



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Misc Appli 920 of 2005

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE SERVICE COMMISSION ACT, CAP 185 LAWS OF KENYA

AND

IN THE MATTER OF THE JUDICIAL SERVICE COMMISSION REGULATIONS, CAP 185 LAWS OF KENYA

AND

IN THE MATTER OF RETIREMENT ON GROUNDS OF PUBLIC INTEREST

AND

IN THE MATTER OF ORDER LIII OF THE CIVIL PROCEDURE RULES

BETWEEN

JOYCE MANYASI.....APPLICANT

VERSUS

1. EVAN GICHERU (HON.).....1ST RESPONDENT

2. CHARLES S. K. NJAI.....2ND RESPONDENT

3. THE JUDICIAL SERVICE COMMISSION.....3RD RESPONDENT

4. THE HON. ATTORNEY GENERAL4TH RESPONDENT

RULING

This application is made by a Notice of Motion dated 12th July, 2005 and brought under Sections 8 and 9 of the Law Reform Act (Cap. 26 of the Laws of Kenya); Order LIII rules 3 and 4 of the Civil Procedure Rules; Section 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya); and all enabling provisions of the Law. By the application, the Applicant prays that this Honourable Court be pleased to grant her –

1 (a) **An order of certiorari to move into this Honourable Court and quash all the decisions and measures of the 1st, 2nd and 3rd Respondents made purportedly to retire the applicant allegedly on ground of public policy effective 7th June, 2005.**

(b) **An order of prohibition directed at the 1st, 2nd and 3rd Respondents restraining them by themselves, their agents, servants, or further decisions, resolutions and measures aimed at implementing the decision of the Judicial Service Commission to retire the Applicant on purported grounds of public interest.**

(c) **An order of mandamus directed at all the Respondents to halt forthwith implementation of the decision of the Judicial Service Commission to purportedly retire the Applicant on alleged grounds of public interest AND further to ensure that the Applicant receives her full salary and other allowances and benefits she is entitled to as a Chief Magistrate in the employ of the Public Service of the Republic of Kenya.**

2. **Such other or further relief as it may deem fit in the circumstances.**

3. **An order that the costs of this application be in favour of the**

Applicant in any event.

The application is supported by the Applicant's annexed affidavit, and is based on the grounds, inter alia, that the 1st Respondent's decision to retire the Applicant under Regulation 28 of the Judicial Service Commission Regulations was ultra vires, arbitrary, rash, null and void as the 1st Respondent did not comply with the provisions of the said Regulation. The Applicant denies participating in any strike and avers that she was not given a hearing contrary to the rules of natural justice, and that the 1st Respondent's decision to retire the Applicant on grounds of public interest was rash, unreasonable, unfair and unjust. It is also the Applicant's case that the Judicial Service Commission was incapable of acting fairly in this matter as its Chairman, the Chief Justice, and its Secretary, who is the Registrar of the High Court, were also the complainants against the Applicant, and that the two of them acted as Complainant, Prosecutor, Judge and Executor and all these in the absence of the accused.

Opposing the application are two affidavits. The first one was sworn by Francis K. Kipsang, a Chief Inspector of Police at Machakos Law Courts, on behalf of the 4th Respondent. He deposes in that affidavit that on 14th March, 2005, prisoners from Kamiti were not brought due to a mechanical problem with the motor vehicle that was to ferry them to court, but the other prisoners were brought as usual. However, by the time the Applicant's court convened, the accused persons had already left.

The second affidavit was sworn and filed by Charles Kariuki Njai on his own behalf as the 2nd Respondent, and also on behalf of the 1st, 3rd and 4th Respondents. In his affidavit, Mr. Njai avers that as

the Registrar of the High Court, he was responsible for the day to day administration of the Judiciary. On the 14th March, 2005 several magistrates countrywide went on strike/go slow, and it came to his attention that the operations of Machakos Courts, where the Applicant was at the time the Chief Magistrate in charge of the Station, had come to a standstill and that no business was transacted on the said date as all the magistrates in the Station, including the ex parte Applicant, did not attend court on that date. Although remand prisoners had been ferried to court from various prison facilities, they were kept in the court cells the whole day waiting to take pleas and for their cases to be heard. The following day, the Chairman of the Judicial Service Commission wrote a letter dated 15th March, 2005 interdicting the Applicant and calling on her to show cause why she should not be disciplined. The Applicant responded vide her letter dated 16th March, 2005 in which she denied having participated in the strike or being absent from duty. The two letters were placed before the Judicial Service Commission at its meeting on 7th June, 2005 and after considering the letters and other evidence, the Commission decided to retire the ex parte Applicant on grounds of public interest. That decision was communicated to the Applicant by a letter dated 8th June, 2005, thereby precipitating this application.

