



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 625 OF 2008

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND FOR ORDERS OF
PROHIBITION, CERTIORARI AND MANDAMUS**

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

IN THE MATTER OF: SERVICE COMMISSIONS ACT

**IN THE MATTER OF: AN APPLICATION BY ELIUD MUNDIA NGUGI FOR LEAVE TO
APPLY FOR**

ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT
MINISTRY OF FINANCE.....2ND RESPONDENT

EX PARTE: ELIUD MUNDIA NGUGI

RULING

Eliud Mundia Ngugi, the ex parte applicant, hereinafter referred to as “**the applicant**”, filed an application dated 10th November, 2008 seeking the following orders:

- “1. An order of certiorari to remove into the High Court and quash the decision made on 9th April, 2008 by the 2nd respondent refusing to forward application letter dated 24th March, 2008 asking for a review of the applicant’s dismissal upon his acquittal by the court to the 1st respondent.**
- 2. An order of certiorari to remove into the High Court and quash the letter of dismissal dated 12th January, 2004.**
- 3. An order of mandamus do issue to**
 - (a) compel the 2nd respondent to forward the applicant’s letter dated 24th March, 2008 for review of his dismissal upon acquittal by the court to the 1st respondent, the Public Service Commission.**
 - (b) compel the 1st respondent to make a decision on the applicant’s letter dated 24th March, 2008.**
- 4. That the costs of this application be provided for.”**

The application was supported by a statutory statement and a verifying affidavit sworn by the applicant. In the affidavit, the applicant deposed that he was employed by the Public Service Commission of Kenya as a Senior Auditor and was interdicted from the exercise of his functions from the 6th of September, 2001. He was charged in **Criminal Case No. 5583 of 2001** with the offence of fraudulent false accounting contrary to **Section 330(b)** of the **Penal Code**. The said criminal case was ongoing when the applicant was dismissed from his employment. The dismissal letter was dated 12th January, 2004. However, the applicant was acquitted of the said charges on 6th December, 2007.

Upon acquittal, the applicant wrote to the Public Service Commission contesting the dismissal. The letter was sent through the Ministry of Finance but by a letter dated 9th April, 2008 the said Ministry advised the applicant that the letter had not been delivered to the Commission, citing the reason that the Commission was through with his case.

The applicant contends that the Public Service Commission mistook the law applicable to the facts of his case and that the decision to summarily dismiss him from employment while the criminal case was still pending in court was not a determination within the meaning of the **Service Commissions Act** and was accordingly a nullity. He further stated that the respondent’s action was oppressive, arbitrary and capricious and ought not to be condoned.

The 1st respondent opposed the application and filed a replying affidavit sworn by **Bernadette Mwhiki Nzioki**, its **Secretary**. She deposed, *inter alia*, that the applicant was issued with a show cause letter on

26th February, 2002 wherein he was charged with gross misconduct, having failed to exercise due diligence in the performance of his duty, as a result of which the Government incurred a substantial loss. The applicant responded to the letter but failed to exculpate himself. He was therefore suspended and subsequently dismissed from service in accordance with the Service Regulations applicable at the time, the deponent stated.

Subsequently, the applicant presented to the Commission an appeal and an application for review against the dismissal. The Commission considered both the appeal and the application for review but disallowed the same on 15th September, 2004 and 24th May, 2006 respectively. In view of the foregoing, the Commission's jurisdiction was exhausted, the 1st respondent stated.

The 1st respondent's Secretary added that **Regulation 25(2)** which forms the basis of the applicant's application was repealed by the **Legal Notice No. 215 of 1991**. The current regulations do not bar institutions of a disciplinary process administratively against an officer who is facing criminal charges. It is on that basis that the applicant was issued with a show cause letter, interdicted and dismissed.

The 1st respondent further stated that the decision which the applicant seeks to quash was made more than six (6) months from the date the applicant filed the application and therefore an order of certiorari cannot issue. With regard to the prayer for mandamus, the same can only be issued to compel the performance of a statutory duty and the applicant has not shown which public duty ought to be performed by the Commission, Mrs. Nzioki contended.

I have perused the submissions filed by parties. The application for leave to institute review proceedings was filed on 14th October, 2008. The dismissal letter was dated 12th January, 2004. The applicant states that vide a letter dated 9th April, 2008 the 2nd respondent refused to forward his letter dated 24th March, 2008 where he was seeking a review to the 1st respondent. The applicant wants the respondent's decision of 9th April, 2008 quashed as well as the dismissal letter.

Order 53 rule 2 of the **Civil Procedure Rules** clearly states that leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed unless the application for leave is made not later than six (6) months after the date of the judgment, order or proceedings complained of. In this case, the application for leave was made outside the statutory period of six (6) months. The prayer for an order of certiorari cannot therefore be granted.

But even if the application was not statutorily time barred, to the extent that it was premised on **Regulation 25(2)** of the **Public Service Commissions Regulations of 1985** that has since been repealed, the application does not lie. The said regulation provided as hereunder:

"If criminal proceedings are instituted against a public officer, proceedings for his dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceeding and the determination of any appeal therefrom.

Provided that nothing in this regulation shall be construed as prohibiting or restricting the power of the authorized officer to interdict or suspend such an officer."

The said regulation was repealed on 3rd May, 1991 vide Legal Notice No. 215 of 1991.

In judicial review proceedings the court is not concerned with the merits of a decision but looks into the decision making process. See **REPUBLIC vs JUDICIAL SERVICE COMMISSION ex parte PARENO [2004] 1 KLR 2003**. In this case, the applicant’s application for review and appeal were duly considered by the 1st respondent and rejected. In the circumstances, there is no statutory duty which either of the respondents was obliged to perform. In **KENYA NATIONAL EXAMINATIONS COUNCIL vs REPUBLIC ex parte GEOFFREY GATHENJI NJOROGE & OTHERS, Civil Appeal No. 266 of 1996**, the court cited Halsbury’s Laws of England 4th Edition Vol. 1 at page 111 where it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once.”

All in all, I am satisfied that the orders of certiorari and mandamus are not available in the circumstances of this matter and dismiss the application with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE, 2011.

D. MUSINGA

JUDGE

In the Presence of:

Nazi – Court Clerk

Mr. Kaumba for the Respondent

Mr. Sijenji for Mr. Shimaga