**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 1474 of 2005**

**LYDIA WANJIKU NDOTO & OTHERS……..……PLAINTIFF**

**Versus**

**THE HON. THE ATTORNEY GENERAL & ANOTHER ……DEFENDANT**

**JUDGMENT**

This is an application for Judicial Review filed by the four Applicants, Lydia Wanjiku Ndoto, Esther Mukami Kabira, Hillary Maina Kigo and Mary Gathoni Ngatia against the Hon. Attorney General, the Permanent Secretary Ministry of Water and Irrigation and the Secretary Public Service Commission, seeking the following orders;

1) An order of mandamus ordering the Personal Secretary Ministry of Water and Irrigation to immediately reinstate the Applicants back to their employment with full benefits;

2) An order of certiorari removing the decisions of the Permanent Secretary, Ministry of Water and Irrigation dismissing the Applicants from employment and the Secretary, Public Service Commission dismissing the Applicants' appeals into this Honourable Court and quashing the same;

3) An order of prohibition prohibiting the 2nd Respondent from dismissing the Applicants from employment;

4) Directions as it may deem fit and just to grant;

5) That the Respondents be ordered to pay the costs of the Application.

The application is brought under S. 8 and 9 of the Law Reform Act and Order 53 Rule 3 Civil Procedure Rules. The Notice of Motion is dated 28th November 2005. I have noted that the Notice of Motion is supported by the affidavit of Lydia Wanjiku Ndoto dated 28th November 2005. A similar affidavit had been filed with the Chamber Summons seeking leave and is dated 9th November 2005, the same date the Chamber Summons was filed in court. There is a statutory statement dated 9th October 2005 and there are several annextures to the affidavit in support. The Applicants' counsel also relied on grounds found on the face of the Application while other grounds are contained in the Statutory Statement.

Two affidavits were filed in reply to the Application, one by Bernadette Mwihaki Nzioki a Secretary, to the Public Service Commission of Kenya

nother by Gilbert Michire Matundura, a senior Human Resource Officer, Ministry of Water and Irrigation.

Both Mr. Gacheche wa Miano Counsel for Applicants and Mr. Ombwayo Counsel for Respondents, filed skeleton arguments. The grounds upon which the Application has been brought are that the Applicants were employees of the Government of Kenya, who were dismissed from employment and it is their contention that the Respondents acted ultra vires their powers, they breached rules of natural justice, by acting as judges in their own cause.

A brief factual background of this case is that the Applicants were employees of the Ministry of Water and Irrigation. Lydia Ndung'u was employed on 29th September 1987, Esther Kabiru on 7th June 1990, Hillary Kigo on 30th December 1981 and Mary Ngatia on 19th October 1978. They exhibited their letters of employment "LWN 1". They were all stationed at Karatina as of June 2003 and about September/October 2004, they received letters from the Permanent Secretary of Ministry of Water and Irrigation dismissing them from employment – LWN 2. Lydia was dismissed on 24th June 2004 vide a letter dated 29th October 2004; Mary Gathoni Ngatia was dismissed effective 29th June 2004 vide letter dated 29th October 2004; Esther Kabiru was dismissed with effect from 29th June 2004 under the letter dated 16th September 2004 and Hillary Kigo was dimissed with effect from 24th June 2004 under a letter dated 29th October 2004

They all appealed to the Secretary Public Service Commission vide their letters dated 2nd December 2004 except for Esther Kabiru whose letter is dated 27th September 2004 (LWN 3). Hillary Kigo and Mary Gathoni received their reply from the Permanent Secretary dated 30th May 2005 and 10th June 2005 respectively disallowing the appeals. All of them deny having been given any hearing in the Appeals by the Permanent Secretary of the Public Service Commission nor were they given reasons for the said decisions. They therefore contend that the Respondents acted ultra vires their powers and breached rules of natural justice.

Mr. Miano, counsel for the Applicants, argued that the Applicants were entitled to a 2nd appeal but were again denied a hearing. He went on to submit that a hearing entails being listened to and being able to cross examine or an opportunity to explain one's side. He relied on the case of **RIDGE V BALIDWIN (1963) 2 ALL ER 66** where it was held that one should be given a chance to explain. Counsel relied on several other cases, **REP V AG & SMITH KHISA WASWA MISC APPLICATION 769 OF 2004** and **MISC APPLICATION 818 of 1992 ELIZABETH WAINAINA V BOARD OF GOVERNORS OF PANGANI GIRLS SCHOOL & OTHERS**

Counsel also submitted that somebody else who was neutral should have heard the appeals.

