REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

Misc Appli 247 of 2007

IN THE MATTER OF AN APPLICATION BY CAPTAIN (RTD) ABDI YARE MOHAMMED FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE PARLIAMENTARY COMMISSION ACT AND THE PARLIAMENTARY SERVICE COMMISSION REGULATIONS 2002

B E T W E E N

REPUBLIC ……..….....APPLICANT

V E R S U S

PARLIAMENTARY SERVICE COMMISSION.....1ST REPONDENT

SECRETARY PARLIAMENTARY SERVICE COMMISSION

CLERK OF THE NATIONAL ASSEMBLY ……..…...…...2ND RESPONDENT

EX PARTE: ABDI YARE MOHAMMED

J U D G E M E N T

This judgement relates to a Notice of Motion dated and filed on 17-05-2006 in which the ex parte Applicant Captain (Rtd) Abdi Yare Mohamed seeks the following orders-

(a) an order of Certiorari to move this Court and quash the decision of the 1st Respondent and the 2nd Respondent retiring the Applicant in the interest of the service, as an employee of the first Respondent and advising the Applicant to lodge an appeal as contained in the Respondent's letter dated 2nd May, 2006,

(b) an Order of prohibition stopping the Respondent from taking or conducting any disciplinary proceedings or action against the applicant and retiring the Applicant from the service on the basis of the Respondent's letter dated 2nd May, 2006 and/or on the ground set out in the said letter,

(c) an order of prohibition barring each and all Respondents from restraining or stopping the Applicant from the exercise of his office, functions, duties, responsibility and role as Deputy Chief

Sergeant at Arms and an employee of the first Respondent,

The Application was based upon the statutory statement filed in accordance with Order LIII rule 1 (2) of the Civil Procedure Rules, and the Affidavit Verifying the Facts sworn on 11th May, 2006 by the Applicant.

The grounds upon which the reliefs cited above are sought are stated both in the statutory statement, and the skeletal submissions on behalf of the Applicant filed on 23rd October, 2006, but dated 19th October, 2006. These grounds which were reiterated by Miss Aulo, learned Counsel for the Applicant in the course of her submissions to the court on 27th November, 2006, are that-

(a) the Respondents have no power to retire the Applicant from the service save in accordance with Regulations 20 and 36 (1) and (2) including delegated powers vested in the Commission under the Parliamentary Service Commission Regulations *(the P.S.C. Commission*

Regulations),

(b) there is no appeal mechanism or process under Regulation 36 (1) and (2) of the Parliamentary Service Commission Regulations,

(c) the decision of the Respondents is consequently a nullity,

(d) the Respondents have acted in excess and without jurisdiction,

(d) The Respondents decision is *ultra vires* ***the PSC Regulations 2002.***

(e) the Respondents have not complied with Regulations regarding retirement on grounds of interest of service.

(f) the Applicant has been condemned and punished without being heard in violation of the principle of natural justice and more particularly the doctrine of *audi alteram partem*

(g) the Respondents' decision was irrational, unreasonable arbitrary, capricious, oppressive and vexatious.

(h) the Applicant's legitimate expectation of being given notice and information of the intended decision and action have not been fulfilled and complied with.

(i) the decision and action of the Respondents is unfair and without due process or fair hearing,

(j) the decision is for an extraneous purpose or ulterior motives unconnected with the objectives of the law and therefore constitutes an abuse of the law and legal process,

(k) the Respondents have not taken into consideration facts and the law as required by the PSC Regulations and have therefore not exercised their power or discretion in a fair, reasonable and judicious manner,

(l) the Applicant was not given notice that the Respondents were considering or contemplating retiring the Applicant on the grounds of interest of the service prior to the decision being made, or taken;

(m) the Applicant was not provided with an opportunity to make representations to the first Respondent and/or the Second Respondent prior to the decision being taken;

(n) the Respondents have not provided any or any adequate reasons for the decision to retire the

Applicant on the grounds on interest of service,

(o) the failure of the Respondents to give notice and reasons prior to the decision being taken, to provide the Applicant with an opportunity to make representations prior to the decision and to provide any, or any adequate reasons after the decision was taken amount to a breach of the Applicant's right to effective access to a Court and a fair hearing of the Applicant's right under the Constitution, International Bill of Human Rights, the Parliamentary Service Commission Act and the Parliamentary Service Commission Regulations 2002.