During the oral canvassing of the application Mr. Nyaoga appeared for the Applicant while Mr. Gikera appeared for the Respondents. After hearing the arguments of both counsel, found that the main issues to be determined are –

- Whose decisions are to be quashed?
- When should a court issue prerogative orders?
- Can the prayers lie?
- Right to be heard? Fair hearing?
- Was she given adequate reasons?
- Was due process followed?

The only fact in dispute in this matter is whether or not the ex parte

Applicant attended duty on 14th March, 2005. She says she did, but the Respondents contend that she did not. Apart from this difference, the other facts are not in dispute.

Arising from the Applicant's alleged failure to attend her duties on 14th March, 2004, she was served with a letter of interdiction dated 15th March, 2005. The letter was signed by the Chairman of the Judicial Service Commission and reads in part –

“It has come to my attention that on 14th March, 2005 you participated in an illegal strike/go slow by abandoning your judicial duties and court precincts. This event, which was widely captured in the Press, is considered a gross breach of discipline that can render you liable to severer disciplinary action being taken against you. Your irresponsible conduct left your court unmanned, thereby inconveniencing consumers of justice who were listed before you.

Due to the foregoing, it has been decided that you be and are hereby interdicted from the exercise and functions of your office with effect from 14th March, 2005 until your case is determined ...

Meanwhile, you are called upon to show cause why severe disciplinary action, which may include dismissal/termination of your appointment should not be taken against you ...”

To this letter, the ex parte Applicant responded promptly vide her letter dated 16th March, 2005 and addressed to the Chairman, Judicial Service Commission. Her said letter read in part –

“It is not true that I participated in any strike/go slow on 14/1/05 (sic). I was on duty as usual for all the working hours on that date and did all that I would do in the circumstances that prevailed at the Machakos Law Courts.

I regret any inconvenience that has been caused by the alarming reports that appeared in the press, to which I would not react, in strict compliance with the code of ethics. Any doubts can be confirmed by carrying out investigations at the Station ...”

This correspondence was followed by the last letter dated 8th June, 2005 and captioned **“Retirement on Grounds of Public Interest.”** It is addressed to the ex parte Applicant by the Secretary, Judicial Service Commission, and reads –

“I wish to convey the decision of the Judicial Service Commission at its meeting of 7th June, 2005 that you be retired from the Judicial Service in the public interest with effect from 7th June, 2005 in accordance with Regulation 28 of the Judicial Service Commission Regulations, Chapter 185 of the Laws of Kenya ... “

The ex parte Applicant’s case is that the above quoted Regulation 28 was not followed and to that extent the Judicial Commission’s decision was flawed. For the avoidance of any doubt, the said regulation reads as follows –

“28. Retirement on grounds of public interest

(1) If the Chief Justice, after having considered every report in his possession made with regard to an officer, is of the opinion that it is desirable in the public interest that the service of such officer should be terminated on grounds which cannot suitably be dealt with under any other provision of these Regulations, he shall notify the officer, in writing, specifying the complaints by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the officer.

(2) If, after giving the officer an opportunity of showing cause why he should not be retired in the public interest, the Chief Justice is satisfied that the officer should be required to retire in the public interest, he shall lay before the Commission a report on the case, the officer’s reply and his own recommendation, and the Commission shall decide whether the officer should be required to retire in the public interest.”

Certain disciplinary powers of the Judicial Service Commission are delegated to the Chief Justice. These are set out in Regulation 16 of the Judicial Service Commission Regulations which states as follows –

“16 1) The following disciplinary powers vested in the Commission are delegated to the Chief Justice –

(a) The power to interdict an officer under regulation 17...”

Regulation 17 in turn states –

“17 1) If in any case the Chief Justice is satisfied that the public interest requires that an officer should cease forthwith to exercise the powers and functions of his office, he may interdict the officer from the exercise of those powers and functions, provided proceedings which may lead to his dismissal are being taken or are about to be taken ... against him.”

Interdiction is therefore the first step on the road to discharging an officer from exercising the functions of his or her office in the public interest. If it is contemplated that the officer should be retired in the public interest, then Regulation 28 (supra) comes into play. This regulation clearly requires that where it is contemplated to retire a judicial officer in the public interest, such an officer should be notified in writing, and the notification should specify the complaints by reason of which the officer's retirement is contemplated, together with the substance of any report which is detrimental to the officer. The letter of interdiction dated 15th March, 2005, did not constitute such a notification as is contemplated under Regulation 28. Firstly, it was only a letter of interdiction, and even though it called upon the Applicant to show cause why severe disciplinary action may not be taken against her, it did not warn her that her retirement in the public interest was contemplated. Secondly, it did not incorporate the substance of any report or part thereof that was detrimental to the officer. Since the intention of the Commission was to retire the ex parte Applicant in the public interest, then care should have been taken to ensure that Regulation 28 was meticulously complied with to the letter .

