Republic v Public Service Commission & 2 others; Director of Public Prosecution (Interested Party); Bikeri (Exparte) (Application E089 of 2024) [2024] KEHC 13898 (KLR) (Judicial Review) (1 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13898 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E089 OF 2024

J NGAAH, J

NOVEMBER 1, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC SERVICE COMMISSION ..... 1ST RESPONDENT

CHIEF EXECUTIVE OFFICER PUBLIC SERVICE COMMISSION .... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... INTERESTED PARTY

AND

FREDRICK BIKERI ..... EXPARTE

JUDGMENT

1. The applicant's application is a motion dated 30 April 2024 brought under Sections 8 and 9 of the *Law Reform Act*, Cap. 26 and Order 53 Rules 1 and 2 of the Civil Procedure Rules, 2010. The applicant seeks the following orders:

> " a) A Declaration that the 1st and 2nd Respondent's call for public participation through the impugned Notice marked FK1 without availing to the Public the two Draft Regulations being Draft Public Service Commission (Affirmative Action) Regulations, 2024, and Draft Public Service Commission (Removal

of the Director of Public Prosecutions) Regulations, 2024 constituted an act in contravention and gross violation of the spirit of Article 10 of *the Constitution*, to wit, public participation, Inclusivity and accountability;

b) A Declaration that the 1st and 2nd fell short of providing and enabling public participation contemplated under Article 10 and 232 of *the Constitution* by dint of unavailability of the Draft Regulations (Draft Public Service Commission (Affirmative Action) Regulations, 2024, and Draft Public Service Commission (Removal of the Director of Public Prosecutions) Regulations, 2024) in the 1st & 2nd Respondent's Link being https://www.publicservice.go.ke, under publications – legislation.

c) Certiorari to bring into this honorable Court for the purpose of quashing the Notice of the 1st and 2nd Respondents inviting Stakeholders and members of the public or any other interested person(s) to participate or raise any concern on the Draft Regulations (Draft Public Service Commission (Affirmative Action) Regulations, 2024, and Draft Public Service Commission (Removal of the Director of Public Prosecutions) Regulations, 2024) to the duo by sending written Memoranda to Public Service Commission, P.O BOX 30095 -00100, Nairobi; hand delivery to the Public Service Commission House, Harambee Avenue or by emailing the same to 1st & 2nd Respondent in their email address being secretary@publicservice.go.ke or legalservices@publicservice.go.ke to be received on or before Friday, 26th April, 2024 and any consequential steps to the Regulations' formulation.

d) Prohibition prohibiting the 1st and 2nd Respondents either by themselves, their agents or servants from conducting any manner or form of public participation related to the Draft Regulations (Draft Public Service Commission (Affirmative Action) Regulations, 2024, and Draft Public Service Commission (Removal of the Director of Public Prosecutions) Regulations, 2024) and gazettement on account of failure by the duo to avail the two Draft Regulations to the Public.

e) Costs be in cause.

f) Any other order that this Honourable Court will be pleased to issue in the circumstances."

2. The application is based on the statutory statement dated 24 April 2024 and an affidavit verifying the facts relied upon sworn on even date by Mr. Fredrick Bikeri.

3. According to Mr. Bikeri, on 23 April 2024, he "bumped" on the 1st and 2nd rrespondents' notice inviting stakeholders and the general public to present their written memoranda on the Draft Public Service Commission (Affirmative Action) Regulations, 2024 and the Draft Public Service Commission (Removal of the Director of Public Prosecutions) Regulations, 2024. The notice is said to have been published on 9 April 2024. According to the notice, the draft regulations could be accessed from the Public Service Commission's (PCS's) website, www.publicservice.go.ke,.

4. The written memoranda were to be submitted to the Secretary, Public Service Commission, by post, on the address of P.O BOX 30095-00100, Nairobi or could be hand-delivered to the Public Service Commission House on Harambee Avenue. The public and stakeholders had also the option of submitting their memoranda by way of email using the email address, secretary@publicservice.go.ke or

legalservices@publicservice.go.ke. The memoranda were to be received on or before Friday, 26 April, 2024.

5. Mr. Bikeri has complained that the draft regulations could not be found on the link provided. In any event, he has sworn, there is in place the Public Service Commission (Removal of the Director of Public Prosecution) Regulations, 2017 which ordinarily provide for the framework for processing complaints in form of petitions for removal of the Director of Public Prosecutions. The applicant contends that it is not apparent from notice what the draft regulations on removal of the Director of Public Prosecution are meant achieve; in particular, it is not clear whether they are intended to amend the existing regulations or they are to replace them altogether.

6. The applicant has faulted the notice to the members of the public as being a mockery of the constitutional values and principles of good governance and the rule of law, participation of the people, non-discrimination, transparency and accountability. The applicant admits that under Sections 76 and 92 of the *Public Service Commission Act*, cap. 185, the 1st and 2nd Respondents have the mandate to formulate regulations for removal of the Director of Public Prosecutions. However, he contends that the mandate must be exercised in accordance to Article 10 and 232 of *the Constitution* that requires effective and economic use of resources and involvement of the people in the process of policy making. Since there are regulations in place for removal of the Director of Public Prosecutions, the 1st & 2nd Respondents are alleged to be misusing public resources, purporting to fix what ought not to be fixed.

7. Mr. Remmy N. Mulati swore a replying affidavit opposing the applicant's application. He has introduced himself in the affidavit as the Acting Commission Secretary cum Chief Executive Officer of the Public Service Commission (also hereinafter referred to as "the PSC").

