



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 282 OF 2009

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

**IN THE MATTER OF: THE CHAIRMAN OF THE BOARD OF DIRECTORS OF THE
POSTAL CORPORATION OF KENYA**

BETWEEN

**REPUBLIC.....
APPLICANT**

AND

**THE CHAIRMAN OF THE BOARD OF DIRECTORS, POSTAL CORPORATION OF
KENYA.....RESPONDENT**

**EX
PARTE.....TO
M OGUTU**

RULING

On 12th May, 2009 the ex parte applicant sought leave to apply for an order of certiorari to quash the decision made by the respondent vide a letter dated 30th April, 2009 in which the respondent sent the ex

parte applicant on compulsory leave with immediate effect. On the same day the court granted leave as sought and consequently the applicant proceeded to file the substantive motion on 21st May, 2009.

The respondent was aggrieved by that grant of leave and filed an application dated 6th August, 2010. The same was filed on 11th August, 2010 and seeks the following prayers:

“(a) THAT the order for leave to apply for an order of certiorari granted on 13th May 2009 be set aside and all consequent orders and proceedings in this matter be set aside.

(b) THAT the costs of this application be provided for.”

The application is supported by an affidavit sworn by **Hellen P. Ambasa**, the Acting Company Secretary of the Postal Corporation of Kenya. She stated that the ex parte applicant, hereinafter referred to as “**the applicant**”, is a former employee of the respondent. He was the **General Manager/ICT** and his services were terminated by the respondent on 22nd July, 2009. The applicant together with six other General Managers had been sent on compulsory leave to pave way for investigations following a forensic audit report into mismanagement of one of the respondent’s products known as **Posta Pay EFT System**.

The respondent further stated that subsequent to the filing of his application the applicant had moved to the Industrial Court and filed a claim against the respondent seeking a declaration that the termination of his employment is unlawful. This is more or less the same relief as sought in his application before this court. The applicant is also praying for payment of his terminal dues, which is a clear testimony that he admits that the provisions of **The Employment Act, 2007** and **The Labour Institutions Act, 2007**, provide the appropriate reliefs available to him. The respondent’s view is that the applicant’s suit before this court amounts to an abuse of the court process.

The respondent further averred that the applicant’s employment, terms and termination thereof, is not statutorily underpinned and this court is being called upon to interfere with a private contract of employment.

Prior to the applicant’s compulsory leave and eventual termination of his services, the respondent had granted the applicant an opportunity to respond to the auditor’s concerns that had been raised against him and the applicant had even appeared before the Human Resource Committee of the respondent on 17th of July, 2009. The respondent had therefore lawfully terminated the applicant’s employment, Ms. Ambasa stated.

The applicant filed a replying affidavit and stated that he filed the application seeking leave to institute these judicial review proceedings on 12th May, 2009 when he was contesting the respondent’s decision to send him on compulsory leave. Subsequent to filing the proceedings the respondent dismissed him from his services vide a letter dated 22nd July, 2009. He admitted that he had filed a suit in the Industrial Court where he is seeking various reliefs for the unlawful dismissal. However, the applicant stated, the suit in the Industrial Court is different in all aspects from these proceedings.

The applicant contended that this court has jurisdiction to hear and determine his judicial review application. He further asserted that the respondent had no jurisdiction or authority from the Postal Corporation’s Board to send him on compulsory leave and therefore the decision was made without jurisdiction, fairness and without hearing his side of the story. He urged the court to dismiss the

respondent's application.

Counsel for the parties filed and highlighted their respective client's submissions which I have carefully considered.

When the applicant filed his application to this court on 12th May, 2009 he was challenging the respondent's decision to send him on compulsory leave. But shortly thereafter, his services were terminated. It is important to note that although the applicant had urged the court to order that grant of the leave do operate as a stay of the respondent's decision to send him on compulsory leave the court did not so order. The respondent's contention is that subsequent to the filing of these proceedings the applicant filed another case at the Industrial Court, **Industrial Cause No. 655 of 2010**, seeking similar or substantially similar reliefs as sought in these proceedings and relying on similar or substantially similar grounds as advanced herein. The filing of the aforesaid case before the Industrial Court is not denied by the applicant. However, he stated that the reliefs sought are different from those which can be granted by this court.

Secondly, the respondent submitted that the applicant's employment was not statutorily underpinned and his remedy lies in the Industrial Court proceedings. He cannot therefore exploit remedies of judicial review as a supplement or as an alternative reliance upon the employment laws.

