



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 971 OF 2000
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
REPUBLIC

Exparte

1. OBADIAH NYATODO OCHILLO

2. IDDY WAMBUI MWANGI

3. FRANK MATHEWS MBOLE

4. MARY MUTHONI MUNYUA

5. CLEMENT ONYANGO DINDA

6. MARY WANJIRU NDERITU

7. ASPENAS MORUMBWA

8. GEORGE NDICHU NJOROGE

9. WILLIS O. ODERO

10. JAMES MUNGAI KUNG'U

11. SAMSON OYWAYA KAKA

12. CAROLINE A. OKIRO

13. CORKY K. OIRA

14. BARRACK JUMA OTIENO

15. BENEDICT OLOO

16. WINFRED WAMBUI KANYI

17. MICHAEL OKARA OSASO

18. JAMES NYAMWEYA MWAMBA

19. STELLAMARIS MUIA

20. TIMOTHY MUKABI OTUNDO APPLICANTS

-VERSUS

KENYA BROADCASTING CORPORATION.....RESPONDENT

RULING

In this Notice of Motion dated 8.9.2000 which is filed under Order 53 of the Civil Procedure Rules, the applicants are asking for Orders that:

- (1) The decision of Kenya Broadcasting Corporation contained in the Internal Memorandum dated the 10th August, 2000 by the Acting Personnel Manager concerning the applicants be quashed.
- (2) The Kenya Broadcasting Corporation (KBC) be and is hereby prohibited from dismissing, conducting fresh interviews or any other way organizing the Corporation's Marketing Department in a manner adverse to the Applicants in respect to their contracts of employment.

The facts as contained in the Statement of Facts are that the Memorandum in dispute amounted to a decision to terminate the applicants' contracts of employment and is ultra vires the Statutory Provisions conferred upon the Respondent. It was also stated that the Defendant did not, through this memorandum and the interview which followed, act fairly. The details are to be found in the verifying affidavit by Obadiah Ochillo.

The application is opposed on the grounds that the contracts between the applicants and the Respondent is one of employment and therefore the remedies sought are not available.

The main complaint by the applicants is that the Memorandum in question inviting the Staff of the Marketing Department for interviews amounted to terminating their employment. This conclusion appears to have been induced by the fact that, alongside the employees, other persons who are not employees were also invited for the interview. It was the contention of the applicants that the disciplinary machinery of the Corporation was ignored. Judging from the facts in the affidavits of Mr. Achillo in support of the application and that of Mr. Joe Khamisi, the Managing Director of the Respondent in reply, the present application is aimed at quashing the decision contained in the Memorandum of 10-8-2000. It also seeks an Order to prohibit the Defendant from dismissing the applicants. Although Mr. Kajwang, the Learned Counsel for the applicant says that the application is not necessarily concerned with the dismissal of the applicants, the application touches on the nature of their employment. The applicants' fears were that the interviews called for by the memorandum amounted to terminating their employment.

It will be necessary to examine the contents of the Memorandum itself. In the relevant part it reads:

"The Management has reviewed the operations of your Department including your work performance and found them wanting. Consequently, it has been decided that all officers in the Department below the rank of Assistant Marketing Manager re-apply for the current posts afresh. You are therefore, required to make handwritten applications enclosing your Curriculum Vitae, Academic and Professional Certificates and any other testimonials addressed to the Managing Director so as to reach him by 15th August, 2000".

The Respondent through the Managing Director said the exercise was aimed at restructuring the Department following an Audit report, which revealed losses in the Department. It is also contended that there was need to employ more persons due to the introduction of new Departments.

There is no doubt that the Contract between the Respondent and the Applicants is one of Employment, that is of Master and Servant, which could be terminated by either party in accordance with the terms of Employment Agreements. The letter of offer stipulate that the appointment can be terminated by either party by giving one month's Salary in Lieu of Notice. The letters also stipulate that the employees would be subject to the Kenya Broadcasting Corporation Regulations in force.

These Regulations in Regulation 1.26 dealing with Termination of Appointments make provision for dismissal or compulsory retirement in the interest of the Corporation and for Termination of employment as a result of the employees resignation in accordance with the provisions of his agreement or letter of appointment or termination by the Corporation in accordance with the provisions of an employees' agreement or letter of appointment.

