



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW & CONSTITUTIONAL DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 142 OF 2010
IN THE MATTER OF THE LAW REFORM ACT & THE CIVIL PROCEDURE ACT
AND
IN THE MATTER OF AN APPLICATION BY FRANCIS JAMES KHASIRA APPLYING FOR
MANDAMUS
AND
IN THE MATTER OF THE SERVICE COMMISSIONS ACT CAP 185 & PUBLIC SERVICE
COMMISSION REGULATIONS OF 1985 J. ON 13TH DAY OF APRIL 2010
REPUBLIC APPLICANT
VERSUS
THE PUBLIC SERVICE COMMISSION OF KENYA..... 1ST RESPONDENT
THE PERMANENT SECRETARY
MINISTRY OF TRANSPORT 2ND RESPONDENT
MINISTER FOR TRANSPORT 3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT
AND
FRANCIS JAMES KHASIRA EX PARTE APPLICANT
RULING

The ex parte applicant's application dated 12th April, 2010 seeks the following orders:

“(a) That an order of mandamus do issue directed at the respondents directing them to release to the ex-parte applicant certified copies of the full proceedings conducted by the committee of inquiry to investigate the alleged misconduct of a senior accountant Mr. Francis James Khasira of the Ministry of Transport and Communications.

(b) That an order of mandamus do issue directed at the respondents directing them to give effect to the findings and recommendations of the committee of inquiry to investigate the alleged misconduct of a senior accountant Mr. Francis James Khasira of the Ministry of Transport and Communication.”

The application was supported by a statutory statement and an affidavit sworn by the ex parte applicant. From that affidavit, the facts that gave rise to this application may be summarized as hereunder.

The ex parte applicant was employed by the Government of Kenya in the Ministry of Transport and Communications where he was serving as an Acting Chief Accountant. In 1991 or thereabout he queried certain financial transactions between his Ministry and the Meteorological Department. The Director of that department was not happy with those queries and complained about the ex parte applicant to the Permanent Secretary. As a result, various “show cause” letters were sent to the ex parte applicant. He was eventually interdicted on 14th October, 1991. He claimed that the interdiction was contrary to Public Service Regulations which confer the power of interdiction to the Permanent Secretary.

After a short while, the Public Service Commission of Kenya constituted a Committee to investigate the alleged misconduct on the part of the ex parte applicant. Following the closure of the Committee sessions on 9th November, 1994 there was inordinate delay in conveying the decision of the Public Service Commission in violation of **Regulation 30(1)** which directs that all reported acts of misconduct should be dealt with as soon as possible.

On 26th July, 1995 the Permanent Secretary informed the ex parte applicant that it had been decided by the Public Service Commission that he should be retired in the public interest. Earlier, that is, on 31st January, 1992 the Permanent Secretary had issued a notice to the ex parte applicant requiring him to state in writing why he could not be dismissed from the Civil Service due to gross misconduct. On 14th March, 1992 the Permanent Secretary informed the Secretary of the Public Service Commission that he insisted that the ex parte applicant be dismissed from the Civil Service.

The ex parte applicant argued that the Public Service Commission in arriving at its decision to retire him failed to observe **Regulation 34(8)** which required that if it was recommended that he be retired in the public interest a fresh notice to show cause had to be issued to him. He also alleged that he was not liable to be retired without the Permanent Secretary issuing a fresh notice to show cause and the Public Service Commission making its findings. He further stated that the Permanent Secretary breached **Regulation 33** by failing to inform him of the findings of each charge which had been preferred against him, the punishment inflicted and the right of appeal within 6 weeks of communication thereof. The ex parte applicant also accused the Public Service Commission of having failed to comply with various other regulations of the Public Service Commission Regulations. In his view, the respondent's omissions, commission and decisions were tainted with illegality, procedural impropriety and improper purpose and it is in the interest of justice that this court intervenes by granting the orders as sought.

The respondents filed a replying affidavit which was sworn by Bernadette Mwihaki Nzioki, the Secretary of the Public Service Commission of Kenya. She stated that the ex parte applicant's suit is frivolous, vexatious and an abuse of the court process in so far as it seeks to compel the Commission to act contrary to the provisions of **Section 7** of the Service Commissions Act. She further stated that the ex parte applicant was guilty of non-disclosure of material facts in that he had failed to disclose that he had earlier filed, **FRANCIS JAMES KHASIRA vs. THE ATTORNEY GENERAL, HCCC No. 964 of 1996** which arose from the same circumstances and involved the same parties as in the present matter. The said suit was heard and dismissed way back on 28th November, 2001. The current matter is therefore *res judicata*, she stated. The deponent added that the ex parte applicant had written to the Commission on numerous occasions requesting for copies of the committee's proceedings and report. However, the Commission's duty to avail records is chained by the provisions of **Section 7** of the Service Commissions Act which renders the Commission's communication privileged. She added that the disciplinary process that led to the retirement of the ex parte applicant was done in accordance with the Service Regulations that were applicable at the time. Furthermore, **Section 106(2)** of the Constitution confers to the Commission independent and exclusive jurisdiction to determine the merits of disciplinary cases in the public service and the 1st respondent had done its work in accordance with the law.