(p) The Respondent's decision was unlawful.

In essence those were the grounds urged by Miss Aulo in her submissions. In addition thereto Counsel also relied upon the following authorities-

(a) the Constitution of Kenya

the Civil Procedure Act and the Civil Procedure Rules,

(c) the Law Reform Act (Cap. 26, Laws of Kenya)

(d) the Parliamentary Service Commission Act,

(e) the Parliamentary Service Commission Regulations 2002;

(f) Geoffrey Muguna Mburugu v. Attorney-General & Another (H.C. C.C. No. 3472 of 1994 (unreported)

(g) Perinchief –Vs- Governor of the Island of Bermunda & Others [1997] ILRC 171.

I will refer to these arguments and judicial authorities and texts after I have put on record, the Respondent's case as stated in the Replying Affidavit of Owino Omolo the Deputy Clerk to the National Assembly sworn on 5th July, 2006, and filed on 6th July, 2006. Apart from confirming that prior to the termination of his services, the Applicant had been employed on permanent and pensionable terms of employment, the Affidavit of Owino Omolo gives further facts relating to the hiring of the Applicant on contract terms to permanent and pensionable terms, and the reasons for termination of the Applicant's services with the First Respondent.

The facts indeed are that the Applicant was hired as stated above, and was appointed ***Deputy Chief Sergeant -at Arms,*** and like every employee was expected to take orders and instructions from his superiors, and in the Applicant's case the ***Chief-Sergeant - at - Arms*** and generally be of (good) conduct and decorum. Mr. Omolo depones that the Applicant was of a violent temper and had a physical confrontation with his superior the **Chief-Sergeant -at- Arms** at a meeting of Senior officers of the PSC. The Applicant was also accused of absenting himself from duty of which he was informed and asked to show cause why the Applicant had extended his leave by one (1) day.

Mr. Omolo also depones in his Affidavit that after appointment the Parliamentary Service Commission establishes the security status of all its employees from the Department of Criminal Investigation (C.I.D) of the Kenya Police. Upon seeking the Applicant's security status, the C.I.D declined to clear the Applicant and give him a certificate of good conduct due to the fact that the Applicant had previously been charged in Nairobi Criminal Case Number 291/2001 with various criminal offences and had subsequently been dismissed from the military on or around 14th March, 2001 without benefits as a result of the said charges. The Applicant had failed to disclose all this in his application for employment with the National Assembly as was required of him.

Mr. Omolo explains in his Replying Affidavit that as the ***Deputy Chief Sergeant -at- Arms*** the Applicant is charged with the duty of ensuring the security of not only the members of Parliament but

also the President when he is attending Parliament Sessions, hence the holder of such office should in addition to being a person of impeccable integrity, have no criminal background whatsoever. The Applicant failed to disclose and instead withheld the above information at the time of applying for a vacancy with the National Assembly.

In conclusion, Mr. Omolo opines that considering all the above facts and given the image and place of the National Assembly, the Parliamentary Service Commission decided that the Applicant` had conducted himself in a manner not befitting an employee of the legislative arm` of government and decided to retire him in the interest of service, but gave him an option of appealing against the said decision to retire the Applicant.

The matters deponed to by Mr. Omolo have not been contradicted by any Further Affidavit from the Applicant. The Court is therefore entitled to take the averments of Mr. Omolo as correct. Learned State Counsel, Mr. Makongo, based his skeletal arguments on the said averments.

The issue which arises is whether the Applicant is entitled to the judicial review orders of certiorari and prohibition. Miss Aulo, learned Counsel for the Applicant was certainly of the view that the Applicant was entitled to the said reliefs. Her submissions are summed up in the Skeletal Arguments dated 19th October, 2006 and filed on 23rd October, 2006. The Applicant's basic case was premised upon the non-compliance by the Respondents with the requirements of Regulations 20 and 36 (1) and (2) including delegated powers vested in the Commission under the Parliamentary Service Commission Regulations.

