



Kinuthia v Judicial Service Commission (Miscellaneous Application 1012 of 2004) [2007] KEHC 2799 (KLR) (4 June 2007) (Judgment)

WILLIAM KINUTHIA v JUDICIAL SERVICE COMMISSION [2007]eKLR

Neutral citation: [2007] KEHC 2799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION 1012 OF 2004**

RPV WENDOH, J

JUNE 4, 2007

BETWEEN

WILLIAM KINUTHIA APPLICANT

AND

THE JUDICIAL SERVICE COMMISSION DEFENDANT

Court dismisses a judicial review application seeking employee reinstatement due to lack of statutory basis.

The High Court held that a claim for unlawful termination of an employment contract should have been filed as an ordinary civil suit and not a judicial review application. Further, the High Court held that for it to entertain a judicial review matter that involved an employment dispute, the applicant had to demonstrate to the court that he enjoyed a public law right which had been infringed and that his terms of employment were controlled or underpinned by statute. The court also noted that the applicant in a judicial review matter should be the Republic.

Reported by Diana Mutunga

Judicial Review - certiorari and mandamus – termination of employment – application challenging the respondent’s decision to terminate the applicant’s employment under regulation 28 of the Judicial Service Commission Regulations – where the Judicial Service Commission terminated the applicant’s probationary appointment as a District Magistrate II (Professional) - when would a court issue judicial review orders – Civil Procedure Rules, order 53 rule 1(2); Judicial Service Commission Regulations, regulation 28.

Jurisdiction - jurisdiction of the High Court - where a suit seeking remedies for the termination of an employment contract was filed as a judicial review matter - where the Judicial Service Commission terminated the applicant’s probationary appointment as a District Magistrate II (Professional) - where remedies sought included reinstatement - whether the High Court had jurisdiction to hear and determine the suit.

Suits - joinder of parties - parties to a judicial review application – proper applicant – who should be the applicant in judicial review proceedings.



Judicial review - grounds for seeking judicial review remedies - rules of natural justice - fair hearing - right to be heard in the process of the termination of an employment contract - termination of a judicial officer's employment in the public interest - provisions of regulation 28 with regard to the specific steps to be taken - whether due process was followed - Judicial Service Commission Regulations, (Cap 185) regulation 28.

Brief facts

The applicant sought an order of *certiorari* to quash the decision of the Judicial Service Commission (JSC), dated 12th March 2004, which terminated his probationary appointment as a District Magistrate II (Professional). The applicant further sought an order of *mandamus* to compel the JSC to reinstate him to his position with full pay and benefits. The applicant contended that the JSC had failed to observe the rules of natural justice in its decision-making process, and acted maliciously and oppressively, with a decision unsupported by material facts or common sense. As a result, the applicant argued he had suffered irreparable harm.

On the other hand, the respondent contended that the court lacked jurisdiction to hear the matter as the relationship between the applicant and the respondent was one of master and servant, which should be addressed by the ordinary civil courts. The respondent further argued that the applicant's only recourse was in damages and that an order of reinstatement could only be issued if a clause underpinning the applicant's employment specifically allowed for such an action.

Issues

- i. Who should be the applicant in judicial review proceedings?
- ii. Whether the High Court had jurisdiction to hear a suit about the termination of a probationary employment contract where it was filed as a judicial review matter.
- iii. Whether due process followed by the Judicial Service Commission in terminating the probationary employment on grounds of public interest.

Held

1. The court found that the application was improperly titled, as it failed to bring the matter in the name of the Republic, which was the proper party in judicial review proceedings. The court emphasized that judicial review applications must be brought in the name of the Republic to ensure public law rights were being asserted and that the state played its role in overseeing the actions of public bodies. As a result, the Notice of Motion ought to have been struck out due to that fatal procedural defect.
2. The High Court lacked jurisdiction to entertain the application. The applicant's dispute arose from a master-servant relationship, which, in the court's view, did not fall under the purview of judicial review. The court referenced various precedents, including *Eric Makokha* and *R. v BBC ex parte Lavelle*, to underscore that judicial review was not the appropriate forum for challenging dismissals in purely private contractual relationships unless a statute specifically governed the terms of employment.
3. A judicial review applicant had to show that a public law right which he enjoyed had been infringed, that where the terms of employment by a public body were controlled by statute, its employees might have rights both in public and private law to enforce those 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 was upon the applicant to demonstrate to the court that he enjoyed a public law right which had been infringed and that his terms of employment were controlled or underpinned by statute. Since the applicant's probationary employment was not underpinned by any statutory provision, the court determined that it had no jurisdiction to entertain the claim for reinstatement. It noted that equitable remedies like reinstatement were not applicable in such master-servant relationships unless supported by statute.
4. The court found that due process had been followed by the Judicial Service Commission in termination of the applicant's probationary employment. The applicant had been given the opportunity to respond to the allegations made against him, and the Commission had considered



