



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**Misc Civ Appli 244 Of 2003**

**SALIM ALI SAID.....APPLICANT**

**AND**

**THE COMMISSIONER OF POLICE.....RESPONDENT**

**RULING**

This ruling is in respect of a preliminary objection which was raised by counsel for the respondent. The preliminary objection was dated 6<sup>th</sup> June, 2005 and it was to the effect that the applicant's application dated 8<sup>th</sup> June, 2004 is incurably defective and bad in law and that it should be struck out with costs. It was also stated that the application was time barred.

Mr. Kamau for the respondent submitted that the applicant was dismissed from his employment on 13<sup>th</sup> of January, 2000 and he appealed against the dismissal on 14<sup>th</sup> January, 2000. The appeal was then heard and dismissed and on 7<sup>th</sup> of October 2002 the decision was communicated to the applicant yet he waited upto the 23<sup>rd</sup> May 2003 to file the present application. Counsel submitted that the application was filed outside the mandatory six months period provided by ***order LIII rule 2*** for instituting certiorari applications. He therefore urged the court to strike out the applicant's application.

Mr. Kamau further submitted that it was mandatory that judicial review proceedings be brought in the name of the Republic and he cited ***FARMERS BUS SERVICE AND OTHERS VS THE TRANSPORT LICENCING APPEAL TRIBUNAL (1959) EA 779***.

Counsel also submitted that in judicial review proceedings the court is not concerned with merits or demerits of a matter but it looks at the procedure that was followed in arriving at the decision. He said that the applicant's application was bad in law to the extent that it was questioning the end result of the applicant's appeal but not the procedure that was followed in determining the same.

Mr. Omae for the applicant opposed the preliminary objection. He submitted that the applicant's application was not brought outside the six months statutory period as stated by Mr. Kamau. He said that the decision of the Commissioner of Police was communicated to the applicant on 27<sup>th</sup> January, 2003 vide a letter which was hand delivered to him on that day although the same was dated 29<sup>th</sup> October 2002. From 27<sup>th</sup> January 2003 when the applicant was made aware of the said decision six months were to expire on 27<sup>th</sup> July, 2003 yet the application was filed on 26<sup>th</sup> May, 2003. Mr. Omae submitted that a decision is deemed to be delivered on the day when it is made known to the applicant.

With regard to the second objection, Mr. Omae conceded that the heading of the applicant's application was wrong in that the matter had not been commenced in the name of the Republic but added that such defect was not incurable. He urged the court to order an amendment to the same and added not prejudice could be occasioned to any party. Counsel further submitted that the application before the court was challenging the decision of the Commissioner of Police because the applicant was charged under non existence rules. He therefore said that the applicant was not just questioning the end result but more important the procedure in which that result was reached.

I have carefully considered all the submissions that were made by both counsel in this matter. With regard to the first ground of preliminary objection relating to time limitation, I have seen annexure marked "SAS 5" to the applicant's affidavit and it is clear that the decision of the Commissioner of Police was handed over to the applicant on 27<sup>th</sup> January, 2003 and therefore in my view, time began to run from the said date and not earlier. It would be plainly wrong to hold that the applicant was deemed to be aware of the decision from the date then the same was made since the same had not been made known to him. I therefore hold that the application is not time barred and therefore overrule the first ground of preliminary objection.

In **FARMERS BUS SERVICE AND OTHERS VS THE TRANSPORTS LICENCING APPEAL TRIBUNAL** (supra), it was held that prerogative orders are issued in the name of the crown (now Republic) and applications for such orders must be correctly intituled. In the said matter the Court of Appeal ordered an amendment to the notice of appeal and other documents in the appeal so that they could bear the proper heading. In the present matter Mr. Omae had conceded that the applicant committed the same mistake of failing to bring his application in the name of the Republic. In my view, such a defect cannot cause summary dismissal of an otherwise competent application. I therefore direct that the heading of the application be amended appropriately. The said amendment should be done within the next ten days from the date hereof.

As to whether the applicant's application seeks to question only the final outcome of his appeal or the manner in which a decision was reached, this is a matter which can only be dealt with during the hearing of the application. In conclusion I dismiss the preliminary objection and the costs thereof shall be in the cause.

DATED, SIGNED AND DELIVERED at Nakuru this 5<sup>th</sup> day of April, 2006.

**D. MUSINGA**

JUDGE

5/4/2006

**D. MUSINGA**

JUDGE

5/4/2006