Regulation 20 of the Regulations provides for delegation of disciplinary powers to deputed officers. The disciplinary powers delegated include the power to retire in the interest of the service, any employee in accordance with regulation 36(1) (2) of the Regulations. The "***deputed officer***" means "***the Clerk of the National Assembly."***

The side note to Regulation 36 is entitled "***retirements on grounds of interest service-***, and provides-

36(1) ***If the deputed officer after having considered every report in his or her possession made with regard to an employee, is of the opinion that it is desirable in the interest of the service that the service of such employee should be terminated on grounds which cannot suitably be dealt with under any other provision of the Regulations, he or she shall notify the employee, in writing, specifying the complaints by reasons of which his or her retirement is contemplated together with the substance of any report or part thereof that is detrimental to the employee.***

(2) ***If, after giving the employee an opportunity of showing cause why he or she should not be retired in the interest of the service, the deputed officer is satisfied that the employee should be required to retire in the interest of the service, he or she shall lay before the Commission a report on the case, the employee's reply and his or her own recommendation, and the Commission shall decide whether the employee should be required to retire in the Interest of the Service."***

Miss Aulo submitted, and I accept her submission, that there was failure by the deputed officer to adhere to procedural safeguards under the said Regulation 36 which establishes a clear procedure to be followed where an employee may be retired in the interest of the service. Those procedural safeguards are that-

(a) the deputed officer, that is to say the Clerk of the National Assembly, first receives reports made regarding the employee.

(b) the deputed officer will consider such reports and arrives at an opinion that it is desirable that the service of such an employee should be terminated, on the grounds of the interests of the service, and not other grounds.

(c) the deputed officer will notify the employee in writing specifying the complaints by reasons of which the employee's retirement is contemplated together with the substance of any report or part

thereof that is detrimental to the employee;

(d) the employee is given an opportunity to show cause why he or she should not be retired in the interest of the service,

(e) the deputed officer if after giving the employee an opportunity to show cause as aforesaid, is satisfied that the employee should be retired in the public interest, then the deputed officer must lay before the Commission-

(i) a report on the case;

(ii) the employee's reply, and

(iii) the deputed officer's own recommendation.

The Replying Affidavit of Otieno Omolo referred to above attaches –

(**1)** a copy of an application for Employment (PSC- Form), dated 4th March, 2002. In answer to paragraph 17 – Have you been charged in a Court of Law and the answer was "N/A" ***(Not applicable),***

(2) Offer of appointment dated 28th March, 2003,

(3) Letter of appointment dated 12th November, 2003,

(4) Confirmation of Appointment dated 14th May, 2004 of the Applicant, as Deputy Chief Sergeant at Arms.

(5) Letter dated 29th March, 2006 by the Chief Sergeant at Arms denying allegations leveled against him by the Applicant,

(6) a copy of a letter dated 24th January, 2003 referring to an earlier show cause letter of 14th November 2003, and now calling the Applicant to explain why he was absent from duty, without leave, and why severe disciplinary action should not be taken against the Applicant. There is no indication that the Applicant responded to that letter in the Affidavit of Owino Omolo.

(7) a copy of the Minutes of the Defence Council dated 19th March, 2001 under Minute o6/01 – Retirement/Termination/Resignation of Commission 8 (c) – ***Termination of Commission without Benefits. One Captain Y Mohammed*** (the Applicant) was one of those whose Commission was terminated without benefits. The grounds for this drastic termination of Commission without benefits related to Criminal charges preferred against the Applicant together with six (6) other officers in Chief Magistrates Criminal Case No. 291 of 2001 a fact which the Applicant failed to disclose in answer to the question in paragraph 17 of the PSC Form Application for Employment whether he had been charged with any criminal offence and to which he had answered with letters "***N/A."***

(8) a copy of a letter dated 15th May, 2006 to the Secretary Parliamentary Service Commission, and Clerk to the National Assembly, being an appeal against retirement on the ground of Interest of the Service; and in which the Applicant denies ever being accorded the treatment prescribed by Regulation 36 (1) and (2) of the PSC Regulations.

