIC SERVICE COMMISSION…….……..2ND RESPONDENT

JUDGMENT

The Application before the court is the Notice of Motion dated 30th November 2007 which seeks:

a) An order of certiorari directed to the Controller and Auditor General and the Public Service Commission quashing the proceedings and the decision taken by the Controller and Auditor General and the Public Service Commission dismissing the Applicant;

b) Costs of the application.

The application is based on the grounds set out in the Statutory Statement and the Supporting Affidavit dated 21st September 2007. Briefly stated, these grounds are that:

a) The Applicant was not accorded an opportunity to defend himself, neither was it made known to him on what basis the decision to dismiss him was taken;

b) The decision to dismiss him was arbitrary and unlawful;

c) There are no documents to show the facts upon which the Commission relied when they stated that the Applicant's signature was appended on a document, that proved he had obtained money from the cashier of the Kenya Sugar Board.

d) The Applicant has denied receiving Kshs 137, 115.00 as alleged. Further the Applicant has denied putting his name on any list, and or signing any document allegedly in receipt of Kshs 137,115.00 or any part thereof at all;

e) That the decision taken by the Public Service Commission was radical and unprocedural and against the rules of natural justice as there is no evidence to support the decision of the Controller and Auditor General and the Public Service Commission

f) The Applicant has suffered financially and has been ridiculed socially due to these accusations and it

would only be fair and just that the proceedings and decisions taken by the Controller and the Auditor General and the Public Service Commission be brought before the High Court and the same be quashed.

The present proceedings stem out of disciplinary proceedings that culminated in the dismissal of the Applicant. Until 18th September 2002, the Applicant served as an auditor in the office of the 1st Respondent.

On 18th September 2002, the Applicant received a letter from the 1st Respondent suspending him from duty. The reason given for the suspension was there had been allegations that between September 1999 and December 2001, the Applicant had fraudulently received the sum of Kshs. 137,115.00 from the cashier at the Kenya Sugar Board, ostensibly to cover audit inspections of its field offices.

On 1st September 2003, the Applicant received a letter from the 1st Respondent informing him that there was information that showed that on diverse dates, he had obtained money from the Kenya Sugar Board, purportedly to cover his audit inspections. The 1st Respondent stated that these actions were regarded as fraudulent and imputed that his objectivity and integrity as an audit officer could be compromised. The Applicant was then asked to show cause why severe disciplinary action, including dismissal, should not be taken against him.

The Applicant responded to the notice to show cause letter on 4th September 2003. In his response, he denied the allegations levelled against him and informed the 1st Respondent that the allegations could not be true as he had never been served with a show cause letter for absence from work.

The Applicant was then dismissed from duty on 9th October 2003. He appealed this decision on 23rd October 2003. His appeal was based on the ground that he had never been called upon either by the Criminal Investigation Department (CID), or by the Respondent, to give his side of the story. He therefore states that his rights as a civil servant were violated.

On 22nd December 2003, an official from the 1st Respondent wrote to the Applicant and informed him that his appeal had been disallowed, but informed him that he had a right to a second appeal. The Applicant exercised this right on 19th May 2004. This appeal also failed. This decision was conveyed to the Applicant on 29th September 2004.

The Respondents opposed the application by way of a Replying Affidavit dated 20th November 2011. The Respondent contends that the Applicant was lawfully suspended from his position to pave way for investigations into his conduct. He was informed of the reasons for his suspension.

The Respondent also contends that while he was on suspension, the Applicant was given an opportunity to respond to the allegations that were levelled against him, a fact that is acknowledged in the letter dated 4th September 2003. After due consideration of the Applicant's defence, the Respondent found that his conduct amounted to gross misconduct, and dismissed from office.

It is the Respondent's case that the Applicant exercised his right to an appeal and second appeal, but did not succeed. The Respondent maintains that the Applicant was accorded sufficient time within which to respond to the allegations and that the rules of natural justice were fully complied with.

It is important to state at this stage that judicial review is concerned not about the correctness of the impugned decision, but the process used in reaching it. This position is stated in Halsbury's Laws Of England 4thEdition Volume 1 at page 92,

"judicial review is concerned with reviewing the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is thus different from an ordinary appeal. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected: it is no part of that purpose to

substitute the opinion of the judiciary or that of individual judges for that authority constituted by law to decide the matters in question"

This position has also been stated in ***Constitutional and Administrative Law (Text and Materials)*** by David Pollard, Neil Parpworth and David Hughes (4th Edition) at page 477:

"The supervisory jurisdiction is a means of review of the law that has been applied by the body under review and it is not an investigation in the facts. Second, the supervisory jurisdiction, being to investigate the legality of a decision, is limited to a decision of the supervisory court that the body under review either acted lawfully or did not act lawfully. If the body acted lawfully, nothing further is needed and the original decision stands. If the body acted unlawfully, the further is needed and the original decision stands..."

This scope of judicial review has been clarified in various Kenyan cases. In ***Republic V Judicial Service Commission exparte Pareno [2007] 1 KLR 203*** the court stated that:

"the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision–making process itself."

In ***Nicholas Muchora & 5 Others V Senior Resident Magistrate (Milimani Commercial Courts) [2011] eKLR (Miscellaneous Application 259 of 2007)*** Justice Musinga restated this as

"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself."

