



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 491 OF 2006

REPUBLIC APPLICANT

VERSUS

THE COMMISSIONER OF POLICE1ST RESPONDENT

THE HONORABLE ATTORNEY GENERAL..... 2ND RESPONDENT

EX PARTEJOSEPH KUNDU KASILI

ALBERT ONYANCHA

JANE ROSE MUGAMBI

ISAIAH KIMANI

RULING

By a Notice of Motion dated 15th September, 2006 the ex parte applicants, hereinafter referred to as “**the applicants**”, sought orders of certiorari to remove into this court and quash the decision of the Commissioner of Police contained in his letters dated 28th August, 2006 in respect of the 1st applicant and 1st September, 2006 in respect of the 2nd, 3rd and 4th applicants. The applicants also sought an order of prohibition directed at the respondents or any officer or body under them or acting on their advice from instituting any disciplinary, civil or criminal action against them in respect of their involvement as police officers in the investigations, arrest, detention and subsequent arraignment in court of one **Elly Owuor Obuya**, the accused in **Criminal Case No. 612 of 2006 before Chief Magistrate’s Court Makadara, Nairobi**.

The Notice of Motion was supported by affidavits sworn by each of the applicants. The factual contents of the affidavits are more or less the same. The 1st applicant was the Divisional Criminal Investigations Officer (DCIO), Embakasi within Nairobi area at the time of filing the application. He stated that on 2nd September, 2006 he received a letter of interdiction from the Commissioner of Police. The interdiction followed a complaint that was made by one Elly Owuor Obuya on 16th January, 2006 against himself and the other applicants. He complained that the interdiction had been done in utmost bad faith as the allegations by the said Obuya are untrue. The allegations were that on 10th January, 2006 officers who were working under the 1st applicant arrested Elly Owuor Obuya, hereinafter referred to as “**the suspect**”, on suspicion that he had stolen a consignment of gold worth Kshs.70 Million. Following the arrest, no entry was made in the Occurrence Book and neither was the reporter’s statement recorded. The suspect was detained in the cells for four days as well as his motor vehicle registration number KAN 105Y, Mercedes Benz. In the detained vehicle was kept some money which was in Kenya shillings and US dollars. Upon release of the suspect, he was handed over Kshs.8,000/= and US Dollars 3,000 only. It was further alleged that on 13th January, 2006 the 2nd respondent received Kshs.400,000/= from the suspect’s wife and directed that a further Kshs.200,000/= be handed over to the 1st applicant.

The 1st applicant stated that on or about 27th December, 2005 a Mr. D.C. Hudson was referred to his Division by the CID Kenya Airport Police Department and he reported that his gold consignment which he had imported from Congo had been stolen. The complaint was recorded in the Occurrence Book. After intensive investigations the said suspect was arrested on 10th January, 2006 and placed in police custody. The suspect was asked to surrender all the property that he had for safe custody which he did. Because the investigations were taking long as the complainant was said to be in Congo, the suspect was released on 13th January, 2006. His property was also released to him and he raised no complaint.

The 1st applicant further lamented that the interdiction had been done without giving him an opportunity to offer an explanation of what actually transpired. That was a violation of natural justice, the 1st applicant added.

The other applicants also denied the aforesaid allegations made by the 1st respondent. They all contended that their interdiction was unfair and was done in breach of the rules of natural justice.

A Replying Affidavit was filed by **Leo Nyongesa Ijora**, an Assistant Commissioner of Police. He was the Investigating Officer in respect of the case in which the aforesaid suspect was the complainant against the applicants. Mr. Ijora reiterated the grounds of interdiction as stated hereinabove. He further stated that the decision to interdict the applicants is in line with the **Force Standing Orders Section 25 (i) (a)**. He added that the applicants were given the chance to defend themselves when they recorded their statements during the investigations. The 1st respondent therefore acted within the law and did not breach rules of natural justice, Mr. Ijora stated.

The applicants’ counsel filed written submissions supported by various authorities which I have carefully considered. Mrs. Shamallah for the applicants highlighted the written submissions. She submitted that the applicants were not accorded the chance to defend themselves. She further submitted that the applicants were not given an opportunity to examine the suspect. She cited **RIDGE vs BALDWIN [1963] 2 All ER 66** where it was held that a decision made without observing the principles of natural justice is void. In that case the appellant had been summarily dismissed from the police force and challenged that dismissal.

