Republic v Judicial Service Commission; Khaemba (Interested Party) (Miscellaneous Civil Application 21 of 2005) [2006] KEHC 1922 (KLR) (4 April 2006) (Judgment)

REPUBLIC v JUDICIAL SERVICE COMMISSION & another [2006] eKLR

Neutral citation: [2006] KEHC 1922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION 21 OF 2005

GBM KARIUKI, J

APRIL 4, 2006

BETWEEN

REPUBLIC ..... APPLICANT

AND

JUDICIAL SERVICE COMMISSION ..... RESPONDENT

AND

COLLETTA OSYANJU KHAEMBA ..... INTERESTED PARTY

Termination of employment from a public body does not necessarily automatically fall into the realm of judicial review

The application sought an order of certiorari to quash the decision of the Judicial Service Commission (JSC) retiring the applicant and an order of mandamus to issue to the JSC to reinstate her employment. The court held that in the case of a public body, termination of employment did not necessarily automatically fall into the realm of judicial review unless it could be shown that it was of a nature of public law and not a private law to which private law rights and remedies applied.

Reported by Kakai Toili

Judicial Review *– matters that fell within the realm of judicial review - termination of employment - termination of employment from a public body - whether termination of employment from a public body automatically fell into the realm of judicial review - what was required for one to succeed in judicial review in a dismissal case an employee.*

Judicial Review *– nature of judicial review -factors to consider in judicial review applications - decision making process - factors to consider in determining whether the decision-making process was conducted in accordance with the law - whether judicial review was concerned with merits of decisions of statutory bodies or tribunals.*

Civil Practice and Procedure *– affidavits – affidavits filed after the court granted leave to file judicial review - whether where leave was challenged at a subsequent stage, an affidavit filed after leave could be called in aid to reinforce the existence of a prima facie case at the leave stage - Civil Procedure Rules, Order LIII, rule 3(1).*

Brief facts

The interested party was employed as a secretary by the respondent, the Judicial Service Commission (JSC). In the cause of her employment there were a series of complaints against her which led to her interdiction which was subsequently lifted. However, by a letter dated March 19, 2004, the JSC wrote to the interested party tabulating the latter's antecedents that had led to her interdiction and called upon her to show cause why fresh disciplinary proceedings should not be instituted against her.

The interested party responded to the JSC and refuted the allegations and further pleaded for leniency. However, the JSC notified the interested party that she had been retired with effect from November 10, 2004 in the public interest.

The interested party filed the instant application and sought an order of *certiorari* to quash the decision of the JSC retiring her and an order of *mandamus* to issue to the JSC to reinstate her employment. The interested party contended that her forced retirement was arbitrary, capricious, and a perverse exercise of discretionary power and lawful authority.

Issues

i. Whether termination of employment from a public body automatically fell into the realm of judicial review.
ii. What was required for one to succeed in judicial review in a dismissal case an employee?
iii. Whether judicial review was concerned with merits of decisions of statutory bodies or tribunals.
iv. What were the factors to consider in determining whether the decision-making process was conducted in accordance with the law.
v. Whether where leave was challenged at a subsequent stage, an affidavit filed after leave could be called in aid to reinforce the existence of a *prima facie* case at the leave stage.

Held

1. Rule 3(1) of Order LIII of the Civil Procedure Rules did not provide for the filing of an affidavit in support of the motion perhaps because rule 1(2) of the same Order required a statement and affidavits verifying the facts relied on to accompany the application for leave to apply for the order/s. It was on the basis that those documents revealed at the leave stage that there was a *prima facie* case for the order or orders sought that leave was granted. Any additional affidavit or affidavits required leave to be filed.
2. One did not have for to seek to see that where leave was challenged at a subsequent stage, an affidavit filed after leave with or without leave could not be called in aid to reinforce the existence of a *prima facie* case at the leave stage. At any rate, as there was no leave to file the supporting affidavit, the same was struck out.
3. When an employer terminated the employment of its employee in accordance with the terms of the contract of employment, the employee could not be heard to complain. But where the termination breached the terms of the contract of employment, the employee could maintain an action for breach of contract. In the case of a public body, termination of employment did not necessarily automatically fall into the realm of judicial review unless it could be shown that it was of a nature of public law and not a private law to which private law rights and remedies applied.
4. Employment by a public authority did not *per se* inject any element of public law. So as to succeed in judicial review in a dismissal case an employee must show that the matter was of public law rights as opposed to private law rights always bearing in mind that the common law did not admit any specific performance of contract of service.
5. Where a matter was a public law one as distinct from private law, judicial review would be available to the aggrieved party. Judicial review, however, was not concerned with merits of decisions of statutory

bodies or tribunals, but rather with public rights and decision-making process. Where the decision was wrong, the manner of challenging it was through an appeal.