Having perused the attachments to the Applicant's Affidavit Verifying the Facts sworn on 11th May, 2006, it is clear that the procedure set out in Regulation 36 (1) (2) of the Parliamentary Service Commission Regulations was not followed. There is a possibility in light of Mr. Omolo's letter of 25th April, 2006, and the Clerk to the National Assembly's letter of 2nd May, 2006, conveying to the Applicant, the Parliamentary Service Commission's decision to retire the Applicant in the interest of the

service, that these requirements were considered but the Replying Affidavit of Owino Omolo is significantly silent and short on the procedural steps required under Regulation 36 of the Parliamentary Service Regulations for - a report on the case, the employee's reply and the deputed officer's own recommendation. These are prescribed requirements and the court cannot simply infer them.

In the absence of proof of compliance with the requirements of the prescribed regulation, the proper inference to draw is that the Respondents did not comply with the requirements of Regulation 36 (1) and (2) as stated above.

Regulation 36 of the Parliamentary Service Commission Regulations is borrowed from Regulation 40 of the Public Service Commission Regulations, which is in these terms-

"***40. If an authorized officer, after having considered every report in his possession made with regard to a public officer, is of the opinion that it is desirable in the public interest that such public officer should be terminated on grounds which cannot suitably be dealt with under any other provisions of these Regulations, he shall notify the public 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 public officer"***

Considering the said Regulation 40 in the case of ***JOSEPH MULOBI –VS- THE ATTORNEY-GENRAL (H.C.C.C. No. 742 of 1995*** (also reproduced in the Nairobi Law Monthly, No. 15 March/April 1989, and also relied upon in the case of ***GEOFFREY MUGUNA MBURUGU*** (H.C.C. No. 3472 of ***1994 – unreported***) the court held that the laid down prescribed procedure in cases involving the dismissal of a civil servant must be strictly followed because it is the only safeguard to ensure that an officer had each charge against him deliberated upon, and if the laid down procedure is not followed, then any disciplinary action would be quashed."

The case of ***PERINCHIEF –VS- GOVERNOR OF BERMUDA & OTHERS*** [1997] ILRC, 171 involved the abolition of the Officer of the Assistant Commissioner without reference to the holder of that office contrary to the terms of service as contained in the Bermuda Police Act 1974 and the Bermuda Constitution Order 1968. On the applicant's application that he had not been given opportunity to be heard regarding why he, as opposed to any other incumbent Assistant Commissioner of Police, should be retired from the Bermuda Police Force as a result of the abolition of one of the posts of Assistant Commissioner of Police, despite the fact that he had not reached the age of 55, whereas the other Assistant Commissioner of Police was 56 years old, and that in absence of a hearing being afforded to him, the respondents were in breach of ***inter alia***, the rules of natural justice, the Government General Order No. 1560, and the Applicant's legitimate expectation that if he had been permitted to remain in the force upto the age of 60 he would be given opportunity to be considered for promotion to the posts of Deputy Commissioner of Police and Commissioner of Police. The court held that-

"***Certiorari was available whenever anybody of persons having legal authority to determine questions affecting the rights of individuals and having the duty to act judicially acted in excess of legal authority."***

In answer to the Applicant's claim in the Perinchief case, argument was put that- ***although the error of not following the laid down procedure to arrive at the decision sought to be quashed) may be fundamental***…… the consequences of granting an order of certiorari is disproportionate to any good it could do, ***[that***] the order ought not be made if it would be detrimental to administration…***[that*]** an order of certiorari would be barren since, in the end, the decision will be no different."

In response to that argument the court ruled at page 188-

"it would be regrettable if a litigant establishes that he had been legally wronged and particularly in so important an issue as his chosen profession, has to be sent away from a court of justice empty handed save for an order for recoupment of the expense to which he has been put in establishing a barren victory."

