

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISC. CIVIL CASE NO. 394 OF 2000

DR. JOHN MUTEMWA WAMBUA

AND

IN THE MATTER OF THE WILDLIFE (CONSERVATION & MANAGEMENT)

RULING

In this application brought under Section 8 & 9 of the Law Reform Act, Order 53 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the applicant is asking for leave to file Judicial Review Proceedings. He is also asking that the leave granted act as stay of his suspension by his employer and also as a stay for the criminal proceedings filed against him in Kibera Principal Magistrate Criminal Case No. 2614 of 2000 – R. vs. John M. Wambua.

When the matter came before me I allowed the matter to be heard during vacation and proceeded to hear the application. The applicant was suspended on 22.3.2000 by a letter written to him on behalf of the Director, which informed him that “it has been decided to suspend you from duty immediately on half pay....”. The suspension was effected in order to facilitate full investigations with regard to the conduct and management of KWS resources by the applicant which were said to have been found wanting. Prior to this, the applicant had been charged with some criminal offences before the Magistrate’s Court at Kibera on 21.3.2000. It is this suspension on these grounds that the applicant says that the procedure as laid down on the Human Resources Policy and Procedures Manual of KWS was not followed. In particular, paragraph F of the Manual was not observed in addition to failing to observe the Rules of Natural Justice. With regard to the leave to commence the proceedings, I have accepted the grounds advanced on behalf of the applicant and I consequently grant the leave. The applicant is asking that the order granting leave should act as stay. Order 53 rule 1 (4) provides that:

“ The grant of leave under this rule.....shall if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Judge orders otherwise”.

From this Rule the court has the discretion. I however note that the complaint is about suspension and about the criminal charges before the Kibera Court. This being in essence a complaint about a breach of a contract between the employer and employee any order of stay must take into account the relationship of master and servant existing between the employer, KWS and the applicant.

The courts are always reluctant to enforce a contract of employment by way of an order for specific performance. The case law on the subject seem to point out to that a contract of employment comes within the category of contracts whose execution the court cannot supervise being a contract of personal services.

A Stay of Execution in this case means that the employer will be forced to lift the suspension and make full use in employment of the applicant. In the light of these principles, I consider it prudent that a stay should not be given at this stage lifting the suspension. With regard to the criminal proceedings, the applicant will need to initiate separate proceedings staying or suspending the proceedings. They cannot be dealt with through the present ex parte proceedings. The upshot of all this is that the leave is granted but the stay is not granted at this stage.

Dated and delivered at Nairobi this 15th day of May, 2000.

KASANGA MULWA

JUDGE