REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 316 of 2012

IN THE MATTER OF: AN APPLICATION SEEKING LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEIDNGS IN THE NATURE OF ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF: THE SERVICE COMMISSIONS ACT CHAPTER 185 LAWS OF KENYA

AND

IN THE MATTER OF: THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA

BETWEEN

JAMES MURIITHI NGOTHO ….....1ST APPLICANT

JAMES SAMBRUMO.....…..... 2ND APPLICANT

STEPHEN OKOTH.....3RD APPLICANT

JOASH IMBUYE AKATSA.....4TH APPLICANT

SOLOMON ONYANGO BOGEH..... 5TH APPLICANT

VERSUS

JUDICIAL SERVICE COMMISSION..... RESPONDENT

RULING

This is a ruling on a chamber summons application dated 6th August 2012 in which the Applicants namely James Muriithi Ngotho, James Samburumo, Stephen Okoth, Joash Imbuye Akaba and Solomon Onyango Bogeh seek the following orders:

1. This Application be certified as urgent and service thereof be dispensed with in the first instance.

2. That this Honourable Court be pleased to grant leave to the Applicants to institute Judicial Review

proceedings seeking an Order of Certiorari to remove to the High Court for purposes of quashing the letters of dismissal sent to the Applicants on 17th April 2002 and 22nd October 2002.

3. That this Honourable Court be pleased to grant leave to the Applicants to institute Judicial Review proceedings seeking an Order of Certiorari to remove to the High Court for purposes of quashing the letters sent to the Applicants on 18th May 2010, 22nd August 2011 and 3rd October 2011.

4. That leave be granted to the Applicants to institute Judicial Review proceedings seeking an order of Mandamus directed to the Respondent to restore the Applicant's to their respective positions as its employees.

5. Costs of this Application be provided for.

6. Any other relief this Honourable Court may deem just and expedient to grant.

The Judicial Service Commission ***(hereinafter referred to as the JSC)*** which is the Applicants' former employer is named as the Respondent in this application.

The application is supported by the statutory statement dated 6th August 2012, an affidavit sworn by one of the Applicants James Muriithi Ngotho on his own behalf and on behalf of the other Applicants and annextures thereto.

It is premised on several grounds which can be summarized as follows:

(1) That the process of dismissing the Applicants from their employment with the Respondent contravened the Judicial Service Commission Regulations and amounted to a violation of the Applicants' right to fair administrative action.

(2) That the process of dismissing the Applicants from their employment violated the rules of natural justice as the Applicants were not given an opportunity to be heard before the impugned decision was taken.

(3) That the process of their dismissal was oppressive, irrational, capricious and was punctuated by malice.

(4) That though the six months statutory time limit had expired in respect of prayers for leave to apply for an order of Certiorari, the court should nevertheless grant leave in the interest of administering substantive justice in view of reasons given to account for failure to seek court's leave within time.

When the application was presented before the vacation judge Hon Lady Justice Muchemi on 6th August 2012, she directed that the application be served upon the Respondents for hearing interpartes on 18th September 2012.

On 18th September 2012, Mr. Issa learned counsel for the Respondent informed both the court and Mr. Kaingu learned counsel then appearing for the Applicants that though the application was opposed, the Respondent did not wish to file any response in the form of grounds of opposition or replying affidavit but wished to oppose the application on points of law only.

The brief background against which the Applicants seek leave to commence judicial review proceedings against the Respondent as can be discerned from the statutory statement and the verifying affidavit is that the Applicants were employees of the Respondent serving as clerical officers till 17th April 2002 and 22nd October 2002 when they were dismissed from their employment on grounds of gross misconduct and negligence. Before their dismissal from employment, the Applicants had been arrested and charged before a Kibera court with several offences related to fraud and theft which offences had allegedly been committed against the Respondent.

The criminal prosecution however terminated in their favour on 30th October 2007 as can be seen from the judgment in Kibera Cr. Case No.5583 of 2001 annexed as exhibit JMM5.

After their acquittal in the criminal case, the Applicants appealed against the Respondent's decision to dismiss them from its employment. The Applicants' respective appeals were considered and disallowed on different dates and the Respondent notified each of the Applicants of its decision in letters dated 18th May 2012 and 3rd October 2011. The Respondent's decision to reject their respective appeals against their dismissal is what apparently prompted the filing of the current application.

The Respondent has opposed the application on grounds that it is bad in law as it is statute barred with regard to the prayers for leave to apply for orders of Certiorari.

Mr. Issa in his submissions in opposition to the application relied on Section 9(3) of the Law Reform Act which is replicated in Order 53 Rule 2 of the Civil Procedure Rules 2010.

Section 9(3) states;

"In the case of an application for an order of Certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired".

Mr. Issa further submitted that since it is conceded by the Applicants that indeed more than six months had elapsed between the time the impugned decisions were made and the time of filing the application, the court is duty bound to apply the law and find that the application is caught up by the statutory limitation period of 6 months prescribed under Section 9(3) of the Law Reform Act (the Act) and refuse to grant leave as sought in Prayer 1 & 2. Counsel relied on the authority of the Court of Appeal in **Aga Khan Education Service Kenya -Vs- Republic, Exparte Ali self and Others, C/Appeal No.257 of 2003** and the High court case of Odinga & Others -Vs- Nairobi City Council [1990-1994] E.A. 476.