At page 190 of the Perinchief case the court said:-

*…..**the cardinal principle is that the law must be upheld….If the Court refuses to grant the relief sought, the acts of the Respondents would be regarded as producing a valid legal effect…… The further the proceedings go and the near they get to the imposition of a penal sanction or to damaging someone's reputation, or to inflicting financial loss on someone, the more necessary it becomes to act judicially, and the greater the importance of observing the notion of audi alteram partem."***

In the case of ***R Vs DEVON COUNTY COUNCIL***, ex parte Baker [1995] All E.R. 73 at page 91 the Court referred to the four-part statement of the basic requirements of consultation originally formulated by the Stephen Sedley Q.C. – These are-

*First**, the consultation must be at a time when proposals are at a formulation stage,* *second**, that the proposer must give sufficient reasons for any proposal to permit intelligent consideration and response* *third* *– **that adequate time must be given for consideration and response, and finally,* *fourthly* *that the product of consultation must be conscientiously taken into account in finalizing any statutory proposals;***

And in ***R. Vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT,*** ex parte Doody [1994] I A.C. 531, 560 DC, also cited in Judicial Handbook by Michael Fordham – (2004 Edition), at page 1021, Lord Mustik said-

*"**Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification or both"***

Miss Aulo argued that the decision conveyed to the Applicant by the Respondents via the letter dated 2nd May, 2006 was a ***fait accompli***, but and indeed, the letter of 25th April, 2005 was simply worse. It merely sent the Applicant on compulsory leave. It made no mention of allegations under investigation against the Applicant. Under the principle of consultation referred to in the case of ***R. Vs. Devon County Council, Ex parte Baker,*** the Respondents ought to have given the Applicant a brief of the allegations against him, and asked him to show cause why further disciplinary action including dismissal in the interest of the service should not be taken against him.

The Respondents attempted to give such grounds in the letter of 2nd May, 2006 conveying to the Applicant the Commission's decision to retire the Applicant in the interest of service, and asking the Applicant to appeal against that decision.

The decision to retire the Applicant in the interest of service was expressed to be in terms of Regulation 36 of the Parliamentary Service Commission Regulations. I have set out the requirements of the said Regulations as to the procedure for retirement of an employee in the interest of the service. Those requirements were not adhered to at all. Besides a request for an appeal was inconsequential as the said Regulation has no provision for an appeal after a decision to retire an employee on grounds of interest of the service. The simple and only answer to the Respondents' decision, is that in terms of Regulation 36, that decision is a nullity, and an order of Certiorari should issue.

Mr. Makongo argued quite forcefully citing several authorities that the judicial remedy of Certiorari does not lie. While acknowledging that the Respondents' did not follow or comply with the procedure prescribed by Regulation 36 for the retirement of an employee in the interests of the service, Mr. Makongo argued that the relationship between the Applicant and the Respondent was that of a normal employment contract, with no statutory security of tenure, that granting of an order of certiorari would amount to an order for specific performance of an employment contract, that neither the Parliamentary Service Commission Act nor the Regulations made thereunder confer any security of tenure entitling the Applicant to reinstatement. Counsel further argued that the said Act and the Regulations merely provided for a procedure for retiring employees in the interest of the service and not a statutory security of tenure

which if not followed entitles the Applicant to reinstatement.

Counsel relied upon the decision of the Court of Appeal in the case of ***ERIC MAKOKHA & 4 OTHERS –VS- UNIVERSITY OF NAIROBI & 20 OTHERS*** (unreported) (Civil Appeal No. 20 of 1994) in which University Lecturers were dismissed without following the procedure laid down in the University Act and the regulations. The court held ***inter alia*** that the employment of the lecturers is unlike that of judges or the Attorney-General or the Controller & Auditor-General under Sections 61, 109 and 110 of the Constitution of Kenya in that these are entrenched provisions for the security of tenure of those offices.

Counsel also cited the case of the ***CHIEF CONSTABLE OF THE NORTH WALES –VS- EVANS [1982] I.W.L.R. 1155*** where the Law Lords applying their decision in the case of ***RIDGE -VS- BALDWIN [1964] A.C. 40*** held inter alia – that, while an order of mandamus ordering his reinstatement was the only satisfactory remedy so far as the applicant was concerned, in practice such an order might border on the usurpation of the powers of the Chief Constable which was to be avoided, and that a declaration that the decision of the Chief constable was unsatisfactory because it was not clear what consequences flowed from it, and that the applicant should be granted a declaration affirming that, by reason of his unlawfully inducing resignation, he had thereby become entitled to the same rights and remedies, not including reinstatement as he would have had if the Chief Constable had not unlawfully dispensed with his service under regulation."

