REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 706 of 2009

IN THE MATTER OF: AN APPLICATION BY JOSEPH NDUKU NJUKI FOR JUDICIAL REVIEW AND FOR THEORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS AGAINST THE JUDICIAL SERVICE COMMISSION

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26, SECTION 8 AND 9, AND ORDER l111, RULES 1 & 2 CIVIL PROCEDURE RULES, SECTION 3A OF THE CIVIL PROCEDURE RULES, SECTION 3A OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF: THE JUDICATURE ACT, CAP 8 AND THE JUDICIAL SERVICE REGULATIONS CAP 185 AND THE CONSTITION OF KENYA

AND

IN THE MATTER OF: A DECISION MADE BY THE JUDICIAL SERVICE COMMISSION AT ITS MEETIIN ON 23RD OCTOBER RETIRING JOSEPH NDUKU NJUKI IN THE PUBLIC INTEREST

AND IN THE MATTER OF

REPUBLIC……..……..…APPLICANT

VERSUS

JUDICIAL SERVICE COMMISSION…….....…….……..RESPONDENT

EX PARTE JOSEPH NDUKU NJUKI

JUDGMENT

Joseph Nduku Njuki was retired from his position of Senior Resident Magistrate. Through the application dated 21st May 2010 he seeks orders of:

a) Certiorari to remove into this Honourable Court and quash the decision of the Judicial Service commission in its letter dated 23rd October 2009 retiring the applicant in the Public Interest

b) Prohibition being an order to prohibit the Judicial Service Commission from retiring the said Joseph Nduku Njuki in the public interest

c) Mandamus being an order directing the Judicial Service Commission to retain the applicant in its employment in the public service in Kenya and continue to pay his salary, allowances, benefits and other emoluments of his office of Senior Resident Magistrate

d) The costs of the application

e) Such further orders so as to meet the interests of justice

The Application is supported by the Statement of Facts, the Verifying Affidavit and on the grounds that:

a) The whole process adopted in retiring the Applicant offends against the rules of natural justice

b) The Respondent acted ultra vires the laid down regulations to the detriment of the Applicant

c) That in so far as the Registrar of the High Court of Kenya and the Honourable Chief Justice were the complainants and preferred charges against the Applicant, it was grossly unfair that they would attend and participate in the adjudication over the claims/charges against the Applicant against the Applicant and condemn him in his absence

d) The Applicant's rights to fair trial as enshrined in the Constitution was trampled underfoot as he was accused by anonymous and non-existent persons, denied the right to test the credibility of his accusers and was not given any or any adequate facilities to prepare his defence.

e) The Applicant was presumed guilty until he proved his innocence.

The Application is opposed by the Respondent through the Grounds of opposition dated 23rd April 2012, which I produce hereunder:

a) The application is based on contested issues of facts and evidence which are best dealt with in a civil suit and not in judicial review;

b) The application is based on unsubstantiated grounds;

c) The order of prohibition sought cannot issue as the same is already overtaken by events;

d) The legal procedure was followed in retiring the ex-parte applicant in the public interest.

In a nutshell, the Respondent is of the view that the correct procedure was followed in retiring the ex-parte applicant in public interest was followed and therefore, the orders sought cannot issue.

The facts leading up to these proceedings have been provided by the Applicant in the statement of facts and the supporting affidavit. The Applicant states that on 2nd April 2008, the Applicant was transferred to Naivasha Law Courts where he was serving under the Principal Magistrate.

On 10th February 2009, he attended an interview for promotion to Principal Magistrate. The Respondent informed the Applicant that a complaint against him had been made by him by the Principal Magistrate whom he was serving under.

On 11th March 2009, he sought details of the complaint from the Principal Magistrate under whom he was serving, who refused to divulge any details and instead reprimanded him. On 20th July 2009, the Applicant received a letter from the Registrar of the High Court of Kenya. The letter set out various allegations of gross misconduct against him. The Applicant requested information about the sources of the allegations from both the Registrar of the High Court and the Principal Magistrate, but received none. He eventually was given the names of two law firms that had allegedly complained against him. He made enquiries from the advocates in these firms regarding the complaints and the advocates denied authoring

the complaints. There were other letters of complaints came from anonymous sources, and were delivered to the Principal Magistrate.