Bernadette Mwihaki, Secretary to the Public Service Commission deponed that the applicants were dismissed by the Public Service Commission for gross misconduct. Their appeals were also disallowed and that disciplinary proceedings leading to the Applicants dismissal were undertaken in accordance with the service Regulations. She deposed that the Permanent Secretary lacks the legal duty to reinstate the Applicants into the Public Service and mandamus cannot issue and similarly an order of certiorari cannot issue because the Application was brought outside the 6 months period allowed under Order 53 R 2 Civil Procedure Rules. She further deponed that prohibition cannot issue as the Applicants are already dismissed.

Mr. Matundura in his replying affidavit gave a detailed account of what transpired before the Applicants were dismissed. It all started with the audit inspection Report carried out by the District Internal Auditor which revealed misappropriation of Government revenue and falsification of receipts. The 1st and 2nd Applicants who manned the Karatina Office were directly answerable and the 1st Applicant received a notice to show cause letter or face dismissal. They gave their various explanations for the shortfalls and falsified receipts. The Ministerial Human Resource Management Committee met on 29th June 2004, deliberated the issue and forwarded recommendations that they be dismissed and they were so dismissed

as from 24th June 2004.

The 3rd and 4th Applicants who were in charge of Karatina Ledger Office were accused of Multiple postings in the ledger which resulted in loss of money. Both Officers were addressed with show cause letters dated 28th August 2003. Mary Gathoni denied messing up the ledgers while Hillalry Kigo claimed to have been away in the field at the time and that he was later admitted in hospital. Again, their cases were considered by the Advisory Committee which recommended suspension and it was further referred to the Public Service Commission for dismissal.

In addition, Mr. Ombwayo, Counsel for the Respondents submitted that the verifying affidavit accompanying the statement was of no evidential value as it contained only 3 paragraphs. He urged the court not to look at the affidavit of 9th November 2005 as it was filed without the leave of the court.

Counsel also objected to the grant of an order of certiorari because it was sought outside the 6 months period allowed after the decision was made.

In regard to mandamus, Counsel urged that the order cannot issue as the relationship between the Applicants and Respondent is contractual and mandamus cannot issue to enforce a private right. On prohibition counsel submitted that it cannot issue after the event has taken place.

I have now considered all the rival arguments by both Counsel, affidavits on record and all annextures thereto. I must deal with the objections regarding the form of the Application first. From the record, the notice to the Registrar was filed on 7th October 2005 accompanied by a 3 paragraphed Verifying Affidavit, and Statutory Statement. When the Chamber Summons was filed on 9th November 2005, the Applicant filed a Supporting Affidavit, and accompanied it with the Statutory Statement of 7th October 2005 and the brief Verifying Affidavit. Order 53 requires that the Affidavits to be considered with the Notice of Motion are those filed with the Chamber Summons. The Affidavit of 9th November 2005 was filed with the Notice of Motion though it is titled 'supporting' Affidavit. In my view it is properly on record. The mere fact that it is titled supporting affidavit does not render it incompetent. It was filed with the Chamber Summons and served on the Respondents. It is properly on record. What will be struck off is a similar affidavit of Lydia Ndoto which accompanies the Notice of Motion and is dated 28th November 2005. It is filed without leave as required by Order 53 Rule 4 (2) Civil Procedure Rules.

Under Order 53 Rule 2 Civil Procedure Rules, leave shall be granted to apply for an order of certiorari to remove any judgment, order, decree or conviction or other for purposes of being quashed, if the Application for leave is made not later than 6 months after the date of the proceedings or decree that is challenged. In this case, the decisions impugned are those of the Permanent Secretary Ministry of Water and Secretary of Public Service Commission dismissing the Applicants. The decisions of the Permanent Secretary are dated 28th October 2004, 16th September 2004, and 29th October 2004. Six months lapsed on or about May 2005, in respect of the Permanent Secretary decision. The decisions of the Public Service Commission were made on 30th May 2005, 10th June 2005, 27th October 2005 and 26th November 2005. Though the dismissal of the 1st appeal was made within 6 months of the filing of the Application for leave, this court would be acting in futility to quash the decision of the Permanent Secretary dismissing the appeal when the decision of dismissal still subsists. Courts do not act in vain and the order of certiorari cannot issue against the orders of dismissal made by the Permanent Secretary in 2004.

