



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 847 OF 2009**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN  
THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE ACT CAP 185 LAWS OF KENYA AND IN THE  
MATTER OF THE PUBLIC SERVICE COMMISSION REGULATIONS 2005**

**AND**

**IN THE MATTER OF THE CHIEF'S ACT CAP 128 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....  
APPLICANT**

**VERSUS**

**THE PUBLIC SERVICE COMMISSION.....1<sup>ST</sup>  
RESPONDENT  
PERMANENT SECRETARY, PROVINCIAL ADMINISTRATION & INTERNAL  
SECURITY.....2<sup>ND</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL.....3<sup>RD</sup>  
RESPONDENT**

**BENJAMIN KIPKIRUI CHEPKWONY }  
JOSEPH KIPLANGAT**

**SANG}.....EX PARTE  
LEDAMA KOILA }  
SHADRACK KIPLANGAT KIRUI }**

**RULING**

The four ex parte applicants seek the following orders:

- “1. An order of certiorari to bring into this honourable court and quash the decision of the 1<sup>st</sup> respondent conveyed by one D.O. Ogutu on behalf of the 2<sup>nd</sup> respondent dated 28/6/2007 purporting to dismiss the 1<sup>st</sup> applicant from the Public Service with effect from 24<sup>th</sup> April, 2007 on account of gross misconduct.**
- 2. An order of certiorari to bring into this honourable court and quash the decision of the 1<sup>st</sup> respondent conveyed by one D.O. Ogutu on behalf of the 2<sup>nd</sup> respondent dated 28/6/2007 purporting to dismiss the 2<sup>nd</sup> applicant from the Public Service with effect from 10<sup>th</sup> August, 2006 on account of gross misconduct.**
- 3. An order of certiorari to bring into this honourable court and quash the decision of the 1<sup>st</sup> respondent conveyed by one D.O. Ogutu on behalf of the 2<sup>nd</sup> respondent dated 2/7/2007 purporting to retire the 3<sup>rd</sup> applicant in the public interest with effect from 1<sup>st</sup> September, 2007.**
- 4. An order of certiorari to bring into this honourable court and quash the decision of the 1<sup>st</sup> respondent conveyed by one D.O. Ogutu on behalf of the 2<sup>nd</sup> respondent dated 2/7/2007 purporting to retire the 4<sup>th</sup> applicant in the public interest with effect from 1<sup>st</sup> September, 2007.**
- 5. That the honourable court be pleased to give further orders and other reliefs as may be deemed just and expedient to grant.**
- 6. That cost of and incidental to the application be provided for.”**

The application was made on grounds that:

- “(a). The decisions were made in breach of the rules of natural justice.**
- (b) The decisions were illegal, arbitrary and unreasonable.**
- (c) Mr. D.O. Ogutu is not a designated officer within the meaning of the Public Service Commission Regulations and hence his actions are ultra vires.**
- (d) The power purportedly exercised by D.O. Ogutu on delegation from the Permanent Secretary was not delegable.**
- (e) The respondents are subject to the supervisory jurisdiction of this honourable court.**
- (f) The decisions to dismiss and/or retire the applicants in the public interest were based on**

irrelevant considerations.

**(g) The 1<sup>st</sup> respondent (The Public Service Commission) acted ultra vires its powers under the Public Service Commission Regulations in making the decisions purporting to dismiss and/or retire the applicants in the public interest.”**

A verifying affidavit was sworn by the 3<sup>rd</sup> ex parte applicant on behalf of all the applicants. The 3<sup>rd</sup> applicant is the Chief of Emurua Dikirr Location of Kirindon Division in Trans Mara District. He stated that he had been given authority by his four applicants to swear the affidavit. The deponent stated that he was served with a letter dated 5<sup>th</sup> November, 2004 authored by a Mr. G.O. Okello purporting to write the same on behalf of the District Commissioner, Trans Mara. In the said letter the 3<sup>rd</sup> applicant was accused of negligence and laxity while on duty. He was further accused of failing to report clashes and intent of fanning clashes. He was also accused of failing to restore order and failing to recover stolen animals.

By a letter dated 17<sup>th</sup> January, 2005 the 3<sup>rd</sup> applicant responded to the said letter and stated, *inter alia*, that there had never been any clashes within his location and that no animals had been stolen and remained unrecovered. He further stated that the letter dated 5<sup>th</sup> November, 2005 was delivered long after it had been written and that is why it appeared as though there was delay in responding to the same. He had been required to show cause, within a period of 14 days from 5<sup>th</sup> November, 2004 why he should not be retired from public service.