I have considered the facts as they have been presented by the Applicants in his pleadings. I find that the Applicant's raises two main points for determination. These are:

1. Whether the procedure used to retire the Applicant was ultra vires the Judicial Service Commission Regulations.

2. Whether the rules of natural justice were violated;

It is important to state at this stage that judicial review is concerned not about the merits of the impugned decision, but the process used in reaching this decision. This scope of judicial review has been clarified in various cases. See ***Republic V Judicial Service Commission exparte Pareno [2007] 1 KLR 203*** wherein 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."***

This was also stated by Musinga J in ***Nicholas Muchora & 5 Others V Senior Resident Magistrate (Milimani Commercial Courts) [2011] eKLR (Miscellaneous Application 259 of 2007)*** wherein he 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."***

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..."

The Applicant has raised an issue regarding the evidence that he tendered to the Respondent in his defence. He states that the Respondent in dismissing him did not accept the evidence he gave in response to the allegations. These are matters that touch on the merit of the decision reached by the Respondent. They cannot be used in determining whether the Applicant is deserving of the orders prayed for.

It is also trite law that a judicial review court does not sit as a court of appeal. See ***Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology Ex parte Cecilia Mwathi & another [2008] eKLR (Misc Civil Application No.30 of 2007)*** wherein a commentary in ***Supreme Court Practice 1997 Volume 1 14/6*** is adopted. It states:

"The court will not, however, on judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power of discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power."

As at 2009, the Service Commissions Act was the statute which applied to disciplinary process of magistrates. It contained the Judicial Service Commission Regulations. Regulation 24 stated that:

24. (1) An officer in respect of whom disciplinary proceedings are to be held under this Part shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the

proceedings, or to be allowed access to it.

The Applicant has stated that the Principal Magistrate declined to avail him the files and other documents that he required to prepare his defence. He then wrote to the Registrar of the High Court on 28th July 2009 asking for access to the information so that he could prepare his response. However, in the letters from the Registrar dated 10th September 2009 and 29th September 2009, the Applicant was given all the copies of the documents on which the complaints were based on. Even though the Principal Magistrate declined to allow him access to the court records, I find that the Registrar sufficiently addressed the concerns of the Applicant. He was given all the information that he sought, and was given ample time to respond to the allegations. In my view, the requirement in Regulation 24 was properly complied with.

On 26th October 2009, the Respondent wrote to the Applicant and informed him that it had reached a decision to retire him in the public interest in accordance with regulation 28 of the Judicial Service Commission Regulations. This regulation reads:

"28. Retirement on grounds of public interest

(1) If the Chief Justice, after having considered every report in his possession made with regard to an officer, is of the opinion that it is desireable in the public interest that the service of such officer should be terminated on grounds which cannot suitably be dealt with under any other provision of these Regulations, he shall notify the officer, in writing, specifying the complaints by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the officer.

(2) If, after giving the officer an opportunity of showing cause why he should not be retired in the public interest, the Chief Justice is satisfied that the officer should be required to retire in the public interest, he shall lay before the Commission a report on the case, the officer's reply and his own recommendation, and the Commission shall decide whether the officer should be required to retire in the public interest."

The question is whether the procedure outlined in the Regulations was properly followed by the Respondent. It is my finding that the Regulation 28 (1) was properly followed. The Applicant's ground that the procedure was not followed is therefore unfounded.

The Applicant is of the view that the rules of natural justice were not properly complied with in this case.

The essential elements of the rules of natural justice are twofold: that a man shall not be condemned unheard *(audi alteram partem)* and that no man shall be a judge in his own cause (*nemo judex in re causa sua)*. The second element is also known as the rule against bias. In ***O'Reilly v Mackman (1983)***
In ***O'Reilly v Mackman (1983) 2 AC,*** the courtstated,

"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 question for determination therefore is whether these rules of natural justice were violated. Various complaints had been levelled against the Applicant. He got to hear of these accusations at an interview by the Respondent. He sought to know on what basis he had been charged, and received formal communication from the Respondent on 17th July 2009. In this letter he was informed of all the charges. He was also informed that severe disciplinary action was being contemplated against him, which action included dismissal or retirement in the public interest, and asked to show cause why such action should not be taken.

The Applicant's main contention is that he failed to receive all the documentary evidence that was relied

on in condemning him. Indeed, there is evidence on the record that shows that his immediate supervisor, the Principal Magistrate in charge of Naivasha Law Courts, refused to furnish him with any documentation citing his criminal tendencies to destroy court files and his dishonesty. However the Applicant's allegation does not hold water since his own affidavits show that the Registrar of the High Court, who was the secretary to the Respondent, furnished him with the documentation by cover of the letter dated 10th September 2009. The Registrar then gave the Applicant a further 14 days to respond to these allegations. It appears that the Registrar then again wrote to the Respondent on 29th September 2009 and informed him of further allegations that had been made against him. He was given a further seven days to respond to these allegations.