It is therefore clear that the termination of an employees services would be in accordance with the agreement or letter of appointment he or she signed. Any other method of termination which is not in accordance with the provisions of the agreement or the letter of appointment would be illegal.

The language of the Memorandum of 10.8.2000 indicates that the particular employees were to re-apply for those posts they were holding. This by itself would indicate that upon failure to satisfy the interviewing panel, they would lose the jobs they were holding. Attending the interview itself is not illegal as it could be necessary in the exercise of reorganizing the Department and this would be within the Respondents powers and duties. Illegality would result only when an employee is informed that he has lost his job because he did not go through the interview and without following the terms of his agreement or those of the letter of offer.

And supposing that the employer considered that the employee has not passed the interview and proceeds to terminate his employment in accordance with the Regulations?

There would be no illegality. It is also to be noted that there is no procedure provided for in the Agreement or Letter of Appointment as to how the employer/respondent would arrive at the decision to terminate an employees' services. Indeed carrying out an interview could have been one way of determining whether his employment should be terminated. Such a procedure cannot therefore be said to be illegal since it could end up being a mere evaluation, which could then be followed by a proper termination of the employment. This finding would make it difficult to support the applicants arguments that the procedure for termination as laid down in the Regulation was not followed. The procedure laid down in Regulation J3 deals with Dismissal and not Termination of the Employment.

This particular regulation deals with cases, which warrant dismissals and should not be confused with cases of Termination of the Employment.

The applicants had not been dismissed before they went to the Interviewing Panel and, as I have said, the Interviews could have ended in proper terminations. My finding that the Interviews did not amount to a procedure leading to dismissal of the applicant would dispose of the application for certiorari but there was another argument which was advanced that the applicants being public officers their dismissals in breach of their contract raises issues of Public Law. In such a case it was urged that the contracts are Statutorily underpinned.

As to whether the Contracts of Employment between the applicants and the Respondent is Statutorily underpinned I found guidance in the Judgement of Court of Appeal **Civil Application No. NAI 20 of 1994 Eric V.J. Makokha and others Vs. University of Nairobi and others**. In this Appeal the Court had occasion to review a number of cases on the issue. The Court came to the conclusion that a contract of service which can be terminated by either party by giving the requisite notice cannot be said to be Statutorily underpinned. It remains a pure Master and Servant contract of Employment which is not guaranteed by any Statute. This applies to the present case and the contract of employment remains a contract of employment between the applicants and Kenya Broadcasting Corporation, which is purely of a private or domestic character notwithstanding that the employer is a public body. In the recent case of **R.V. BBC, Ex Parte Lavelle (1983) 1 All ER 241** the judge observed:

“An application for Judicial Review has not and should not be extended to a pure employment situation. Nor does it, in my view, make any difference that what is sought to be attacked is a decision of a domestic tribunal, such as the series of disciplinary tribunals provided for by the British Broadcasting Corporation”.

I would apply this statement to the present case. See also the English case **McClaren V. Home Office (1990) ICR 824** where it was held that an employee of a Public Body is normally in exactly the same situation as other employees. His remedies will lie in an action for damages, a declaration or an injunction but not in Judicial Review which has been held to be inappropriate. See also **Doyle Vs. Northermberland Probation Committee (1991) 1 WLR 1340** where it was a probation officers claim for a breach of contract and which was held to be a matter of private law.

The other prayer sought by the applicant was an order to prohibit the Respondent from dismissing, conducting fresh interviews or any other way organizing the marketing Department in a manner adverse to the applicants.

When granting the leave to move Judicial Review proceedings, the Court ordered that the leave operate as a stay. At the time when that order was granted it could have been appropriate. But having found that the interviews did not amount to dismissal of the applicants and that in fact the application was made prematurely an order of prohibition cannot issue. There is no basis for prohibiting the reorganization of the Department as prayed for. The mere fears that such reorganization may affect the applicants adversely is no reason for granting such an order.

This being a contract of Employment the Court would not grant an order which in effect would be against the provisions of the agreement between the parties and which govern how their relationship is to be terminated. Prohibition would have issued if the interviews were illegal which they are not.

For these reasons the application must fail and dismissed with costs.

Delivered and dated this 11th day of May, 2001.

KASANGA MULWA

JUDGE