To counter these submissions by the Respondent, the Applicants through learned counsel Mr. Githinji though conceding that the application had been made well beyond the 6 months period allowed by the law to challenge the validity of formal orders or decisions made by entities which are amenable to judicial review like the Respondent urged the court to find that the statutory limitation period of six months was a fetter on the courts discretion to administer substantive justice. Counsel submitted that the said limitation period was a procedural technicality which should be disregarded under Article 159(2)(d) of the Constitution of Kenya 2010. For this proposition, counsel mainly relied on the authority of Appex Finance International Ltd & Another -Vs- Kenya Anti-Corruption Commission (2012) eKLR where according to counsel, the High court (J Anyara Emukule) held that the six months statutory limitation period prescribed under Section 9(3) of the Act can be disregarded in the interest of rendering substantive justice. Mr. Githinji further submitted that the court should allow the Applicants an opportunity to ventilate their case as they intended to enforce their constitutional rights to fair labour practices and fair administrative action guaranteed under Article 41 and Article 47 of the Constitution and that in any event, if the application was allowed, the Respondent was not going to suffer any prejudice since it can still reinstate disciplinary proceedings against the Applicants and make its decision according to the law.

I have carefully considered the rival submissions made by both counsel on record and all the authorities cited.

I find that the only issue that arise for determination by this court is whether the court has discretion under the law to grant leave to the Applicants to apply for the judicial review remedy of Certiorari in the face of their admission that they had moved the court when the statutory limitation period of 6 months had

already expired.

Infact looking at the pleadings, it is clear that this limitation period expired a long time ago given that some of the decisions sought to be quashed are contained in letters dated 17th April 2002 and 22nd October 2002. The last in the queue of the impugned decisions is contained in a letter dated 3rd of October 2011.

The Applicants' sought to explain this long delay of about 10 years when one looks at the first set of decisions under challenge by claiming that they could not have challenged the Respondent's decision to dismiss them from employment when the criminal case was ongoing and that after their acquittal, they engaged the Respondent in active correspondence culminating in the Respondent's decision to reject their appeals against dismissal communicated to them in letters dated 18th March 2010, 22nd August 2011 and 3rd October 2011. The Applicants did not however give any explanation for their delay in approaching the court to challenge the validity of the Respondent's decision rejecting their appeals against their dismissal from employment.

Be that as it may, I find that whether the Applicants had a good reason for the prolonged delay in instituting these proceedings or not is not a relevant consideration by the court in this application since the Applicants did not seek enlargement of time within which to apply for orders of Certiorari. If such an application had been made, this is the only time that such reasons would have become crucial in order to enable the court determine whether it should exercise its discretion in favour of the Applicant or not. This was in fact the point under consideration in Appex Finance International Ltd & Another -Vs- Kenya Anti-Corruption Commission (supra) although in that case J Anyara Emukule was dealing with an application seeking enlargement of time within which to file the substantive motion after the Applicants failed to file it within time limited by the court after being granted leave. The facts and circumstances in that case are therefore different from the circumstances in the instant application.

Turning now to the main issue for determination by this court which as stated earlier is whether this court has discretion to grant leave to the Applicants as sought, I wish to begin by observing that the conduct of judicial review proceedings is governed by both substantive and procedural law.

The substantive law is found in the Law Reform Act while the procedural law is found in Order 53 of the Civil Procedure Rules 2010.

The substantive law governing the grant of leave for commencement of judicial review proceedings for orders of Certiorari as correctly stated by counsel on record for both parties is Section 9(3) of the Act. As can be seen from the wording of that section, the law provides an absolute prohibition against the grant of leave to an applicant seeking to commence proceedings for orders of Certiorari unless the application for leave had been made inside six months from the date of the impugned decision. It is important to note that the provision is couched in mandatory terms.

In my view, Section 9(3) does not give the court any discretion to grant leave to an applicant to apply for orders of certiorari after the expiration of the 6 months limitation period for whatever reason. This is why the Court of Appeal held in the **Aga Khan Education Service Ltd case** (supra) that it is incumbent upon the applicant to prove that he had filed the application for leave within 6 months from the date of the impugned decision otherwise leave cannot be granted.

The Court of Appeal expressed itself in the following words:-

"We agree with Mr. Inamdar that the burden is on an applicant for leave to satisfy the judge that leave ought to be granted. As we stated elsewhere in this judgment, if it is apparent from the material placed before a judge that the application for leave is made more than six months from the date of the decision sought to be challenged, then in the words of *Section 9(3), "leave shall not be granted*".

The court made a similar finding in the case of Nakumatt Holdings Ltd -Vs- The Commissioner of Value Added Tax, Civil Appeal No.200 of 2003.

It was argued by the Applicants that the court should treat the statutory limitation period of 6 months as a procedural technicality which it can disregard in the exercise of its discretion under Article 159 2(d) of the Constitution in the spirit of administering substantive justice.