Can an order of prohibition issue? An order of prohibition issues from the High Court to an inferior tribunal or body forbiding it to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land. It does not issue to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings. In the case of **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/1996,** the court of Appeal held that "**Prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That in our understanding is the efficacy and**

**scope of an order of prohibition**." page 12.

In the instant case, dismissal of the Applicants took place in 2004 and was ratified in 2005 when appeals were dismissed. Prohibition cannot therefore lie.

There is no doubt that the Applicants are challenging their dismissal from employment by the Respondents. The question is whether the Applicants are trying to enforce performance of a public duty or enforcement of private rights.

In the case of **R V EAST BERKSHIRE EX PATE WALSH (1985) QB 152** a nurse had been dismissed for misconduct and she moved the court for Judicial Review orders to quash the decision of dismissal and the court held that the Applicant was not seeking to enforce a public right but his private contractual right under his contract of employment and therefore, his Application was a misuse of the Judicial Review process under Order 53. The court held:-

"an applicant for Judicial Review had to show that a public law right which he enjoyed had been infringed; that where the tems of employment by a public body were controlled by statute, its employees might have rights both in public and private law to enforce these terms but a distinction had to be made between an infringement of statutory provisions giving rise to public law rights and those that arose from a breach of the contract of employment."

It is upon the Applicants to show that they enjoyed public law rights which have been infringed and that the terms of employment are controlled or underpinned by statute. In the case of **R V BBC ex parte LAVELLE 91983) 1 ALL ER 241,** an employee of BBC challenged his dismissal and the court held that it had no jurisdiction to interfere with an employee's dismissal in a purely master and servant situation where there was no protection of employment beyond that which was offered by common law. In **KADAMAS V MUNICIPALITY OF KISUMU 1955 1 KLR** the court observed that though a corporate body was sustained by public funds, the duties to its employees were not necessarily of a public nature and the remedy of Judicial Review was only available where a public law issue arose.

The sum of the above decisions is that Judicial Review orders cannot issue in a claim arising out of a master and servant relationship where there is no statutory underpinning. Judicial Review is a public law remedy and will only lie for public wrongs but not private ones like contracts. If the Applicants are aggrieved, their remedy lies in the ordinary civil Courts. Consequently, even an order of madamus cannot issue. In any event, it is not demonstrated that the Permanent Secretary Ministry of Water has the legal mandate to reinstate the Applicants to their jobs.

The Public Service Commission is the creature of the Constitution of Kenya – (S 106). Under Section 106 (12), the Commission shall not be subject to the direction or control of any person or authority during the exercise of its duties. It can only be subject to this courts supervision if it has not exercised its functions in accordance with the law or the constitution for example if it has exceeded its jurisdiction or contrary to public policy. There is no evidence of arbitrariness, caprice or malice, in the discharge of the Public Service Commission's functions. The Applicants have not demonstrated how the Public Service Commission exceeded its powers. If anything the Applicants have not come to court with clean hands. They never disclosed to the court that they were alleged to have been involved in embezzlement of funds and falsifying of records for which they were called upon to explain. They gave their explanation s which were considered and found to be unsatisfactory and that is why decisions were taken to dismiss them. It is Mr. Matundura who disclosed those facts in his replying affidavit and annexed the relevant letters addressed to each Applicant and the allegations against each and the reply thereto "A W K 1". Under S. 106 (13) of the Constitution, the Public Service Commission will regulate its own procedure. It is not necessary that the commission calls evidence and the Applicants be called upon to defend themselves and cross examine witnesses like in a court of law. It was sufficient that they were asked to show cause upon the discovery of the loss of monies and falsified records and their replies were considered and they even filed two appeals. It would have been different had they not been given a chance to show cause and appeal. A hearing need not take the form of proceedings before a court of law as Counsel for the Applicants seemed to suggest it. In the case of **RIDGE V BALDWIN (supra)** the court observed that

one could not be dismissed without first telling him what is alleged against him and hearing his defence or explanation. That procedure was strictly followed in this case. The Applicants were given a hearing and the Applicants' case would not have any merit in any event. The Public Service Commission can not be faulted in any way.

The upshot is that the Applicant's Notice of Motion is defective in

form, lacks merit and orders sought cannot lie. It is hereby dismissed with costs to the Respondents.

Dated and delivered this 9th day of February 2007.

R.P.V. WENDOH

**JUDGE**

Presence of Mr. Nyagah holding brief for Gacheche –for Applicant

Ojijo – Court Clerk

R.P.V. WENDO

**JUDGE**