



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Miscellaneous Civil Application 353 of 2008
IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF JOSEPH OGARO

AND

IN THE MATTER OF MOI TEACHING & REFERRAL HOSPITAL BOARD

AND

IN THE MATTER OF ORDER LIII OF THE CIVIL PROCEDURE RULES, CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA AND SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP. 26 LAWS OF KENYA

AND

IN THE MATTER BETWEEN

REPUBLIC APPLICANT

VERSUS

**THE MOI TEACHING AND
REFERRAL HOSPITAL BOARD RESPONDENT**

EX-PARTE JOSEPH OCHENGE OGARO

JUDGMENT

The ex parte applicant Joseph Ochenge Ogaro by an application dated 20th August, 2008 and expressed to be brought under Section 8 and 9 of the Law Reform Act and Order LIII Rules 1, 2 and 3 of the Civil Procedure Rules seeks the following orders:-

(1) That the Court do issue an order of certiorari to remove to this Honourable Court and quash forthwith the decision arrived at by the Respondent's Hospital Staff Disciplinary and Advisory Committee on 9th April, 2008 and the subsequent dismissal letter dated 22nd April, 2008.

(2) The costs of the application be provided for.

The application is based on the following grounds:-

(a) That the respondent acted ultra vires its powers in dismissing the applicant from service.

(b) That the applicant was not accorded an opportunity to be heard.

(c) That the respondent's Committee had breached the basic principles of natural justice particularly the rule of fair hearing.

The applicant also relies on the statement of facts filed herein and the verifying affidavit sworn on 29th July, 2008.

The application was opposed and the Director of the respondent Prof. H. N. K. Arap Mengich swore an affidavit on 4th November, 2008 in which he avers that the allegations by the applicant are baseless and untrue as the procedure for dismissal of the applicant pursuant to the respondent's terms and conditions of service was duly followed and the applicant was accorded an opportunity to be heard but snubbed it.

The respondent further contends that the applicant's application is incurably defective and is untenable/unsustainable in law for reasons inter alia:-

(a) The contract of employment for the Applicant is not subject to judicial review.

(b) Rules of natural justice do not apply to a contract of employment, and in any event the Applicant was afforded an opportunity to be heard.

(c) The remedy for breach of a contract of employment for personal services is damages only.

(d) The order of certiorari cannot be granted as it is trite law that the availability of alternative relief is a bar to judicial review.

The facts which gave rise to this judicial review application briefly may be stated. By a letter dated 20th August, 2002 the applicant Joseph Ochenge Ogaro was offered and employment as Accountant II by the respondent. The applicant accepted the offer by a letter dated 21st August, 2002. The applicant's appointment was confirmed on 13th August, 2004. The applicant was also served with a document which contained the respondent's Terms and Conditions of Service which he read and accepted. In order to appreciate the issues raised in this judicial review application it is pertinent to reproduce those terms and conditions relevant to this application.

REGULATION 3:13: TERMINATION OF APPOINTMENT. It provided:-

(i) In the course of employment, the Hospital (respondent) for various reasons may wish to terminate the appointment of an employee or the employee may wish to terminate his employment with the Hospital i.e. by resignation. In such circumstances, the termination of the appointment by either party shall be by notice of not less than one calendar month for all grades or payment of one month's salary in lieu of notice.

(ii) An employee's appointment may be terminated by dismissal and/or action that involves application of disciplinary procedure as set out in the code of conduct. Dismissal may result in the forfeiture of benefits, otherwise accorded to the employees on leaving the service.

REGULATION 16.11.2 SUSPENSION

(1) Where an employee has committed a criminal offence, the Director shall order for his suspension from the exercise of his duties pending consideration and determination of the case.

REGULATION 16.11.3

(a) An employee who is convicted in any Court of law of a criminal offence, which in the opinion of the Director warrants disciplinary action, the Director may, upon receipt of the Judgment, and of any order made on appeal, decide whether the employee is to be dismissed or subjected to some lesser punishment.

(b) If an employee who was previously arrested is acquitted of a criminal charge in any Court of law, he may not be dismissed or otherwise punished on any charge in which he has been acquitted. However, nothing shall prevent his dismissal or other punishment for any other charge arising out of his conduct in the matter.