In the case of ***RIDGE -VS- BALDWIN [1964] A.C. 40, 66*** Lord Reid said- "***there is an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation."***

In ***REPUBLIC -VS- JUDICIAL SERVICE COMMISSION ex parte SUMEKI ONDIEKI*** (*Nairobi H.C. Misc. Application No. 1043 of 2003)* the Court declined to grant an order of Certiorari where a magistrate had been retired in the public interest without being given a hearing as required by regulation 26 of the Judicial Service Commission Regulations stating, that it would be inappropriate to impose an employee upon an unwilling employer.

In ***REPUBLIC –VS- JUDICIAL SERVICE COMMISISON*** ***ex parte Stephen S. Pareno (Nairobi H.C.C. Misc. Application No. 1025 of 2003) the court posed these questions –***

"***suppose this court were to quash the dismissal decision and remit the matter back to the respondent with the recommendation that Regulation 26 be followed before another decision is reached is there a guarantee that the decision in the second instance would be different? I am not convinced in the circumstances that the decision would be different. An order to remit would therefore be in vain."***

Mr. Makongo therefore concluded that given the averments contained in the Replying Affidavit of Owino Omolo, it would be unlikely that the Parliamentary Service Commission would reach a different conclusion vis-à-vis the Applicant's contract of employment even if they had followed the procedure set out in Regulation 36, the Respondents would most probably reach the same conclusion, and by granting an order of Certiorari the Court would be acting in vain.

Having considered the rival arguments, and the judicial authorities on either side, I set out in the subsequent passages of this judgement my opinion and conclusion in this Application, starting **firstly**, with the nature of judicial review and ***secondly*** the nature of the contract of service in light of the authorities cited and ***thirdly*** my final orders.

(I) THE NATURE OF JUDICIAL REVIEW

In his opening speech (in Chief Constable of the North ***Wales, Police -Vs- Evans*** (supra), Lord Hailsham, the Lord Chancellor said inter alia –

….. ***the remedy of judicial review (provided under R.S.C. 53) is intended to protect the individual***

against the abuse of power by a wide range of authorities, judicial quasi-judicial and administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner."

The Lord Chancellor, continued at page 160 -

*……**Since the range of authorities and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case.** <u>But it is important</u> **to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not 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 is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by law.***

*….**At page 161- the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."***

(ii) <u>THE NATURE OF THE CONTRACT OF SERVICE AND THE AUTHORITIES</u>

In the case of **<u>CONSOLATA KIHARA & 241 OTHERS –VS- DIRECTOR OF KENYA TRYPANOSOMIASIS RESEARCH INSTITUTE [2003) 232</u>,** Kuloba J. held:-

"***It is an elementary principle of law in cases of master and servant*** *(that)* ***if any employer wrongfully dismisses an employee or servant, the employment is effectively terminated albeit in breach of contract. An employer can terminate an employment contract with his employee at any time, and for any reason or none."***

If an employer terminates the employee's contract in a manner not warranted by the contract, he must pay damages for breach of contract.

The law is settled that where there is an ordinary contractual relationship of master and servant the master terminates the contract, the servant cannot obtain an order of certiorari.

In the case of **<u>REPUBLIC –VS- JUDICIAL SERVICE COMMISSION [2004] K.L.R. 2003</u>,** it was held-

"***If the Court were to quash the decision and remit the matter*** *(to the Judicial Service Commission)* ***with a direction that the Regulation 26 be followed, there was no guarantee that the decision in the second instance would be different.***

In a judicial review hearing on an application such as this one where the single remedy, merely, an order of Certiorari, the Court would not grant any other relief not prayed for in the statement."

The reason for dismissal having been given the statutory underpinnings of the Regulations relied on could not *per se* ***prevent the court from finding that ultimately there was a contract for personal services, and the most efficacious remedy for the Applicant would be a claim for damages which had not been claimed in these proceedings."***

<u>CONCLUSION AND FINAL ORDERS</u>

In this matter, the Applicant was first offered employment as a Deputy-Sergeant- at- Arms by letter dated 28th May, 2002, for a period of three (3) years renewable contract. "***The conditions of contract of employment were subject to all regulations for officers which are now in force or which may be***

promulgated from time to time."