his reply before making its decision. However, the court clarified that judicial review did not involve assessing the merits of the decision made by the public body but only examined whether the proper procedural steps were followed. The court concluded that the procedural fairness required by law had been observed, and the applicant's challenge based on the merits of the allegations could not be considered under judicial review. Furthermore, the court held that since the employment relationship had already been severed, judicial review would not provide the most effective remedy, and the applicant should seek damages in the ordinary civil courts.

Application dismissed.

Orders

- i. *The Notice of Motion dated 20th August 2004 was found to be incompetent and unmerited and was therefore dismissed.*
- ii. *Each party was to bear their own costs.*

Citations

Statutes

None referred to

Advocates

Mr. Bosire holding brief for Sitima

JUDGMENT

1. The ex parte applicant, by a Notice of Motion Application dated 20th August 2004 and filed in court on 20th August 2004, brought pursuant to Order 53 Rule 1 (2) of the Civil Procedure Rules and the Law Reform Act, seeks an order of certiorari to quash the decision of the JUDICIAL SERVICE COMMISSION dated 12th March 2004 terminating the probationary appointment of the Applicant as a District Magistrate II (Professional). He also prays for an order of mandamus to issue against the JUDICIAL SERVICE COMMISSION to reinstate the Applicant to his position as DM II (Prof) with his full pay and benefits. Counsel for the Applicant, Mr. Mwaura RELIED ON an affidavit sworn by the Applicant dated 20th August 2004.
2. A brief background of this matter is that the ex parte applicant was employed as a District Magistrate II (Professional) on 2nd May 2001 by the JUDICIAL SERVICE COMMISSION. After attending an induction course by the judiciary, he commenced work at Vihiga Law Courts and on 17th August 2003 he received a letter of notice to show cause why he should not be retired in public interest on the ground that he had solicited for a bribe of Kshs.10,000/= to release a suspect on bond in Crc. 302/01. The Applicant is alleged to have received Kshs.4000/=. The Applicant responded to the notice to show cause on 27th November 2003 denying having dealt with such a case but that the said case was dealt with by Mrs. Chepseba on 7th March 2001 even before he was employed and that the accused persons in the said case had pleaded guilty on their own plea and fined. The applicant annexed proceedings in CRC 302/2001 to the reply. Despite the explanation he gave, he received a letter terminating his probation appointment as per the Judicial Service Commission's decision of 12th March 2004. The said letter prompted this Application. It is the Applicant's contention that the Respondent failed to observe rules of natural justice, acted maliciously, oppressively and that decision was unsupported by material facts or common sense and as a result, the Applicant has suffered irreparably.
3. It was the Applicant's submission that the Respondent totally ignored his response to the notice to show cause and that due process was not followed in accordance with Regulation 26 – 28 of the Judicial Service Commission. He relied on the case of STEVEN PARENO VS. JUDICIAL SERVICE



COMMISSION Misc. 1025 of 2003 – saying that he had satisfied the grounds upon which the orders could be granted.

