



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JR. MISC. CIVIL. APPLICATION NO.133 OF 2010**

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

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT (CAP.26, SECTIONS 8 & 9) AND THE  
KENYA AIRPORTS AUTHORITY ACT (CAP.395)**

**VERSUS**

**REPUBLIC .....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY.....RESPONDENT**

**EX-PARTE:**

**ANTHONY MUTHUMBI WACHIRA**

**RULING**

On 12<sup>th</sup> November, 2010 the exparte applicant Anthony Muthumbi Wachira filed a chamber summons application seeking leave to apply for orders of certiorari to quash the decision made by the respondent in letter dated 29<sup>th</sup> October, 2010 to summarily dismiss the applicant from the respondent's employment and an order of prohibition to prohibit the respondent from terminating the applicant's contract of employment without following due process.

The application was heard before Hon. Musinga, J on 15<sup>th</sup> November, 2010 who proceeded to grant the leave sought and directed that the substantive motion be filed and served within 14 days from date of the grant of leave.

The applicant filed the substantive motion on 25<sup>th</sup> November, 2010 and served it on the respondent.

On 7<sup>th</sup> December 2010, the respondent filed a notice of preliminary objection which is the subject of the instant ruling objecting to the hearing of the applicant's notice of motion dated 25<sup>th</sup> November, 2010 on the following grounds:

1. ***The Chamber summons application dated 10<sup>th</sup> November, 2010 on the basis of which leave was obtained and the current substantive Notice of Motion is based is incurably defective, bad in law and fatally incompetent as it violates the mandatory provisions of Order LIII Rule 1(2) and 4 of the Civil Procedure Rules hence leave to institute the substantive Notice of Motion should not have been granted and should be set aside.***
2. ***The Notice of Motion is incurably defective, bad in law and fatally incompetent as it is not supported by an Affidavit and cannot stand by itself in the present form for want of evidence by way of Affidavit.***
3. ***This court has no jurisdiction to entertain try and or determine the ex-parte Applicant's complaints as there is no issue of public law involved.***
4. ***The ex-parte Applicant's complaints are not justiciable under the judicial review jurisdiction as the Industrial court as specially constituted under the Employment Act, 2007 has the machinery, laid down procedure for redress and clothed with special jurisdiction to resolve master and servant disputes.***
5. ***The ex-parte Applicant's dismissal having crystallized this court has no jurisdiction to grant the order of prohibition as it has been overtaken by events.***

Counsel for the applicant and the respondent filed their respective written submissions on the preliminary objection which they highlighted before the court on 10<sup>th</sup> November, 2011.

I have carefully considered the rival submissions made by Mr. Ogolla for the respondent while supporting the preliminary objection and Mr. Kanjama for the ex-parte applicant in opposition thereto and all the authorities cited.

The gravamen to the respondent's objection to the applicants notice of motion is that it is fatally defective and incompetent having been filed without an independent supporting affidavit. Pursuant to leave granted on the basis of a chamber summons which according to the respondent was also incurably defective, having been filed contrary to the procedure prescribed by Order 53 Rule 2 Civil Procedure Rules. Order 53 Rule 2 Civil Procedure Rule requires that the chamber summons seeking leave to commence judicial review proceedings should be accompanied by a statement setting out the name and description of the applicant, the relief sought and grounds upon which it is sought and a verifying affidavit.

It is the respondent's contention that the applicant's application for leave was not accompanied by a statutory statement and verifying affidavit as required by law and for that reason the same was defective and leave granted pursuant to such a defective application should be set aside. In his initial submissions Mr. Ogolla urged the court to set aside leave granted by Musinga, J in this case on grounds that it was premised on a defective application for the reasons aforesaid but in his reply to Mr. Kanjama's submissions he appears to have abandoned that prayer when he emphasized that the respondent was not challenging grant of leave but was attacking the notice of motion since it was filed without an independent supporting affidavit and as the application seeking leave was defective, it could not have given rise to a valid notice of motion.

It was also the respondent's contention that the ex-parte applicant's complaints are not justiciable under the judicial review's jurisdiction since they did not raise any issue of public law. It was Mr. Ogolla's submission that the decision being impugned was in the realm of private law made pursuant to the applicant's contract of employment with the respondent and that the applicant's remedy lay in the Industrial Court which has exclusive jurisdiction to resolve all employment and labour related disputes.

I have perused the chamber summons application dated 10<sup>th</sup> November, 2010 on the basis of which leave to institute judicial review proceedings herein was granted on 15<sup>th</sup> November, 2010. Though Mr. Kanjama maintained in his submissions that the same was filed together with a statutory statement and a verifying affidavit as required by Order 53 Rule 2 of the Civil Procedure Rules, I have confirmed from the court record that this is not infact the position. The court record confirms the position taken by the respondent that the application was filed on its own unaccompanied by a statutory statement and a verifying affidavit. It is however noted that on 10<sup>th</sup> November, 2010 the applicant had filed a notice to the

Registrar to which he had attached a statutory statement and verifying affidavit. It is clear from a reading of Order 53 Rule 2 Civil Procedure Rules that the statutory statement and verifying affidavit ought to have been filed simultaneously with the application for leave.