In Industrial Cause No. 655 of 2010 which was filed on 4th June, 2010 the applicant acknowledged the fact that the respondent had dismissed him from its employment and sought the following prayers:

- “(a) A declaration that claimant's dismissal from the respondent's employment was unprocedural, unfair and unlawful.**
- (b) Gratuity as provided for in the contract of service being 25% of the salary earned amounting to Kshs.2,421,000/=.**
- (c) One month's salary in lieu of notice of termination of employment being Kshs.400,000/=.**
- (d) Unpaid salary and allowances amounting to Kshs.293,300/=.**
- (e) Earned leave of 44 days being equivalent to Kshs.586,667/=.**
- (f) Damages for breach of contract.**
- (g) Punitive and aggravated damages.**
- (h) Compensation equivalent to 12 months wages equivalent to Kshs.3,600,000/=.**
- (i) Interest on (b) (c) (d) and (e) above.**
- (j) Costs of this suit.**
- (k) Any other relief that the court may deem appropriate to grant.”**

It is instructive that the applicant did not seek an order for reinstatement to his former employment. The Industrial Court is vested with power to order such reinstatement in appropriate cases.

In the applicant's Notice of Motion filed on 21st of May, 2009 the substantive prayer is for an order of certiorari to quash the respondent's decision contained in a letter dated 30th April, 2009 to send the applicant on compulsory leave. The applicant had been sent on compulsory leave pending investigations. The issue of compulsory leave became irrelevant after the applicant was dismissed from his employment. The filing of the claim before the Industrial Court seeking terminal benefits and other reliefs as shown hereinabove is a tacit admission that the applicant has made a decision to permanently leave the employment of the respondent. In the circumstances the application to quash the respondent's decision of sending the applicant on compulsory leave is a hollow one, it has been overtaken by events.

In **REPUBLIC vs. THE BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND & ANOTHER ex parte ISHAK CHANZU [2010] eKLR**, the ex parte applicant was dismissed from his employment by the respondent. He sought and obtained leave to apply for an order of certiorari to quash the respondent's decision to terminate his services. Subsequent to the filing of the substantive application the ex parte applicant also filed another case before the Industrial Court seeking similar or substantially similar relief as sought in the judicial review proceedings.

The respondent filed an application and sought an order to set aside the grant of the leave to apply for an order of certiorari. In its ruling, this court set aside the grant of the leave and held that the applicant was playing lottery with the judicial process which is an abuse of the court process. I believe that holding is equally applicable in this matter.

I agree with the respondents' submission that there was no statutory underpinning against forced leave or removal in the applicant's contract of employment. The applicant was employed under a contract of employment and the general principles of the law of master and servant as applied in the employment contracts apply to the applicant herein. In **REPUBLIC vs. VICE CHANCELLOR, JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY ex parte CECILIA MWATHI Miscellaneous Application No. 30 OF 2007**, Nyamu, J. (as he then was), cited with approval the principle enunciated in the celebrated case of **R vs. EAST BERSHIRE HEALTH AUTHORITY ex parte WALSH [1984] 3 All ER 425** that:

“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 of the employee's position and not on the fact of employment by a public authority *per se* or the employee's seniority or interests of the public in the functions of the authority.”

The court continued,

“...where the authority was required by statute to contract with its employees on specified terms with a view to employees acquiring private law rights, a breach of that contract was not a matter of public law and did not give rise to any administrative law remedies.”

On the issue of jurisdiction, **Article 165(5) (b)** of the **Constitution of Kenya** does not empower the High Court to handle employment and labour claims, though I believe in cases where a person alleges that his fundamental rights and freedoms as guaranteed under the Constitution have been or are likely to be violated by an employer, the High Court has some limited jurisdiction under **Article 23** of the **Constitution** to consider the matter and if satisfied that such claim is valid grant appropriate relief. That is not the case in this matter.

On the other hand, the **Employment Act** as well as the **Labour Institutions Act** empower the Industrial Court wide powers to grant appropriate reliefs in all employment and labour claims. The applicant is therefore not without an alternative remedy and has indeed filed a suit before the Industrial Court.

I am satisfied that the proceedings herein are an abuse of the court process and must be terminated. Consequently, the prayers sought in respondent's application are granted as prayed. The applicant shall bear the costs of these proceedings.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2011.

D. MUSINGA
JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Ogambo for the Applicant

No appearance for the Respondent