By a Letter of Appointment dated 12th November, 2003, the Applicant was appointed on probation as Deputy Chief Sergeant at Arms, with effect from 26th February, 2002, within the Department of the National Assembly. This letter subjected the Applicant to all regulations for officers of the Public Service of Kenya which are now in force or which may be promulgated from time to time.

The Applicant accepted the terms of said letter on 1st December, 2003.

The first question which arises is whether the Applicant was subject to all the regulations for officers of the Public Service of Kenya which by law fall under the Service Commissions Act (Cap. 185 Laws of Kenya), ***OR is*** the Applicant subject to the Parliamentary Service Commission Regulations made under the Parliamentary Service Commission Act (***No. 10 of 2001).***

By strict construction of this Letter of Appointment the Applicant is subject to the regulations applicable to all officers under the Service Commissions Act, and not the Parliamentary Service Commission Act or Regulations of that name made on 24th April, 2002. However by common understanding of Counsel and I think the Applicant as well, the Applicant was subject to all regulations of the Parliamentary Service Commission and those are the Regulations published under Legal Notice No. 63 of 2002 – and known as the Parliamentary Service Regulations 2002 ***(the Regulations).***

Again by common acknowledgement and understanding of the Applicant and counsel on both sides of the divide the Applicant was said to have been retired under Regulation 36 of the Regulations. By express acknowledgement of Counsel for the Respondents, the Respondents failed and/or neglected to observe the requirements for dismissal of the Applicant on the grounds of public interest of the Parliamentary Service. Their defence is that even if we did not observe those regulations, it was quite in order because the Applicant was under a contract of employment or service, and the court will not order specific performance because that would amount to enforcing ***servitude or slavery*** on the part of the Applicant. The authority was that of ***Eric Makokha*** & ***4 others –Vs- University of Nairobi*** *(supra)* and not only that case, but others I have referred to above.

Whereas I accept as good law, the principle that a breach of contract of personal service cannot be redressed by the equitable remedies of injunction and specific performance, and indeed that the court cannot force a re-marriage on unwilling partners or that an aggrieved party cannot invoke an equitable remedy to ***underpin a tenure*** of employment any more than the same remedy can be invoked to compel redress of any breach of an employment contract, this is however no defence in an appropriate suit by an employer to follow the terms of contract, particularly where those terms are statute-born.

The import of the cases, both foreign and local is that in matters of contract for personal service, no order of Certiorari will issue, even though the employer has breached his part of the terms of contract. The philosophy behind this view is premised upon the doctrine of mutuality of the contract of employment. An employer will not demand the performance of a contract if the employee decides to terminate it on his part and similarly an employee will not demand to remain in employment if the employer decides to terminate the employee's contract. The philosophy is not dependent upon the principle that there was no guarantee that the employer concerned would if the procedure for termination were adhered to, arrive at a different decision and have the aggrieved employee reinstated.

The question whether or not the employer will come to the same or different decision is not the issue in judicial review. The issue in judicial review as observed by Hailsham, the Lord Chancellor in the case of the ***Chief Constable of the North Wales Police*** **-Vs-** ***Evans*** (supra) is whether the individual concerned receives fair treatment by the authority to which he has been subjected and in making that inquiry, the court is not to substitute its opinion or decision with that of the concerned authority.

Where therefore a contract of service provides that it or the terms of that contract are subject to that or this law, argument that the contract is thereby statutorily underpinned is irrelevant and besides the point. When lawyers argue that a particular contract of service is statutorily underpinned like that of judges and

other holders of Constitutional offices, such as the Attorney-General or the Controller and Auditor-General it does not mean that the holders of those offices must die in office. All it means is that so long as the holders of such offices remain of good behaviour or conduct, they will not be removed from office, and if cause should arise for their removal, such removal shall be done in accordance with the procedure provided in the Constitution for their removal in respect of constitutional offices. To remove them at random or at the whim of those in authority over them, would be unconstitutional.