Though this was not done in this case, this anomaly or irregularity went unnoticed by the Judge who considered the application and he proceeded to grant leave as sought. The question that now arises for determination by this court in my view, is whether this irregularity can be used as a basis for setting aside the leave granted by Musinga, J at this juncture pursuant to a preliminary objection.

In the case of Republic –vs- Land Disputes Tribunal Court Central Division & another exparte Nzioka [2006] I E.A.321, it was held by Justice Nyamu (as he then was) that though grant of leave is provisional until set aside for good reason, it can only be set aside upon an application and not through a preliminary point and only before the filing of the substantive motion. Once the substantive motion was filed, the leave granted was spent and parties had to contest the application for judicial review on its merits. It was his view that any errors or irregularities in the application seeking leave could only be contested before the filing of the substantive motion.

In that case as is the instant case the application seeking leave had been filed without a statutory statement and a verifying affidavit and in refusing to set aside the grant of leave in that case on a preliminary objection, Justice Nyamu stated at Page 327 as follows:

***“It is quite apparent that this irregularity did escape the court’s attention at leave stage perhaps due to the urgency and haste which accompany the application for leave. In my view, leave having been granted it cannot be relitigated for the reasons outlined above. After all there is no application to set aside leave as such”***

In the case of Republic –vs- Secretary of State Exp Harbage [1978] ALL ER 324 which was cited with approval by the Court of Appeal in Aga Khan Education Service Kenya –vs- Republic & Others [2004] eKLR it was stated:

***“It cannot be denied that leave should be granted, if on the material available, the court considers going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the Judge who granted leave to set aside such leave”***

From the foregoing and this is evident from other authorities on the subject, it is clear that it is trite law that a respondent who wishes to challenge grant of leave to institute judicial review proceedings can only do so via an application seeking to set aside such leave and not through a preliminary objection.

Even where an application to set aside such leave is made the Court of Appeal in Aga Khan Education Service Kenya –vs- Republic & Others (supra) held that such leave can only be set aside in exceptional circumstances and in very clear cut cases where it is obvious that the Notice of Motion filed subsequently had no chances of success. The Court of Appeal expressed itself thus “.....***even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside”***.”

In the instant case, the respondent has not made an application to set aside the grant of leave but has instead moved the court to do so through a preliminary objection which is not permissible in law. In any event the preliminary point was raised after the substantive motion was filed meaning that leave granted

had already been spent. I therefore find no merit in the first ground of objection.

For the avoidance of doubt, I wish to state that even if an application had been made seeking to set aside leave granted in this case, given the guidance by the Court of Appeal in the ***Aga Khan Education Services Case (Supra)*** I would have been very hesitant to set aside the leave granted herein for the reasons advanced by the respondent.

Coming now to the second ground supporting the preliminary objection, the respondent contended that the notice of motion was incurably defective and fatally incompetent as it was not supported by an affidavit and hence could not stand on its own. For this proposition, Mr. Ogolla relied on the case of Mwala Land Disputes Tribunal & Another and Kiilu Mathuva & 4 Others Exparte Kyengo Muthuva – Civil Appeal No.178/03 where Onyanja, J held that a notice of motion in a judicial review application must be supported not only by a statement of facts but also by a supporting affidavit attaching the application for leave and extracted copy of order granting leave. With due respect to that holding by my brother Justice Onyanja, I beg to disagree with that position. I hold the view that it does not represent the correct legal position.

The legal position regarding how notice of motion should be filed in my opinion was properly enunciated by Justice Nyamu (as he then was) in Republic –vs- Land Disputes Tribunal Court Central Division & Another Exparte Nzioka (Supra) when he held that there is no legal requirement that the notice of motion be filed simultaneously with any other documents. This is the import and meaning of Order 53 Rule 4 Civil Procedure Rules (CPR) which provides as follows:

***“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement”.***

It is clear from the provisions of Order 53 Rule 4 (CPR) that the notice of motion need not be filed with any document. The law only requires that it be served together with a statement and affidavits supporting grant of leave. In the circumstances, I find no substance in the submission that the notice of motion filed herein was defective and incompetent as it had not been filed together with an independent supporting affidavit. Even though the chamber summons seeking leave was not filed simultaneously with a statutory statement and verifying affidavit as earlier noted, this fact alone cannot invalidate the notice of motion subsequently lawfully filed pursuant to leave properly granted especially considering that when leave was granted, there was a statutory statement and verifying affidavit filed together with the notice to the Registrar which was already on record. Consequently, I find that the notice of motion herein is not defective or incompetent and is properly before the court.