The parties filed their respective submissions and agreed by consent that the court would peruse the submissions and the affidavits on record and render its decision. I have carefully perused the submissions on record.

The first issue that I wish to consider and determine is whether these proceedings are *res judicata* in view of the judgment in **FRANCIS JAMES KHASIRA vs. THE ATTORNEY GENERAL, HCCC No. 964 of 1996**. In that case the ex parte applicant had stated in paragraph 2 of his plaint that:

“2. The defendant is the Attorney General of the Republic of Kenya sued for and on behalf of the Government of the Republic of Kenya by virtue of the provisions of Government Proceedings Act, Laws of Kenya, respecting the plaintiff's claims against the Ministry of Transport and Communications and the Public Service Commission as a public servant.”

The ex parte applicant then proceeded to narrate the facts that gave rise to his forced retirement in the public interest and sought the following prayers:

“(a) A declaration that the action by the Public Service Commission and the Ministry of Transport and Communications thwarting the plaintiff’s right of appeal against dismissal and the eventual dismissal were wrongful, vindictive, malicious and unlawful and that findings contrary to the weight of evidence is without jurisdiction and/or in excess of jurisdiction and therefore the said finding are a nullity and the dismissal wrongful and general damages and punitive as per paragraph 21 and 23.

(b) Costs and interest at court rates.

(c) Any other relief within the inherent jurisdiction of the court.”

The defendant filed a statement of defence and the hearing proceeded. In his judgment, Aganyanya, J. (as he then was) found no merit in the ex parte applicant’s case and dismissed the same. No appeal was preferred against that judgment. During the hearing, the ex parte applicant addressed the court on the complaint that he had not been given proceedings of the deliberations of the committee in order to lodge an appeal. That appears at page 7 of the judgment.

Section 7 of the Civil Procedure Act states as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

It is in the interest of justice that there be an end to litigation. The plea of *res judicata* applies not only to issues upon which a court was actually required by the parties to form an opinion on and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising due diligence, could have brought forward at the time.

There can be no denial that the ex parte applicant filed the aforesaid case, **HCCC No. 964 of 1996**. Although the orders which he sought therein are not exactly the same as the ones sought in these judicial review proceedings, there was nothing to stop the ex parte applicant from praying for the same orders, not necessarily by asking for an order of mandamus. He could have urged the court to make a declaration that he was entitled to certified copies of the proceedings and the report. As earlier pointed out, there is evidence that the ex parte applicant addressed the court on the issue. At page 7 of the judgment the learned judge stated as follows:

“On the complaint that the plaintiff was not given proceedings of the deliberations of the committee in order to lodge an appeal, counsel for the defendant stated that he did not require these in order to appeal. That in any case these are privileged documents and that the Commission is not permitted to divulge them.”

The ex parte applicant did not disclose to the court that he had filed the aforesaid case. It is therefore right to say that he was guilty of non-disclosure of material facts.

From the foregoing, I am satisfied that these proceedings are an abuse of the court process because the issues raised therein are *res judicata*. That is enough to dispose of this matter. But even if the matter was not *res judicata* the provisions of **Section 7** of the Service Commissions Act provide adequate defence to the respondents. The section provides as hereunder:

“No person shall in any legal proceedings be permitted or compelled to produce or disclose any communication, written or oral, which has taken place between a Commission, or any member or officer thereof, under the Government or the President, or a Minister, or any officer of the Government, or between any member or officer of a Commission and its Chairman, or between any member or officers of a Commission, in exercise of, or in connection with the exercise, the functions of a Commission, unless the President consents in writing to such production or disclosure.”

All in all, I find and hold that the ex parte applicant’s notice of motion is bad in law and an abuse of the court process since the issues raised therein are *res judicata*. I dismiss the same with costs to the respondents.

DATED, SIGNED and DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2011.

**D. MUSINGA
JUDGE**

In the presence of:

Nazi – court clerk

No appearance for the applicant

No appearance for the respondent