Article 159 2(d) states:

"Justice shall be administered without undue regard to procedural technicalities"

Though I agree with the Applicants that the court is enjoined by the Constitution to administer substantive justice, I am persuaded to agree with Mr. Issa for the Respondent that the limitation period of 6 months prescribed under Section 9(3) of the Law Reform Act is not a procedural technicality. It is a statutory limitation of time for the filing of applications seeking leave to apply for orders of Certiorari. It is therefore a requirement imposed by substantive law and it cannot be said to be a procedural technicality which can be ignored under Article 159 2(d) of the Constitution. It is equivalent to the statutory periods of limitation prescribed under the limitation of Actions Act for instituting actions based for example on contract or tort among others and I think it would be stretching it too far to hold that statutory provisions relating to time can be equated to procedural technicalities envisaged under Article 159 (2) (d) of the Constitution of Kenya 2010.

We all know that what is normally regarded as procedural technicalities would be in the nature of procedural lapses that do not go to the root of the matter under consideration. They would for example include lapses like using the wrong mode of moving the court for certain reliefs/orders e.g. filing a notice of motion to seek leave to commence judicial review proceedings instead of a chamber summons as prescribed under Order 53 Rule 1 Civil Procedure Rules or citing the wrong provisions of the law while the substance of the application shows clearly that the Law cited is not applicable to the subject of litigation among many others.

I am fortified in this finding by the definition of the words "procedure" and "technicality" since it is from a combination of these two words that the phrase **procedural technicality** must have been coined from. The word procedure is defined in the Black's Law Dictionary, 9th Edition Page 1323 as ***"a specific method or course of action. The Judicial rule or manner for carrying on a civil law suit or criminal prosecution – also termed rules of procedure".***

I did not come across a definition of the term "technicality" in the Black's Law Dictionary but I found it in the Concise Oxford English Dictionary. According to the Concise Oxford English Dictionary, 11th edition Revised the word "technicality" means

"1. a point of law or a small detail of a set of rules as contrasted with the intent or purpose of the rules.

2. details of theory or practice within a particular field".

From the foregoing, it is my finding and conclusion that the 6 months limitation period prescribed under Section 9(3) of the Act is not a procedural technicality that this court can dispense with in the interest of administering substantive justice however much the court may be willing to assist the applicants in their quest to access justice in the courts judicial review jurisdiction. The limitation period is a substantive legal requirement that goes to the root of the application. If in fact it goes to the court's jurisdiction to grant the orders sought.

I therefore agree with Mr. Issa that this court is bound to apply the law as it stands today. I believe that the new Constitution did not come to overthrow the provisions of the law found in existing statutes but was only meant to avoid injustice to parties arising from failure to comply with minor procedural lapses or technicalities in the course of proceedings. I wholly appreciate that in the new constitutional

dispensation, the court should appreciate the need to embrace widely the constitutional principle of access to justice but this must be done within the confines of the law. Unfortunately the Applicants in this case find themselves outside the ambit of the law governing commencement of judicial review proceedings.

In Samuel Muchiri Wanjuguna & 6 Others -Vs- The Minister for Agriculture, C/Appeal No.144 of 2000, the Court of Appeal held that the test to be applied by the court in order to decide whether or not to grant leave is whether looking at the material presented before the court, the applicant had established prima facie that he had an arguable case with the prospect of success in the main motion.

That being the case, even without considering the other aspects of the Applicants' case, I find that having found that the application is statute barred and that the 6 months limitation period is not a procedural technicality that can be disregarded under Article 159 2(d) of the Constitution, the Applicants do not have an arguable case with any prospect of success at the substantive stage. In the circumstances, I am satisfied that they are not deserving of the grant of leave as sought in Prayer 1 & 2.

Having made that finding, it consequently follows that the prayer for leave to apply for an order of mandamus falls by the way side as an order of mandamus would of necessity be predicated upon issuance of orders of Certiorari quashing the Respondent's decision to dismiss the Applicants from employment. Flowing from this finding, it is clear that the Applicants application must fail in its entirety.

In conclusion, I wish to comment on the Applicants' assertion that if the application is dismissed, they would suffer injustice as they will be left without any judicial recourse. I wholly disagree with this submission by the Applicants. It is clear from the pleadings that the Applicants are basically contesting the Respondents decision to dismiss them from employment on grounds that the said dismissal was not done lawfully or fairly.

It is my finding that even if their application is dismissed, the Applicants will not be left without a remedy as they have the alternative remedy of instituting civil action in the Industrial Court for recovery of damages against the Respondent for alleged unlawful termination of employment if they so desire.

In any event, judicial review orders in my view are not the most efficacious remedies when it comes to disputes related to employment and Labour relations.

In the end, the upshot of this ruling is that I do not find merit in the Applicants' chamber summons application dated 6th August 2012 and the same is hereby dismissed with no orders as to costs.

DATED, DELIVERED and SIGNED this **13th** day of **December** 2012.

C.W. GITHUA
JUDGE

In the presence of:
Florence – Court Clerk
Mr Githinji for Applicants

M/S Mutua for Respondents