



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 212 OF 2010

REPUBLICAPPLICANT
VERSUS
THE PERMANENT SECRETARY MINISTRY OF
TRANSPORT & COMMUNICATIONS
(DEPARTMENT OF METEOROLOGY)....1ST RESPONDENT
THE PERMANENT SECRETARY/DIRECTOR OF
PERSONNEL MANAGEMENT.....2ND RESPONDENT

EX-PARTE

- 1. ALOYS MBOGO MUTUKU**
- 2. PETER KAMURI KITIMU**
- 3. JEREMY MUTHUI KIRANGURI**
- 4. BENEDICT H. OWUOR**
- 5. RICHARD LEO MUNYENDO**
- 6. LOISE N. WAMBUGI**
- 7. FESTUS M. ISIAHO**
- 8. HAGGAI MADARA**
- 8. SAMUEL W KIMANGA**
- 9. LEONARD P MBURU**
- 10. EDWARD O AWILI**
- 11. JOHN GITHUA**
- 12. PAUL NDUNGU CHEGE**
- 13. PETERSON MACHURI**

JUDGEMENT

By way of a notice of motion dated 8th July, 2010 Aloys Mbogo Mutuku and other 13 applicants have asked for orders as follows:-

- 1. Judicial Review orders of mandamus do issue compelling the Permanent Secretary Ministry of Transport and Communications (Department of Meteorology) Transport/Information and Communications and The Permanent Secretary/Director of personnel Management to implement the decision of the said Permanent Secretary/Director of Personnel Management to upgrade the applicants from Job Group “F” to the following Job Groups with the arrears as more particularly contained in the letter dated 2nd January, 2001 and the arrangements be back dated to the date of Personnel General letter No.15 of 19th January , 1995 on the appointment of Certificate**

and Diploma holders as follows:-

- (a) On 1st November, 1987, the applicants to be promoted to Job Group “H” as per the scheme of service approved by the special board.
- (b) On 29th /30th April, 1992, the same to be promoted or given to Job Group J/K superintendent as per the P.S.C letter Ref: No 31/56 dated 16th April, 1993.
- (c) On 1st January, 1995 the applicants grade to be raised to Job Group “L” which is superintendent Realignment and Upgrading .
- (d) On 9th January, 1995 the Applicants grade to be raised to Job Group “M” i.e. Diploma as per the DPM –Personnel General letter No. 15

One of the grounds in support of the application is that the respondents have illegally and unlawfully failed to make a decision in compliance with government policy. It is also said that the respondents have acted unjustly, unfairly and in a discriminative manner.

According to the statement of facts and the verifying affidavit sworn by Alloys Mbogo Mutuku (the 1st Applicant) the applicants are retired employees of the Meteorological Department of the then Ministry of Transport and Communications.

In 1993 the Directorate of Personnel Management issued a scheme of service to be implemented with effect from 1st December, 1983. The scheme of service in as far as the applicants are concerned should have resulted in each applicant being promoted from one job group to the next job group. This did not happen and as a consequence some of the Applicants’ co-employees moved to court and obtained orders in *H.C. Misc civil Application No. 376 of 1991 S.R. Sewe & 28 others Vs. the Permanent Secretary, Ministry of Transport and Communication & Another* compelling the respondents to comply with the said scheme of service. The respondents in that case who are the same respondents in this case acted on the court order. For reasons not disclosed, the applicants herein were never included in the list of those to be up-graded. The applicants then wrote to the respondents about the issue but they did not receive any response. That is why they have come to court.

The Respondents filed the following grounds of opposition:-

- (a) That this is not a case for judicial review and the same ought to be heard through an ordinary suit;
- (b) That the issues raised are contractual in nature and ought not to be the subject of judicial review; and
- (c) That a case for issuance of Judicial Review orders has not been set out.

In grounds of opposition Mr. Onyiso for the respondents submitted that this being a labour dispute the same ought to have gone before the Industrial Court as provided by Article 162 (2) (a) of the Constitution and the Industrial Court Act, Act No, 20 of 2011. Mr. Mutua for the applicants however countered this argument by referring the court to the saving provision in Clause 22 of the Transitional and Consequential Provisions in the Sixth Schedule of the Constitution. Clause 22 clearly provides for cases that were pending in court before the constitution was promulgated on 27th August, 2010. I tend to agree with counsel for the applicants that this matter should be finalized by this court. Counsel for the respondents also argued that there is no evidence that the applicants have knocked upon the doors of the respondents and the respondents have not opened their doors. In response to this argument counsel for the applicants showed the court letters written to the respondents by the applicants. The letters were not acted upon. It therefore becomes clear that the respondents have refused to execute their mandate.

Are the applicants entitled to the orders prayed for?

I have read the decision of Lenaola, J in *Misc. Civil Application No. 376 of 1991* already cited and come to the conclusion that it addressed the issues raised by the applicants before me. The applicants in that case were sorted out but for unknown reasons the applicants herein were locked out. They did not enjoy the fruits of that decision. To me, it is clear that by not addressing the issues of the applicants before me, the respondents discriminated against these applicants. In doing so, the respondents acted unreasonably.

H.W.R Wade & C.F. Forsyth in ADMINISTRATIVE LAW, 10th Edition at pages 254 and 255 observed that if an act or order is held to be ultra vires and void it is to be treated as non-existent by all who would otherwise be concerned. It is however clear that a judgment of a court binds only the parties to it. The authors were of the view that a solution to this issue was supplied by Lord Diplock in HOFFMANN-LA ROCHE & CO VS. SECRETARY OF STATE FOR TRADE AND INDUSTRY (1975) AC 295 at 365 who stated that

“ Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare”.

Although the applicants before me were not parties in Misc. Civil application No.366 of 1991, the issues determined by Lenaola, J in that case are the issues raised in the case before me. Justice would demand that the applicants before me are accorded the same treatment with the applicants in that case. Considering the material placed before this court, the only logical conclusion is to allow the applicant's notice of motion dated 8th July, 2010 as prayed. The applicants will get costs from the respondents.

Dated and signed at Nairobi this 29th day of November, 2011.

W.K. KORIR
JUDGE