Mr. Obir for the respondents sought to rely on the affidavit sworn by Mr. Ijora and urged the court to

dismiss the application saying that the applicants' complaint does not fall within the purview of judicial review because they were rendering contractual services. He sought to rely on the case of **SAMUEL MBAKA MONDESTO vs. PERMANENT SECRETARY, MINISTRY OF LANDS AND HOUSING**. In that case Wendoh J. cited **R vs. EAST BERKSHIRE ex parte WALSH [1984] 3 ER 425** where a nurse had been dismissed for misconduct and he moved the court for an order of certiorari to quash the decision and the court held as follows:

“An applicant for judicial review had to show that a public law right which he enjoyed had been infringed; where the terms of employment by a public body were controlled by statute, its employees might have rights both in public and private law to enforce these terms but a distinction had to be made between an infringement of statutory provisions giving rise to private law rights and laws that arose solely from a breach of the contract of employment.”

The court further stated:

“Whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee's position and not on the fact of employment by a public authority per se or the employee's ability or the interests of the public in the functions of the authority. Where the authority was required by a statute to contract with its employees on specified terms with a view to employees acquiring private law rights a breach of contract was not a matter of public law and did not give rise to any administrative law remedies, it was only if the authority failed or refused to contract on specified terms that the employee had public law rights to compel the authority to comply with its statutory obligations.”

The aforesaid legal principle has been applied locally in various authorities, one of them being **REPUBLIC vs. VICE CHANCELLOR, JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY ex parte CECILIA MWATHI & ANOTHER [2008] eKLR**.

I do not entirely agree with Mr. Obir that this is a matter that is of a contractual nature. The applicants are police officers and their employment including the terms and conditions thereof, is governed by the provisions of the **Police Act Cap 84 of the Laws of Kenya** as read with the regulations and rules made thereunder. The procedure of disciplining police officers is set out under **Part IV** of the **Act** as read together with the **Public Service Commission (Police Force) Regulations, 2006**. I must point out that the issue for consideration in this matter is the legality of the applicants' interdiction by the Commissioner of Police and no more. The letter of interdiction from the Commissioner of Police indicated that the applicants' interdiction was to remain in force pending an inquiry surrounding the complaints made against the applicants by the suspect. Interdiction of an employee for purposes of carrying out investigations relating to issues that touch on an employee is a normal practice in any employment. It is doubtful whether such interdiction can be the basis of court intervention by way of judicial review orders except where it is demonstrated that the interdiction is contra statute. The 1st respondent cited the provisions of **Regulation 23 (Police Force) Regulations (2006) Public Service Commission Act** in his letter of interdiction. That regulation states as follows:

“23(1) If in any case the Commissioner of Police is satisfied that the public interest requires that a gazetted officer or an officer in the inspectorate should seize forthwith to exercise the powers and functions of his office, he may interdict the officer from the exercise of those powers and functions, provided proceedings which may lead to his dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against him.”

There is no legal requirement for a police officer to be heard before the Commissioner of Police interdicts him. That is in respect of both gazetted and ungazetted officers but in exercise of the delegated disciplinary powers under **Regulation 22** if the Commissioner is of the opinion that the disciplinary action is likely to lead to the dismissal of an officer the Commissioner is supposed to apply the provisions

of **Regulation 32** which sets out in great details the procedure to be followed. This is where the officer concerned must be given an opportunity to be heard, in writing or verbally. That is not the case where the Commissioner is interdicting an officer. In the circumstances, the orders of certiorari cannot therefore issue.

As regards the prayer for an order of prohibition, the 1st respondent cannot be prevented by such an order from taking an appropriate disciplinary action which is allowed by the Police Act. It is trite law that an order of prohibition cannot issue to prohibit a person or an institution from doing that which is lawfully supposed to be done by statute.

In view of the foregoing, the orders sought by the applicants cannot be granted and their application dated 15th September, 2006 is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Miss Kirubi for Mrs. Shamalla for the applicants

No appearance for the respondents