6. The court did not in judicial review exercise or usurp the function or power of an appellate court. Rather, it exercised its original supervisory jurisdiction conferred on it by section 8 of the Law Reform Act, Chapter 26 of the Laws of Kenya. The rationale behind that principle was that the High Court was entrusted by the law with the task of ensuring that an individual received fair treatment and that the authority concerned acts within the law. The court would not be concerned whether the authority involved made a good decision or not providing that the decision was authorized by the law and the individual was given fair treatment and the rules of fair play and natural justice were adhered to.
7. In determining whether or not the decision-making process was conducted in accordance with the law, the court would, *inter alia*;
    1. ascertain if there was failure by the concerned authority to act fairly and to observe the principles of national justice; the principles relating to bias;
    2. bad faith;
    3. irrational decisions which may amount to unreasonable decision; or
    4. whether the concerned authority took irrelevant considerations into account or failed to take into account relevant considerations thus making the decision making process wanting and therefore amenable to judicial review.
8. The contract of employment between the interested party and the respondent did not have underpinnings that brought it into the realm of public law rights, nor was the nature of her job in great public service to an extent where the public would be said to be interested or concerned to see that the respondent acted towards the interested party lawfully and fairly because the public may ultimately be affected by the decision of the respondent in view of the nature of the service rendered. The interested party did not satisfy the court that she was entitled to the judicial review remedies of *certiorari* and *mandamus*.

Application dismissed; each party to bear its own costs.

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

1. The pleadings in this cause show that COLLETTA OSYANJU KHAEMBA, described as the interested party, gave the Registrar Notice on 7-.2.2005 of her intention to apply for leave to seek an order of Certiorari against the Judicial Service Commission to quash the latter's decision dated 10.11.2004 to retire her from Judicial service and for an order of mandamus to reinstate her in employment.

2. The interested party was employed as a Secretary by the Judicial Service Commission and served as such in Bungoma, Kisumu and Thika law courts.

3. In the cause of her employment there were a series of complaints against her which led to her interdiction which was subsequently lifted. By a letter dated 9.10.2002 the Secretary of the Judicial Service Commission confirmed to the Interested Party that the interdiction imposed on her had been lifted with effect from the date it had been imposed, that is to say, 27-2-2002.

4. However, by a letter dated 19.3.04 the Respondent wrote to the interested party tabulating the latter's antecedents that had led to her interdiction and called upon the Interested Party to show cause why fresh disciplinary proceedings should not be instituted against her. In the penultimate paragraph of the said letter the Secretary of the Respondent stated "the foregoing clearly demonstrates that your conduct does not befit a court official. This office is contemplating taking a sever disciplinary action against you, which may include dismissal from the service with loss of all terminal benefits, but before this is done you are hereby called upon to show cause why the intended action should not be taken against you."

5. The Resident Judge at Kisumu where the interested party was attached at the time the letter was written pleaded for the interested party in his letter dated 26-3-2004 to the Secretary of the Respondent as did also the Chief Magistrate in her letter dated 30-3-2004 to the latter. The interested party also responded to the Respondent's letter dated 19.3.2004 on 25.3.2004 in which she refuted the allegations and pleaded for leniency pointing out that she had worked for the Respondent for 23 years and had served in six stations pointing out that she was a parent with heavy financial responsibilities.

6. However, on 26.11.04, the Respondent notified the interested party that she had been retired with effect from 10.11.04 in the Public Interest and in accordance with Regulation 28 of the Judicial Service Commission Regulations, Chapter 185 of the Laws of Kenya. This is what precipitated those proceedings by the interested party.

7. Leave to apply for the said orders was granted on 13.4.2005 with a direction that it would not operate as a stay because to so order "would be to seek to reinstate the interested party in employment" before the cause had been heard.

8. The Notice of Motion dated 28.4.2005 was filed in court on 3.5.2005. It was supported by an affidavit of the interested party sworn on 29.4.2005. It sought two main orders:-

    1. an order of certiorari to remove into the High Court and to quash the decision of the Judicial Service Commission retiring Colleta Osyanju Khaemba's employment at its meeting held on 10.11.2004."

    "2. ...and order for mandamus to issue to the Judicial Service Commission to reinstate Colleta Osyanju Khaemba in her employment at the Judicial Service Commission.

9. In the grounds in the body of the Notice of Motion, the interested party contended that her forced retirement was "arbitrary, capricious, and a perverse exercise of discretionary power and lawful authority, that the mandatory procedure outlined in Regulation 28 of the Judicial Service Commission Regulations, Chapter 185, of the Laws of Kenya and that the Respondent had acted in excess of its jurisdiction; that the interested party had been acquitted of the charges that led to her retirement; that the decision of the Respondent to retire her was unlawful ..... unreasonable and retrospective in effect; and that it failed to give reasons for the decision."