After his response the matter rested there for about two years until he received a letter dated 2<sup>nd</sup> July, 2007 vide which he was retired in public interest. The retirement took effect from 1<sup>st</sup> September, 2007. He lamented that the said letter contained no reason for the said action and neither did it refer to the response which he had made to the earlier allegations. The letter stated in part as follows:

**“I wish to inform you that it is not in the interest of the Government to retain you in the service. Accordingly, the Public Service Commission has conveyed its decision that you be deemed to have been confirmed in appointment and admitted to the permanent and pensionable establishment and you be retired from the service in the public interest. This retirement takes effect from 1<sup>st</sup> September, 2007. You will therefore be paid salary upto and including 31<sup>st</sup> August, 2007.**

**In terms of pensions Regulations, you will qualify for pension. You are therefore required to complete and return to this office the enclosed commutation of pension form (in duplicate) together with the Official Secrets Act Declaration Form for officers leaving the service.”**

The 3<sup>rd</sup> applicant went on to state that in the year 2004 there were clashes between the Maasai residents in Emarti Location of Trans Mara District and the Kipsigis of the Kapsosian Location of Bomet District. The clashes did not involve his location and no allegation had been made to the contrary. The Chief of Emarti Location is one Benjamin N. Ole Kipas who ought to have been asked about the clashes but no action had been taken against him. He alleged that the said Benjamin Ole Kipas is a close friend of Honourable Gedion Konchellah, the area Member of Parliament. The 3<sup>rd</sup> applicant attributed the action taken against him to politics and malice against him.

The 1<sup>st</sup> applicant is the Assistant Chief of Kapsosian Sub Location in Emarti Location. Besides the 1<sup>st</sup> applicant there is another Assistant Chief in the location specifically in charge of Emarti Sub Location by the name Joseph Ole Kaapei. It is said that the 1<sup>st</sup> applicant received a handwritten correspondence from the District Officer, accusing him of taking part in the clashes. He also responded to the same letter and

denied the said allegations. However, on 28<sup>th</sup> December, 2004 the 1<sup>st</sup> applicant received a letter from one J.M. Mathenge, the then District Commissioner, Trans Mara District, interdicting him from public service. Subsequently he received a letter dated 21<sup>st</sup> January, 2005 authored by a Mr. S.O. Ouko on behalf of Provincial Commissioner, Rift Valley confirming his interdiction. Vide a letter dated 28<sup>th</sup> June, 2007 the 1<sup>st</sup> applicant was summarily dismissed from duty. No reasons were given for the dismissal.

The 2<sup>nd</sup> applicant is the Assistant Chief of Ntulele Sub Location in Kirindon Division. He received a letter on 13<sup>th</sup> March, 2006 accusing him of gross misconduct and failing to prevent the clashes from taking place in his area. He responded to the said letter and denied that any clashes took place in his area of work. That notwithstanding, he was served with a dismissal letter dated 2<sup>nd</sup> July, 2007 signed by one D.O. Ogutu for the Permanent Secretary, Provincial Administration and Internal Security. He was dismissed from public service with effect from 10<sup>th</sup> August, 2006 on account of gross misconduct. As a result he forfeited all his terminal benefits. He was however given a right of appeal against that decision which right was to be exercised within 42 days from the date of the said letter.

The 4<sup>th</sup> applicant is the Assistant Chief of Mogondo Sub Location, Murkan Location in Kirindon Division. He also received a letter dated 2<sup>nd</sup> July, 2007 retiring him from public service in the public interest. The retirement took effect from 1<sup>st</sup> September, 2007. He however qualified for payment of pension. He lamented that the said retirement was unwarranted and unjustified because he had not been given any prior warning. The said letter was also signed by D.O. Ogutu.

The applicants stated that the signatory of the dismissal/retirement letters is an unauthorized person who purported to exercise powers which he did not have. Although they had appealed to the Public Service Commission vide their letters dated 24<sup>th</sup> July, 2007, they were apprehensive that the said appeals had not been heard. The applicants further stated that they had not been given fair hearing before the drastic actions as aforesaid were taken against them. In their view, there had been deliberate sacking of Chiefs and their Assistants within Trans Mara, and most of those affected are perceived to be against the area Member of Parliament. For the aforesaid reasons the applicants urged this court to grant the orders as sought.

The 1<sup>st</sup> respondent filed a replying affidavit through **Bernadette Mwihaki Nzioki**, the Secretary to the Public Service Commission of Kenya. She stated that on 13<sup>th</sup> June, 2007 the Commission dismissed the 1<sup>st</sup> and 2<sup>nd</sup> applicants from the public service with effect from 24<sup>th</sup> April, 2007 on account of gross misconduct. On the same day the Commission retired the 3<sup>rd</sup> and 4<sup>th</sup> applicants from the public service in the public interest. She further stated that in each of the cases the Commission's Service Regulations availing the applicants a chance to put their cases before the Commission were complied with so that the rules of natural justice were upheld. In each case the respective applicants were notified of their right to apply for a review and the Commission did not receive any such application from any of the applicants, Mrs. Nzioki stated.

The Commission's decisions were conveyed to the applicants by the Permanent Secretary, Provincial Administration and Internal Security who is the authorized officer but that action was done through D.O. Ogutu, who was merely performing an administrative function under administrative delegation. The Commission's Secretary further stated:

**“9. That the procedure in the service Regulations having been complied with, it is not open for the court to investigate the merits of the cases in the judicial review proceedings.”**

**10. That I particularly refer the court to provisions of Section 106 (12) of the Constitution which confers the Commission with independent and exclusive jurisdiction to determine the merits of disciplinary cases in the public service as it did in the applicants cases.”**

The ex parte applicants through their advocates and the respondents through the Attorney General filed their respective written submissions which I have duly considered. The court now has to determine whether the orders sought by the applicants ought to be granted.