The rationale behind Regulation 28 is not far to seek. That Regulation is an embodiment of the rules of natural justice which require that a person should not be condemned unheard. It is to be remembered that the remedy of judicial review is not concerned with the merits or demerits of the decision in respect of which the application for judicial review is made. Rather, it is concerned with the decision making process itself. And if that process is flawed, the decision reached is equally flawed and will not be allowed to stand.

Regulation 28 details the specific steps to be taken if and when it is contemplated to retire a judicial officer in the public interest. And the language of that regulation is couched in mandatory terms. In this matter, the ex parte Applicant was neither served with any notice of intention to retire her in the public interest, nor with the substance of any report or part thereof that was detrimental to her. And to crown it all, she was not given an opportunity to show cause why she should not be retired in the public interest. For these reasons, we find that Regulation 28 of the Judicial Service Commission Regulations was not complied with and therefore the procedure purporting to retire the Applicant in the public interest was flawed and the decision was equally flawed.

Finally, we note that Section 69 (1) of the Constitution provides as follows –

“The power to appoint persons to hold ore act in an office to which this section applies, the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those persons from office shall vest in the Judicial Service Commission.”

Subsection (2) empowers the Judicial Service Commission to delegate any of its powers under subsection (1) and it has done in delegating to the Chief Justice the power to interdict officers. Subsection (3) then states –

“The offices to which this section applies are –

(a) the officer of the Registrar or Deputy Registrar or Deputy Registrar of the High Court.

(b) The officer of the Chief Magistrate, the Principal Magistrate, the Senior Resident Magistrate, Resident Magistrate or District Magistrate;

(c) the office of any other person empowered to hold or be a member of a subordinate court

exercising criminal jurisdiction;

(d) **the office of Chief Kadhi and Kadhi; and**

(e) **Such other offices of members of any court or connected with any court as may be prescribed by Parliament.”**

As a Chief Magistrate, the Applicant fell within the disciplinary control of the Judicial Service Commission, and if the Commission put a foot wrong, it is the Commission and the Commission alone which should be answerable.

In the instant case, we note that in addition to making the Commission a Respondent, the Applicant has also joined the Chief Justice as the 1st Respondent, the Registrar who was the Secretary to the Commission as the 2nd Respondent, and the Attorney General as the 4th Respondent. In our view, whatever these officials did, it was done in the name of the Commission. For instance, when the 1st Respondent wrote the letter of interdiction, he did so under powers delegated to him as chairman of the Commission. Similarly, the letter from the Registrar was only signed by that officer as the Secretary to the Commission. It was therefore the Commission which was acting through its officials, and the acts of those officials were acts of the Commission. For instance, when the 1st Respondent wrote the letter of interdiction, he did so under powers delegated to him as Chairman of the Commission. Similarly, the letter from the Registrar was only signed by that officer as the Secretary to the Commission. It was therefore the Commission which was acting through its officials, and what those officials did were acts of the Commission.

The applicant correctly captures that picture when she states in paragraph 12 of her supporting affidavit sworn on 12th July, 2005 –

“... I am immensely aggrieved by the decision of the Judicial Service Commission to retire me on alleged grounds of public interest.”

The Applicant also expresses similar sentiments in paragraph 15 of the said affidavit where she states –

“... I believe that the Judicial Service Commission was incapable of acting fairly in this matter as its Chairman who is the Chief Justice, and its Secretary, who is the Registrar of the High Court, were also complainants against me...”

These utterances confirm our view that the Judicial Service was the only proper Respondent in this matter, and that the addition of other parties as Respondents was an unfortunate misjoinder. The only decision that falls for consideration is that of the Judicial Service Commission and not the acts of individual members and officers.

For the above reasons we find that the procedure for retiring judicial officers on grounds of public interest was not followed to the letter, and that failure to do so renders both the decision making process, as well as the decision itself, flawed. The many decisions cited by Mr. Nyaoga for the Applicant, may be summarized in the words of Lord Reid in **RIDGE v. BALDWIN** [1964] AC 40 by saying without any fear of contradiction, that **“a decision given without observing the principles of natural justice is void.”** We accordingly move to this Honourable Court and quash the decision of the 3rd Respondent made purportedly to retire the Applicant on grounds of public interest effective from 7th June 2007 and in the circumstances, we find that the said retirement was not only null and void, but that it was improper. It

can not therefore lie.

We also grant her an order of mandamus directed at the 3rd Respondent to halt forthwith the implementation of its aforesaid decision AND further direct that it reinstates her in employment forthwith as a Chief Magistrate.

Save for the fact that the 3rd respondent shall bear the applicant's costs of this suit, the applicant shall herself bear the costs of the suit against the 1st and 2nd and 4th Respondents.

It is so ordered.

Dated and delivered at Nairobi this 12th day of November 2009.

J. W. GACHECHE

JUDGE

L. NJAGI

JUDGE