The Applicant responded to these allegations by way of his letters dated 7th August 2009 and 16th September 2009. I note in the Applicant's letter dated 16th September 2009, he referred to the Registrar's letter dated 29th September 2009 and addressed the issues raised therein. The Applicant has not explained the discrepancy in the date of this letter. Copies of the correspondence between the Applicant and the Respondent have all been annexed to the Applicant's pleadings. In my view all this correspondence shows that the Applicant was given ample and fair opportunity to be heard by the Respondent. In ***Wilson's Application [2009] NIQB 60*** McLaughlin J adopted the term natural justice as it has been defined by De Smith's Judicial Review (6th Edition, 2007) at paragraph 7-003:

*"**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 added)***

In this case, it is shown that the Applicant was allowed to participate when he was given an opportunity to respond to the allegations levelled against him. The correspondence shows that this decision was made with the participation of the Applicant. It is therefore my finding that the Applicant was given a fair opportunity to be heard.

The Applicant also takes issue with the fact that the Registrar of the High Court, and the Chief Justice were part of the sitting that heard his case. He states that these two were his 'investigators, judge, jury, and executioner', and that he had already been found guilty by the Principle Magistrate, the Registrar and the Chief Justice. The rules of natural justice demand that a man shall not be a judge in his own cause. This means that no judge should participate in making a decision in a case in which he has an interest in. This principle guards against the probability of having a biased judge in one's cause, which would defeat the ends of justice.

Did the fact that the Chief Justice and the Registrar sit in the meeting of the Respondent that eventually condemn the Applicant amount to an injustice, and violate this rule? In my opinion, it did not. First, the Chief Justice was a member of the Respondent by virtue of section 68 of the repealed Constitution of Kenya. The Registrar of the High Court was also performing a duty conferred upon her by the repealed Constitution and the repealed Service Commissions Act. Any dealings these two officers had to do with the Applicant's matter were not done in their personal capacity. Secondly, the decision of the Respondent to commence disciplinary proceedings against the Applicant was as a result of complaints from other parties, among them the Principal Magistrate, and not from the Chief Justice and the Registrar. Finally, the Principal Magistrate was not involved in the decision making process of the Respondent. Indeed, he or she is not a member of the Respondent. The fact that he perceived the Applicant to be guilty of some actions and omissions does not amount to a violation of the Applicant's rights.

The Applicant has referred me to the case of ***Joyce Manyasi V Evan Gicheru & 3 others [2009] eKLR (Miscellaneous Application 920 of 2005)***. This case also dealt with the retirement of a magistrate in the

public interest. The court in this case found that the procedure used to retire her was ultra vires the regulations, and issued orders quashing the decision. I wish to distinguish that case from the present one because in that case, the Applicant (Manyasi) had not been notified of the action that was being contemplated by the Respondent and had not been given an opportunity to show cause why she should not face disciplinary action. In the present case however, it is clear that the Applicant was notified, was asked to show cause, and was given ample time to respond. Only after the response did the Respondent take the step of retiring the Applicant in public interest.

Having addressed my mind to the issues raised in the Notice of Motion and the reply thereto, I am satisfied that there are no grounds, basis and reasons to interfere with the decision of the Respondent. There is nothing manifestly illegal, unlawful and/or inappropriate in the manner and the process employed by the Respondent in making the decision to retire the Applicant in public interest.

In the circumstances, I do not find that the Applicant has made out a case that warrants the orders that he seeks. Moreover, I am particularly guided by the statements of Nyamu J, (as he then was) in the case *of* ***Republic v Judicial Service Commission ex parte Pareno [2004] KLR.*** This case also dealt with the removal of a magistrate from service. Justice Nyamu stated:

"It must however be pointed out in the case of judicial officers although they occupy very important, dignified and powerful positions in our society, these positions are at the same time most vulnerable and sensitive and like the precious human soul which lives in earthen pots, judicial officers are also housed in breakable earthen pots. In the case of the precious human soul it flies away upon the breaking of the earthen pot and in the case of a judicial officer it he finds it difficult to retain his position when the earthen pot called perception becomes adverse."

When I bear in mind the circumstances in the instant case alongside the sentiments above, I am more convinced that the Applicant does not deserve the orders that he seeks. Judicial review seeks to ensure good administration in accordance with the law. In this case the decision to retire the Applicant in the public interest was not made in a manner that reveals an infringement of any rights of the Applicant.

The upshot of this is that the Notice of Motion dated 21st May 2010 is dismissed. Each party shall bear its own costs.

DATED, SIGNED and DELIVERED this 19TH day of NOVEMBER 2012

M. WARSAME
JUDGE