4. The Application was opposed and Mr. Charles Njai, Registrar of the High Court of Kenya
5. an affidavit dated 18th February 2005 in which he deponed that in August 2002, the Chief Magistrate Kakamega Court informed the Hon. the Chief Justice that the Applicant had heard a matter involving possession of illegal firearms and ammunition and granted bail to the accused and yet the Applicant had no jurisdiction in the said matter. The accused in that case jumped bail. Following the recommendation by the Committee on Integrity and Ant Corruption the Applicant was cited severally as an officer without integrity and that his case constituted professional dishonesty and misconduct and that is when a notice to show cause was addressed to him on 12th March 2003. His response was considered by the JUDICIAL SERVICE COMMISSION which dismissed him on 12th March 2003.
6. Mr. Sitima who urged this matter on behalf of the Respondent contended that this court has no jurisdiction to hear the matter the relationship between the Applicant and Respondent being one of master and servant which should be considered in the ordinary civil courts. That the Respondent cannot be forced to keep a servant they do not want and the Applicant's only recourse would be damages. Counsel urged that the court can only make such an order of reinstatement if there was a clause underpinning the Applicant's employment.
7. Counsel relied on the case of ERIC MAKOKHA V UNIVERSITY OF NAIROBI CA 20/94 where the Court of Appeal held that it is only in contracts of employment which are statutorily underpinned like the constitutional offices of judges, Attorney General, that the court can make such an order there is breach.
8. Counsel went on to consider whether if the Applicant left the Respondents employment on his own volition, he could be forced back into employment and the answer was in the negative. Reliance was also made on HCC 1099/03 PATRICK OKILE V JUDICIAL SERVICE COMMISSION which was similar to the present and Justice Lesiit dismissed it. As regards the PARENO CASE, Counsel said this is not the most efficacious remedy. Mr. Sitima further observed that the Application was defective in that it was not made in the name of the Republic. He relied on HC MISC 280/96 KENTON KIJABE HILL FARMERS CO-OP SOCIETY V D.O. NAIVASHA in which Justice Aganyanya dismissed an application for Judicial Review which was not brought in the name of the Republic. Further Counsel urged that the orders would not issue for being against Public Policy. In JOHNSON V THE SHREWBURY & BIRMINGHAM RLY COMPANY (1914) E.R. 358 the court held that specific performance to enforce a contract of personal service is against public policy.
9. Before going into the merits of the Application, I deem it proper to consider the objections raised as to the form of the Application. I have noted that the Applicant is William Kinuthia Kahindi whereas the Respondent is the Judicial Service Commission. Again, the same William Kinuthia is named as the ex parte Applicant. There is now a host of authority which has dealt with the issue of who should be the Applicant in Judicial Review proceedings. The leading case on this point being FARMERS BUS SERVICE & OTHERS V THE TRANSPORT LSENSING APPEAL TRIBUNAL (1959) EA 779 where the Court of Appeal of East African held that prerogative orders (now judicial orders) are issued in the name of the crown and must be correctly intituled. That case had adopted the case of MOHAMED AHMED V REP (1957) EA 523 where it was held that prerogative orders, now read as judicial orders are issued in the name of the crown. This is the decision that Justice Aganyanya followed in KENTON HILL CASE (supra). In another case of JOTHAM MULATI WELAMONDI V ELECTORAL COMMISSION OF KENYA MISC APPLICATION 81/2002, Justice Ringera held that failure to bring such an application in the name of the Republic was fatal to the Application.



The place of the crown was replaced by the Republic when Kenya assumed a Republican status in 1964. The reason for bringing Judicial Applications in the name of the Republic is because the state has put in place a mechanism to check the excesses of its public bodies and officers and so brings the application on behalf of the affected party at the instance of that party. Justice Nyamu followed the above decision in HC MISC 875/01 PAGREX INTERNATIONAL V R.

10. Consequently I find that the Notice of Motion is incompetent having not been properly intitled or brought in the name of the Republic. This defect is fatal and the Notice of Motion should therefore be struck out.
11. The above notwithstanding, does this court have jurisdiction to hear this matter? It was Mr. Sitima's submission that this court has no jurisdiction to entertain the Applicants claim, the same having arisen from a master servant relationship. In the case of ERIC MAKOKHA the Court of Appeal consisting of 5 judges emphasized the mutuality principle in contracts of service. In that case, lecturers whose services had been terminated sought to be reinstated and the court held that equitable remedies are mutual so that if the lecturers could, under their contract of employment give notice to terminate their services, and the university could not force them to resume duty by the equitable remedy of specific performance, the only remedy for the University would be to sue for damages and that principle operates both ways.
12. The Court of Appeal went ahead to observe that the remedy for reinstatement could only issue if a statute conferred that right on the Applicants and therefore their employment was underpinned. The court said,

“They cannot competently claim to be reinstated unless a statute to which they can point expressly conferred this right on them and by that method, underpinned their continued employment.”