REGULATION 16.8.3 – DISCIPLINARY PROCEDURE AGAINST EMPLOYEE

Each disciplinary committee shall upon inquiry lay charges before respective disciplinary authority against Hospital employees whose conduct is being inquired into. Any employee whose conduct is being inquired into shall be offered an opportunity to appear before the disciplinary authority and defend himself. Where an employee has been guilty of an offence which attracts dismissal or termination of service of his employment the presiding disciplinary authority shall cause records of proceeding and recommendation to the Director for final decision.

The applicant was on 25th August 2005 arrested and was arraigned before the Chief Magistrate's Court at Eldoret charged with the offence of stealing by servant vide Criminal Case number 5805 of 2005. He was tried but was acquitted under Section 210 of the Criminal Procedure Code on 8th May, 2007.

The applicant did on 12th August, 2005 receive a letter dismissing him on allegations that he did misappropriate/embezzle hospital funds to unauthorized use, absenting himself from duty and failing to comply and

execute a valid order given to him by the Deputy Director.

The applicant contends that the respondent breached the basic principles of natural justice particularly the rules of fair hearing by failure to serve him with the charges leveled against him which is a clear violation of Regulation 16.8.3 of the Terms and Conditions of Service and failure to offer him an opportunity to be heard. Lastly, the applicant contends that he is entitled to be reinstated upon acquittal as provided for under Regulation 16.11.3 (b) of the Terms and Conditions of Service.

While the respondent contends that the procedure for dismissal of the applicant was duly followed and the applicant was accorded an opportunity to be heard which he snubbed. The respondent further submits that the applicant's application is incompetent and unsustainable in law for the reason that the contract of employment for the applicant is not subject to judicial review.

Based on the affidavit evidence on record and submissions by both counsel it comes out clearly that the issues for determination in this judicial review application are as under:-

- (a) whether or not the respondent's contract of employment can be subject to Judicial Review
- (b) whether or not the rules of natural justice do apply to a contract of employment
- (c) whether or not the respondent acted ultra vires in dismissing the applicant
- (d) whether or not the Court can make an order to reinstate the applicant to his employment.

I will deal with these issues in the order they appear above.

(a) WHETHER OR NOT THE RESPONDENT'S CONTRACT OF EMPLOYMENT CAN BE SUBJECT TO JUDICIAL REVIEW

An employment contract confers rights and obligations

on both parties to the contract and each party agrees to be bound by the terms and conditions contained therein.

The applicant was employed by the respondent as an Accountant. This created a contractual relationship of master and servant, so that the applicant's remedy lie in a claim for damages for breach of contract and not in judicial review. In **CONSOLATA KIHARA & 241 OTHERS V. DIRECTOR KENYA TRIPANSOMIASIS RESEARCH INSTITUTE at Pg. 237** the Court said:-

“The law is well settled that if where an ordinary contractual relationship of master and servant the master terminates the contract, the servant cannot obtain orders of certiorari. If the master rightfully ends the contract there can be no complaint. If the master wrongfully ends the contract the servant can pursue a claim for damages”.

Further judicial review is not applicable where there is an alternative remedy. Master-servant relationship falls within the province of private law and the alleged rights thereto are enforceable within the confines of private law.

Having considered all the affidavits, the submissions and all the authorities cited I find that the applicant has failed to establish the requisite grounds available in judicial review. The applicant concedes in his pleadings that there was a contract of employment which he claims was breached. I am of the view that the issues that can be canvassed by the parties are more related to private law as opposed to public law. As I have already stated the relationship that existed between the applicant and the respondent was contractual. If there was a breach of contract of employment, the applicant is entitled to a claim in a Civil Court. Having made such a finding there is no need for the Court to consider the other issues raised by the applicant.

In the result I find that the applicant's claim is not tenable as the same is incompetent having been brought by way of judicial review in a case of contract of personal service and the most efficacious remedy would have been a claim in a Civil Court and I decline to grant the order of certiorari sought.

The applicant is at liberty to file a competent claim in a Civil Court.

The respondent having successfully defended this application, it is entitled to costs and it is so ordered.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY, 2010.

J. L. A. OSIEMO
JUDGE