The issue for determination is whether the proper procedure was used in the dismissal of the Applicant.

The Applicant submits that the initial suspension was harsh and in violation of Regulations 23 and 24 (1) of the Public Service Commission Regulations, 2005. Regulation 23 provided for interdiction while regulation 24 provided for suspension of public officers.

From the annextures of the applicant, it is evident that the Applicant was suspended before investigations into his conduct commenced. The letter dated 18th December 2002 informed the Applicant of the charges levelled against him, and told him that the matter had been handed over to the Criminal Investigation Department for investigation. The charge of financial misconduct is a serious. In this case, it was particularly serious because the Applicant served as an auditor in the 1st Respondent's office. He obviously could not continue to undertake his duties as an auditor when he was being investigated for misconduct in this role. It is my view that the suspension, even though not done in strict compliance of Regulation 23 and 24 of the Act, was reasonable in the circumstances.

The Applicant has submitted that the rules of natural justice were not fully complied with because he was not accorded an opportunity to defend himself and was not availed all documentary evidence in support of the allegations that had been levelled him.

De Smith's Judicial Review (6th Edition, 2007) at paragraph 7-003 defines natural justice thus:

*"**The term 'natural justice' has largely been replaced by a general duty to act fairly which is a key element of procedural propriety. On occasion, the term 'due process' has been invoked. Whichever term is used, the entitlement to fair procedures no longer depends upon the adjudicative analogy, nor on whether the authority is required or empowered to decide matters analogous to a legal action between two parties. The law has moved on; not to the state where the entitlement to procedural protection can be extracted with certainty from a computer, but to where the Courts are able to insist upon some degree of participation in reaching most official decisions by those whom the decisions will affect in widely different situations, subject only to well established exceptions." (Emphasis mine)***

One of the essential elements of natural justice is that no one shall be condemned unheard. This element

is also known as *audi alteram partem.* In ***O'Reilly v Mackman (1983) 2 AC,*** the court**,** in relation to this rule, stated:

"the two fundamental rights accorded to [a person] by the rules of natural justice or fairness vis , to have afforded him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and in the absence of personal bias on the part of the person by whom the decision falls to be made."

The Applicant was given notice to show cause why disciplinary action (including dismissal) should not be taken against him through a letter dated 1st September 2003. He responded to this letter on 4th of September 2003, wherein he defended himself. Moreover, he was given an opportunity to prefer an appeal and a second appeal. This is a clear indication that he got an opportunity to put forth his defence.

In any case, his contention that he was not afforded an opportunity to defend himself is negated by his own letter of 4th September 2003, in which the he stated:

"I also thank the office for giving me an opportunity to defend myself under the NATURAL JUSTICE (sic) where nobody may be condemned without being accorded an opportunity to defend oneself."

The assertion was therefore that he was not given an opportunity to defend himself is therefore not true. He was given an opportunity to respond to all the allegations levelled against him.

The Applicant submits that there was no evidence of the fraud either from the Criminal Investigation Department or from the Kenya Sugar Board. His take is that since there was no proof of the misconduct, he ought not to have been dismissed. These allegations go to the merit of the decision that was reached by the 2nd Respondent. This court has no jurisdiction to delve into the merits of the finding of the Applicant.

The Applicant has also submitted that the letters by the Respondent informing him of the disciplinary action were written by unauthorised officers. This submission is based on the ground that there is no evidence that there was written authority to the authors to write these letters. In ***Republic v Controller & Auditor General & Another Ex parte Flora Njeru Misc Application No 683 of 2005 (unreported)***, the court, when considering an application very similar to the present one, found that the proceedings were a nullity because the proceedings were taken by unauthorised officer.

The term 'authorised officer' includes the Permanent Secretary who exercises supervision over the ministry in which the public officer concerned holds an office, the head of a department, and in the case of the National Audit Office, the Controller and Auditor-General. It also includes any other public officer appointed by the Public Service Commission.

The letters in question were all signed by a certain Winston J. O. Orega There is no evidence that the person who signed the letters was properly authorised to sign them. Moreover, in the letter of dismissal, the letters indicate that the said Winston J. O. Orega was conveying the decision of the authorised officer. It is unclear who this authorised officer is. I therefore find, just as Justice Osiemo did in ***Republic v Controller & Auditor General & Another Ex parte Flora Njeru Misc Application No 683 of 2005***, that the letters upon which the Applicant was dismissed were improper.

The Applicant has prayed for an order of certiorari. It is important to note that the decision to dismiss him from duty was taken in 2003. The Applicant however only came to this court in 2007 to seek relief. The Applicant has not stated the reasons that caused him to wait four (4) years before coming to this court for review.

Moreover, a quashing order would mean that in effect, the decision to dismiss the Applicant would be set aside and the Applicant could resume the duties he was undertaking as at the date of his suspension. In my view, this would not be an appropriate remedy, especially considering the amount of time that has passed since.

Judicial review orders are discretionary orders, and in some instances, they will not be granted even where the grounds to grant them do exist. They will ordinarily be granted only where they are the most efficacious remedy.

For these reasons, I find that the Notice of Motion must fail and it is hereby dismissed. Each party shall bear its own costs.

DATED, SIGNED and DELIVERED this 29th day of November 2012

M. WARSAME

JUDGE