



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

Civil Suit 975 of 2006

**JAMES
OMOTO**

WILBERFORCE ODUORI

**RONALD O.
OKACHA**

**DANIEL
ONYANGO OGOMBE**

**MILLICENT
A. OLWERO**

SARA SIRMA

**MICHAEL KUNGU.....
.....APPLICANTS**

VERSUS

**KENYA RAILWAYS CORPORATION
RESPONDENT**

RULING

By a Summons filed pursuant to Order LIII rules 1 (1), (2) and (4) of the Civil Procedures, James Omoto,

Wilberforce Oduori, Ronald Akacha, Daniel Onyango Ogombe, Mrs Millicent Awuori Olwero, Mrs. Sarah Sirma and Michael Kungu hereinafter referred to as the Applicants applied for leave to institute Judicial Review Proceedings in the nature of certiorari and prohibition to be directed at Kenya Railways Corporation hereinafter referred to as the Respondent. The Applicants each filed a verifying affidavit in support of the Summons. Pursuant to Order LIII rule 1(2) of the Civil Procedure Rules a statement of fact was filed.

The background of this matter appears to be simple and straightforward. On the 12th day of September, 2006, the Respondent through the Staff Management Committee 'B' (administration) dismissed the Applicants from its employment. It was also communicated to the Applicants that they would lose all their terminal benefits. The material placed before this court shows that the woes bedeviling the applicants began sometimes in the month of May 2006. The Applicants were charged to the effect that between the 4th and 5th day of May 2005, they grossly misconducted themselves by mobilizing and inciting staff to boycott duties leading to serious disruption of train operations. They were then suspended on 8th May 2006. The suspension was lifted on the 19th day of June 2006 on a without prejudice basis. On the 12th day of September 2006 or thereabout the Respondent dismissed the Applicants. This decision prompted the Applicants to institute these proceedings.

In order for this court to grant the Applicants leave to institute judicial review proceedings, they must show to this court that they have a prima facie case. I appreciate the fact that the dispute is that which arises out of the contract of employment. In this regard the Applicants are the employees of Kenya Railways Corporation the Respondent herein. The remedies which are proposed to be sought by the Applicants are in the nature of prohibition and Certiorari. These remedies are exclusively public law character as opposed to private law rights. My understanding of the law is that the statutory right not to be unfairly dismissed is a private law right not enforceable as a matter of public law. The remedy of certiorari is inappropriate to quash a decision taken by an employer to dismiss his employee. Quashing the decision will not restore the employee to his employment.

The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so forth. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee 'public law' rights and at least making him a potential candidate for administrative law remedies. It will be this underpinning which injects the element of public law. In the matter before this court, it was incumbent upon the Applicants to show that their employment contract with the Respondent was statutorily underpinned.

The material placed before me clearly indicate that the dispute is that of an ordinary private civil right of contract between him and his employees. It was the duty of the Applicants to show that their claim was that of a public law nature.

In the end I am not convinced that the Applicants are entitled to leave. Consequently leave is refused.

Dated and delivered this 19th day of October 2006

J. K. SERGON

JUDGE

In open court in the presence of Mr. Oguk holding brief for Mr. Opolu for the Applicants.