In judicial review proceedings the court is not concerned with the merits of a decision in respect which the application for judicial review is made but rather the decision making process itself. See *The Supreme Court Practice, 1997*. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment and rules of natural justice are adhered to. The court cannot substitute its opinion for that of the authority constituted by the law to decide or deal with the matters in question.

The Supreme Court commentary further states as follows:

**“The court will not, however, on a 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 or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that 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.”**

The ex parte applicants claim that they were denied the right to be heard in defence before disciplinary actions were taken against them. It cannot be denied that the right to be heard is an important requirement in the rules of natural justice. A person is required to be given a reasonable opportunity to be heard before any disciplinary action is taken against him. There is however no settled rule as to whether the hearing should be by way of oral evidence or written. In *East African Community vs. Railway African Union (Kenya & Others)* [1973] EA 529 the court held that the hearing need not be oral.

In the initial letters that were sent to the ex parte applicants outlining the complaints against each of them it was intimated that disciplinary action was being contemplated and they were required to show cause why the intended disciplinary measures should not be implemented. Each of them responded and denied the allegations raised against them. In the circumstances, it cannot be said that they were denied the right to be heard in defence. The respondents considered their defences but were not satisfied with the explanations advanced.

The ex parte applicants further complained that the person who signed their respective retirement/dismissal letters, D.O. Ogutu was not an authorized officer within the meaning of Public Service Regulations. The Public Service Commission Regulations define an ‘authorized officer’ to mean

**“the Permanent Secretary who exercises supervision over the department concerned or over the department in which the public officer concerned holds a post, as the case may be, and, in the case of a department which is not assigned to any Minister, the head of that department, and, in the case of the Exchequer and Audit Departments, means the Controller and Auditor-General”.**

Mr. D.O. Ogutu signed the letters for the Permanent Secretary, Provincial Administration and Internal Security. He was therefore exercising delegated administrative authority. In my view, I find no irregularity in the signing of the said letters.

The ex parte applicants further claimed that the 1<sup>st</sup> respondent acted *ultra vires* its powers under the Public Service Commission Regulations in making the decisions to dismiss and retire them in public interest. They cited **Regulation 40. Regulation 39** stipulates that disciplinary proceedings against Chiefs and their Assistants may be undertaken by authorized officers. The marginal note to that Regulation is entitled: **“Disciplinary Proceedings against Chiefs, Assistant Chiefs and members of subordinate service”**. The Regulation stipulates as hereunder:

**“39(1) In the case of public officers to whom this regulation applies, authorized officers shall when necessary take disciplinary action and inflict any of the punishments mentioned in the regulation 26:**

**Provided that, before any punishment is inflicted on a public officer to whom this regulation applies, the authorized officer shall notify the public officer of the charge or charges against him and shall give him full opportunity of exculpating himself before a date to be specified in the notification; alternatively, if this is not practicable, the public officer shall be called before two or more senior public officers of the Ministry or department concerned, informed verbally of the charge or charges against him and given the opportunity of exculpating himself.**

**(2) Where the authorized officer is satisfied that for any reason the accused officer is unable to present his case to its best advantage he may permit the accused officer to be represented by another public officer.”**

The retirement letters that were addressed to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> ex parte applicants indicated that the decision to retire them in public interest had been made by the Public Service Commission. With regard to the dismissal letter in respect of the 2<sup>nd</sup> ex parte applicant, it was not expressly stated that the decision had been taken by the Public Service Commission. The ex parte applicants’ contention is that the Public Service Commission had no authority to take any disciplinary action against them because it is only an authorized officer who is mandated to do so under **Regulation 39**. However, **Regulation 2** states that:

**“Nothing in this regulations empowering an authorized officer or any other person to perform any function vested in the Commission shall preclude the Commission from itself performing that function in any particular case.”**

As regards the merits of the allegations that were made against the ex parte applicants and which led to the disciplinary actions that were taken against them, it is outside the province of this court in judicial review proceedings to consider whether there was any justification or not. As earlier stated, the remedy of judicial review is concerned with reviewing the decision making process but not the merits of the decision. The Public Service Commission in the exercise of its functions is not subject to the direction or control of any other person or authority. Each of the applicants was given a right of appeal which was to be exercised within 42 days from the date of the retirement/dismissal letters and there is no evidence that they preferred any appeal. But whether such appeals were preferred or not, it is not for this court to consider the merits thereof.

All in all, the ex parte applicants have not demonstrated that the orders sought in their application ought to be granted. Consequently, I dismiss the amended notice of motion with costs to the respondents.

**DATED, SIGNED and DELIVERED at NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – court clerk**

**Mr. Momanyi for the ex parte applicants**

**No appearance for the respondents**