So what is the position of a humble executive or other officer serving under the Parliamentary Service Commission Act, and Regulations made thereunder whose letter of appointment says that he will be subject to all the regulations for officers of the Public Service Commission of Kenya, and in this case the Parliamentary Service Commission Act and Regulations, which provide for the manner in which the services of such an employee may be terminated? In my humble view, it does not mean that the offices held under the Parliamentary Service Commission Act and Regulations made thereunder are statutorily underpinned like those of holders of Constitutional office where there are entrenched provisions for removal of such office holders. All it means in my humble view is that, the officer concerned shall be subjected to the procedural safeguards – the rules of natural justice, before he is removed or his contract of employment is terminated.

It is clear from the analysis of Regulation 36 of the Parliamentary Service Regulations under which the Respondents purported to terminate the services of the Applicant that the procedures set thereunder for termination of the Applicant's employment were not followed by the Respondents. It is no defence to say that the Applicant would have been dismissed any way even if we had followed the requirements or the laid down procedure for termination of his services in the interest of the service. It is also no defence to argue that we will follow the procedure and have his services terminated anyway, and his victory would be pyrrhic and in vain.

I think that this is a very narrow and unfortunate manner of looking at an Applicant's victory. A court will not issue an order in vain, and an Applicant's victory will not be pyrrhic merely because he has an assurance that if the procedure for his removal from employment is adhered to or followed the decision will be the same. He will be removed. That I think is not the concern of an affected employee or the Applicant in this matter. The concern of an employee or the Applicant here is that the procedure for termination of his employment on the grounds of interest of the service was not followed or adhered to by the Respondents, and what does a Court of law think of his, or such a claim?

I have already referred to the case of ***Re Godden*** [1971] 3 ALL ER. 20 at 25, [1971] 2 QB. 662 at 669 where Lord Denning M.R. said-

*"……..**decisions leading to compulsory retirement are of a judicial character and must conform to the rules of natural justice."***

I have also referred to the case of ***R.V. Devon County Council, ex parte Barker*** [1995] ALL E.R. 73 at page 91 where I set out the four part statement of the basic requirements of consultation which principles are effectually embodied in Regulation 36 of the Parliamentary Service Regulations.

I further referred to the decision of **Cockar** J, (***as he then was)*** in the case of ***Joseph Mulobi –Vs-Attorney-General*** (HCCC No. 742 of 1985), where the Government failed to observe the requirements of Regulation 40 of the Public Service Commission Regulations made under Section 13 of the Service Commissions Act (***Cap. 185, Laws of Kenya***), and held that disciplinary proceedings had been rendered ***ab initio*** invalid. The Plaintiff's retirement from the service was declared to be invalid and quashed. The court entered judgement for the Plaintiff including costs as the Plaintiff, Joseph Mulobi had prayed.

The Applicant here is not asking for any judgment in this matter. The Applicant prays for an order of Certiorari and also order of prohibition to prohibit the Respondent from taking any disciplinary measures against the Applicant and prohibiting the Applicant from accessing his offices and exercising the functions of the office of Deputy Chief Sergeant at Arms.

An order of prohibition is said to act in the future. It will not go to cure or correct what has already been done. The Applicant has effectively been barred from exercising any functions of his office. An order of prohibition will therefore not lie, and the same is declined.

The remedy of the Order of Certiorari will, on the grounds of illegality, go to declare that the inferior court or authority has not acted in accordance with law, or has, acted in excess of its authority or jurisdiction, or is, on the grounds of fairness, otherwise guilty of some procedural impropriety which renders its decision a nullity, and puts both the aggrieved party and the authority or tribunal in the same position where they were at the time the quashed decision was made. It is neither an order for specific performance of contract nor for reinstatement of a dismissed employee. On matters of master and servant, an order of Certiorari will not issue because it would create a situation of forced employer or employee relationship leading to servitude and slavery on either party. A declaration that the termination was not in accord with the procedural safeguards becomes a cornerstone and foundation for any suit for damages for the unlawful dispensation of the applicant's services.

For the reasons already reiterated in many passages of this judgement, no order of Certiorari will issue and the Notice of Motion dated 17th May, 2006 and filed on the same day is dismissed with a direction that each party shall bear its own costs.

There shall be orders accordingly.

Dated and delivered at Nairobi this 5th day of October, 2007.

M.J. ANYARA EMUKULE

JUDGE.