10. The interested party had lodged a verifying affidavit on 2.3.205 and Statement of Facts. The Notice of Motion was accompanied by an affidavit titled "supporting affidavit." Rule 3 (1) of Order LIII does not provide for the filing of an affidavit in support of the Motion perhaps because Rule 1 (2) of the same order requires a statement and affidavits verifying the facts relied on to accompany the application for leave to apply for the order/s. It is on the basis that these documents did reveal at the leave stage that there was a prima facie case for the order or orders sought that leave was granted. Any additional affidavit or affidavits required leave to be filed. One does not have for to seek to see that where leave is challenged at a subsequent stage, an affidavit filed after leave with or without leave cannot be called in

aid to reinforce the existence of a prima facie case at the leave stage. At any rate, as there was no leave to file the supporting affidavit, the same is hereby struck out.

11. The Respondent after service on 24.6.05 filed Notice of Appointment through the Senior Principal Litigation Counsel, Ms. Wanjiku Mbiyu but no replying affidavit was filed. The Notice of Motion eventually came up for hearing before me on 5.7.2005.

12. Mr. Kasamani, learned counsel, appeared for the interested party. The Respondent was un-represented. Mr. Kasamani urged the court to quash the decision of the Respondent retiring the interested party from employment on the ground that it violated the rules of natural justice because his client had not been afforded an opportunity to be heard. He pointed out that his client had had lifted an earlier interdiction and restored but two years later the same allegations on which the interdiction hinged had been used to forcefully retire her before she had reached retirement age. He urged the court to issue an order for mandamus to compel the Respondent to restore the interested party in employment.

13. When an employer terminates the employment of its employee in accordance with the terms of the contract of employment, the employee cannot be heard to complain. But where the termination breaches the terms of the contract of employment, the employee can maintain an action for breach of contract. In the case of a public body, termination of employment does not necessarily automatically fall into the realm of judicial review unless it can be shown that it was of a nature of public law and not a private law to which private law rights and remedies apply. It is a correct proposition of the law that employment by a public authority does not per se inject any element of public law. So as to succeed in judicial review in a dismissal case an employee must show that the matter was of public law rights as opposed to private law rights always bearing in mind that the common law does not admit any specific performance of contract of service. In the restatement of Lord Diplock's paraphrase of Lord Atkin's seminal statement in R v. Electricity Commissioners [1924] 1 KB 171 the court stated:-

> " whenever any person or body of persons has legal authority conferred by legislation to make decisions in public law, which affect the common law or statutory rights of other persons as individuals, it is amenable to the remedy of judicial review of its decision either for error of law in so acting, or for failure to act fairly towards the person who will be adversely affected, viz by not affording him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him, on the part of the person by whom the decision falls to be made."

14. It is also a correct proposition of the law that where a matter is a public law one as distinct from private law, judicial review will be available to the aggrieved party. Judicial review, however, is not concerned with merits of decisions of statutory bodies or tribunals, but rather with public rights and decision-making process. Where the decision is wrong, the manner of challenging it is through an appeal. This court does not in judicial review exercise or usurp the function or power of an appellate court in that regard. Rather, it exercises its original supervisory jurisdiction conferred on it by section 8 of the Law Reform Act, Chapter 26 of the Laws of Kenya. The rationale behind this principle is that the High Court is entrusted by the law with the task of ensuring that an individual does receive fair treatment and that the authority concerned acts within the law. This court will not be concerned whether the authority involved made a good decision or not providing that the decision was authorized by the law and the individual was given fair treatment and the rules of fair play and natural justice were adhered to. In determining whether or not the decision making process was conducted in accordance with the law, the court will, inter alia, ascertain if there was failure by the concerned authority to act fairly and to observe the principles of national justice; the principles relating to bias; bad faith; irrational decisions

which may amount to unreasonable decision; or whether the concerned authority took irrelevant considerations into account or failed to take into account relevant considerations thus making the decision making process wanting and therefore amenable to judicial review.

15. These then are the principles to be applied in determining whether or not the Interested Party has made out a case to warrant the making of the orders of certiorari and mandamus.

16. In this case, has the Interested party shown that the nature of her employment had underpinnings such as constitute her claim one in the realm of public law rights or was her relationship with the Respondent one of master and servant with no element of public law in it. Did the Interested party hold an office of great public service in which the public was interested and as such attracted judicial review remedy? In R v. East Berkshire Health Authority, Ex-parte Walsh [1984] 3 WLR 818 Sir John Donaldson, MR had this to say in the subject –

> " Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a 'higher grade' or is an 'officer'. This only makes it more likely that there will be special statutory restrictions upon dismissal or other underpinning of his employment. (see per Lord Reid in Mallock v Aberdeen Corporation at page 1582). It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient."

16. In the circumstances of this case, it seems clear that the contract of employment between the Interested party and the Respondent did not have underpinnings that brought it into the realm of public law rights, nor was the nature of her job in great public service to an extent where the public would be said to be interested or concerned to see that the Respondent acted towards the Interested party lawfully and fairly because the public may ultimately be affected by the decision of the Respondent in view of the nature of the service rendered.

17. In my view the Interested party did not satisfy the court that she is entitled to the judicial review remedies of certiorari and mandamus. In the result, I dismiss the application. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF APRIL 2006

G. B. M. KARIUKI

J U D G E