Turning now to the issue of jurisdiction raised in the third and fifth grounds of objection, the respondent has claimed that this Court has no jurisdiction to try or determine the exparte applicant's complaints as they do not allegedly have any public law component and they relate primarily to an employment dispute between a master and servant. This claim was vehemently opposed by the applicant who through counsel, Mr. Kanjama submitted that the application raises issues of Public Law since the respondent is a public body which is amenable to judicial review orders.

The respondent urged the court to find that it is the industrial court which has special jurisdiction to entertain the applicant's complaints under the Employment Act of 2007 and that recognizing this fact the applicant had filed Industrial Cause No.1590 of 2010 seeking more or less similar reliefs as those sought in this case. The applicant admitted having filed Cause No.159/2010 at the Industrial Court but claimed that reliefs sought in that case were different from those sought in this case.

It is not disputed that the respondent is a public body statutorily established under Section 3 of the Kenya Airports Authority Act, Cap.395 Laws of Kenya (*hereinafter referred to as the Act*).

It is also not disputed that prior to 29<sup>th</sup> October, 2010 when he was summarily dismissed, the

applicant was the ICT General Manager in the employ of the respondent. It is also not disputed that it is the decision of the respondent to summarily dismiss the applicant from its employment that is the subject matter of these judicial review proceedings.

I have carefully looked at the pleadings filed by the applicant and in my view the major complaint raised by the applicant relates not only to the decision itself but more importantly the process by which the decision to terminate his services was arrived at. He complains that the disciplinary committee of the respondent that deliberated in the matter acted unreasonably and in bad faith in resolving to have his services terminated and that he was not given a fair hearing before that decision was made.

In my understanding, the law is that the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but with the decision making process itself.

In the case of Chief Constable of North Wales Police –vs- Evans [1982] I W.L.R. 155 page 1160, [1982] 3 ALL ER, 142, page 143, Lord Halsham L.C. stated as follows:

***“It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question”.***

The function of the court exercising judicial review jurisdiction is to ensure that public bodies, public officers or inferior tribunals do not abuse their lawful authority by subjecting persons against who that authority is exercised to unfair treatment.

It is common ground that the respondent is a public body being a statutory body created by Section 3 of the Act. Section 29 (1) of the Act gives the respondent authority to hire members of staff and to exercise disciplinary control over them. The authority to discipline employees by the respondent is therefore a power derived from statute not from private employment contracts entered into with its employees like the applicant.

I appreciate Mr. Ogolla’s submission that employment by a public body *per se* does not entitle the applicant to the judicial review remedies sought in this case. However, in this case employment and discipline of employees by the respondent has been given statutory under pinning making it a statutory obligation which ought to be exercised fairly and in accordance with the rules of natural justice.

In Halsbury’s Laws of England, 4<sup>th</sup> Ed. Vol.1 page 112 it is stated:

**“Employment by a public body does not per se mean that the remedies of certiorari or prohibition are available.<sup>19</sup> Where a body exercises contractual powers which are in part regulated by statute the availability of prerogative remedies depends on the extent of the statutory intervention.<sup>20</sup>”**

It is my considered view that in the exercise of that power and /or statutory duty the respondent or any of its organs had the duty to act fairly, reasonably and rationally towards its employees. Where a complaint is raised that this power was exercised unfairly, unreasonably or irrationally or in breach of the rules of natural justice as has been done by the applicant in this case, I find that this court has jurisdiction to investigate those complaints under its supervisory jurisdiction and if found valid grant appropriate reliefs.

In Council Of Civil Service Unions & Others –Vs- Minister for the Civil Service [1984] 3 All ER 935, it was held that judicial review provides the means by which judicial control of administrative action is exercised under three heads; (1) **illegality**, where the decision making authority has been guilty of error of law, e.g. by purporting to exercise a power it does not possess; (2) **irrationality**, where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision; (3) **procedural impropriety**, where the decision making authority has failed in its duty to act fairly.

These are some of the grounds that are relied upon by the applicant in the Notice of Motion filed on 25<sup>th</sup> November, 2010.

In view of the foregoing with utmost respect to counsel for the Respondent, I do not find any merit in Mr. Ogolla's submission that the applicant's complaints related to matters of private law not public law and that therefore this Court did not have jurisdiction to entertain and determine the same. I find that in so far as the said complaints related to the process by which the impugned decision was arrived at and in so far as there is a claim that the respondent which is a public body or any of its organs breached the rules of natural justice in arriving at the said decision, this court has jurisdiction to investigate those complaints and reach a determination on their validity or otherwise.

For all the foregoing reasons, I have come to the conclusion that the preliminary objection taken by the respondent to the hearing of the applicant's notice of motion dated 25<sup>th</sup> November, 2010 has no merit and it is hereby dismissed with costs in the cause.

**Dated, Signed and Delivered** by me at Nairobi this 9<sup>th</sup> day of December 2011

C. W. GITHUA

**JUDGE**

In the presence of:

Florence – Court Clerk

Kanjama for the Applicant

M/s Omollo holding brief for Yego for the Respondents