13. In the case of R. Vs. EAST BERKSHIRE ex parte WALSH (1985) QB 152 a nurse who had been dismissed for misconduct moved the court for Judicial Review Orders to quash that decision to dismiss him 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 Judicial Review procedure 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 terms of employment by a public body were controlled by statute, its employees might have rights both in public and private law to enforce those 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”

14. It was upon the applicant to demonstrate to the court that he enjoyed a public law right which has been infringed and that his terms of employment are controlled or underpinned by statute.
15. In another case of R. Vs. BBC ex parte LAVELLE (1983), ALL ER 241 an employee of BBC challenged his dismissal by way of Judicial Review and the court held that it had no jurisdiction to interfere with an employees' dismissal in a purely master and servant situation, where there was no protection of the employment beyond that afforded by the common law. In VIDYODAYA UNIVERSITY OF CEYLON & VS. SILVA (1964) 3 ALL ER 365, the court held that the remedy of certiorari was inconceivable where a master summarily terminated a servant's employment.



16. In this case, the Applicant has not pointed to any statute that underpinned his continued employment with the Judicial Service Commission. He was still on probationary terms and has not demonstrated what the Respondent should have done.
17. In the PARENO CASE, Justice Nyamu found that though the process leading to the dismissal of Pareno was flawed, there was substantial compliance with the Notice to show cause and that the dismissal had already taken effect and that in that case, a private law remedy appeared to be more efficacious than the public law remedy that had been sought.
18. The supreme court practices para 53/1-14/14 states as follows of Judicial Review remedies:-

“ Even if a case falls into one of the categories where Judicial Review will lie, the court is not bound to grant it; the jurisdiction to make any of the various orders available in Judicial Review proceedings is discretionary. What order or orders the court will make depends upon the circumstances of the particular case.”
19. In this case the court cannot force a remarriage between two contracting parties. This court would therefore decline to grant such an order.
20. Was due process followed by the Judicial Service Commission in terminating the probationary employment?
21. It was the Applicants submission that the 1st Respondent did not comply with Regulation 26 to 28 of the JUDICIAL SERVICE COMMISSION Regulations.
22. Under Regulation 26 of Judicial Service Commission Regulations, in proceedings of dismissal, the Chief Justice is supposed to frame a charge accompanied with a brief statement of the allegations to which the officer is to reply to and then several steps taken so that if the officer is found guilty, a commission decides what punishment to inflict. Regulation 27 deals with discipline proceedings that do not warrant dismissal. Under Regulation 28, the Chief Justice may retire one in public interest after considering reports submitted to him and shall notify the officer of all allegations against him. Though there seems to be some flaw in the procedure adopted by the JUDICIAL SERVICE COMMISSION in the manner of dismissing the Applicant, there was substantial compliance by the issuance of the Notice to show cause. The Chief Justice has discretion under Regulation 28 to consider the reports and come up with a decision, which he did and interfering with that discretion would amount to substituting the Chief Justice’s decision with that of the court which is not the mandate of this court under Judicial Review.
23. After a notice to show cause was issued to the Applicant, he replied to the allegations and the JUDICIAL SERVICE COMMISSION considered his reply before a decision to dismiss him for misconduct was made. The Applicant has been separated from his employer since 16th March 2004. And as earlier stated the court cannot force a remarriage between the Applicant and Respondent.
24. The Applicant seemed to base this Application on the ground that the allegations made against him were not true because the case in which he was said to have released a suspect on bond without having jurisdiction to do so, was found to have been different. However, it should be borne in mind that an Application for Judicial Review does not concern itself with the merits of a decision. It only concerns itself with the decision making process or whether the Judicial Service Commission followed due process in terminating his employment. The merits of such decision would be dealt with at another forum in the Civil Courts.



25. In any event, the relationship having already been severed, Judicial Review would not be the most efficacious remedy in the circumstances because the court cannot order a reinstatement. If the Applicant has any claim, he should pursue it in the ordinary civil courts.

26. For the reasons considered in this judgment, I find the Notice of Motion dated 20th August 2004 to be incompetent and unmerited and it is hereby dismissed with each party bearing their own costs.

DATED AND DELIVERED THIS 4TH DAY OF JUNE 2007.

R.P.V. WENDOH

JUDGE

In Presence of:

Mr. Bosire holding brief for Sitima for Respondent

Daniel: Court Clerk

R.P.V. WENDOH

JUDGE