8. A good part of Mr. Mulati's "depositions" constitutes statements of law that would appropriately be canvassed in grounds of objection rather than in an affidavit. For instance, he has "sworn" that the Public Service Commission is established under Article 233(1) of *the Constitution* and that it is a constitutional commission within the meaning and tenor of Chapter 15 of *the Constitution*, specifically in Article 248(2)(g) thereof and, further, its functions and powers are covered under Article 234(2) of *the Constitution*.

9. Mr. Mulati has quoted Article 252 (d) of *the Constitution* on the functions of the PSC and Articles 234(2)(j) and 252(1)(d) pursuant to which Parliament has enacted the Public Service *Act, No. 10 of 2017* under which the PSC operates. As far as the removal of the Director of Public Prosecutions is concerned, the 1st and 2nd respondents have quoted Article 158 of *the Constitution* and section 76 of the *Public Service Commission Act*. This section states that a petition for the removal of the Director of Public Prosecutions under Article 158 of *the Constitution* shall be made in accordance with regulations made by the Commission.

10. On the question of affirmative action, section 48 of the Public Service Act has been invoked as the provision of the law that empowers the PSC to make the regulations to give effect to the requirements of *the Constitution* regarding inclusiveness in terms of gender, Kenya's diverse communities, persons with disabilities and the youth. They have also citedsection 92 of the Act on the PSC's general powers to make regulations generally for the better carrying into effect the provisions of the Act.

11. In exercise of the powers under Section 31 of the *Public Service Commission Act*, No.13 of 2012 (now repealed), the Commission made the current Regulations known as the Public Service Commission (Removal of the Director of Public Prosecutions) Regulations, 2017.

12. It is deposed that having used and applied the said Regulations from 2017 to date, the Commission found them inadequate and, therefore, deemed it necessary to improve the regulations by developing

the current draft in order to, inter alia, provide clarity on the procedure for lodging a petition for removal of the Director of Public Prosecutions; provide a sample format of lodging petitions for the removal of the Director of Public Prosecutions; and, guide on the timelines to be complied with by parties in the determination of petitions for the removal of the Director of Public Prosecutions.

13. The regulations are also necessary to provide for the rules of natural justice and fair administrative action when determining petitions for the removal of the Director of Public Prosecutions; to provide clarity on the meaning of the grounds upon which the Director of Public Prosecutions may be removed from office; and, to guide the PSC and the parties on how petitions for removal of the Director of Public Prosecutions are determined. It is against the forgoing background that the PSC developed the draft Public Service Commission (Removal of the Director of Public Prosecutions) Regulations, 2024.

14. And in order to comply with section 48 of the *Public Service Commission Act*, the PSC developed the draft Public Service Commission (Affirmative Action) Regulations, 2024.

15. The two regulations were subjected to public participation through newspaper advertisements published on 26 March, 2024 and 9 April, 2024 in the Star and MyGov newspapers respectively. In the adverts, the Commission invited stakeholders and the general public to submit their views through written memoranda on the two draft regulations.

16. Besides, the newspaper advertisements, the PSC wrote to specific stakeholders, including the Director of Public Prosecutions, asking for their views on the draft affirmative action regulations. The letters to the stakeholders were dated 26 March, 2024. By a letter dated 3 April, 2024, the Commission also wrote to all constitutional commissions and Independent Offices asking for their views on the draft regulations.

17. In both the newspaper advertisements and the letters, the stakeholders were notified to access the said draft regulations from the Commission's website and give their views on or before Friday 26 April 2024. Various stakeholders and members of the public accessed the draft regulations as a result of which the PSC received written memoranda from forty-four stakeholders who expressed their views on the two draft regulations.

18. The Commission has considered and incorporated the views received from the stakeholders in the draft regulations which will now be subjected to stakeholder validation before submission to Parliament for consideration and approval in accordance with the *Statutory Instruments Act*, 2013. The 1st and 2nd respondents have denied the allegation that the draft regulations are inaccessible because all the other stakeholders who have expressed their views through written memoranda accessed the said draft regulations through the PCS's website.

19. Contrary to the Applicant's contention that it is not clear whether the regulations are to amend or revoke the existing regulations, it is clear at clause 22 of the draft regulations for the removal of the Director of Public Prosecutions that they intend to revoke the current regulations.

20. It is the 1st and 2nd respondents' position that the applicant's suit is mala fides because the Applicant has never raised his complaint with the Commission but only waited up to the very last day for submission of written memoranda to complain to the Court. If for whatever reason the applicant could not access the draft regulations from the Commission's website, for whatever reason, he could have easily obtained hard copies from the PSC. Even then, other stakeholders have accessed the said draft regulations from the Commission's website and submitted their views through written memoranda.

21. The 1st and 2nd respondents have contended that after undertaking the stakeholder validation, the revised draft regulations will be forwarded to Parliament for consideration in accordance with the

Statutory Instruments Act, 2013. Prior to enactment or approval of the regulations, Parliament will, through the Committee on Delegated Legislation, undertake public participation in accordance with Article 118 of *the Constitution* and the applicable Standing Orders. Thus, the applicant still has an opportunity to give his views during the stakeholder validation and the Parliamentary process that will be undertaken by the Committee on Delegated Legislation.

22. The applicant and the 1st and 2nd respondents have largely replicated in their written submissions what they have averred in their pleadings and deposed in their respective affidavits.

23. In a judicial review application such as the one before court, it is the grounds on which judicial review reliefs are sought that are of immediate interest to the court. The grounds constitute the first hurdle which an applicant must surmount because without them, an application for judicial review would be baseless and fatally defective. Needless to say, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to supervisory jurisdiction of this Honourable Court is the grounds upon which the application is made.

24. This is obvious from Order 53 Rule 1(2) which states in rather peremptory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

25. And Order 53 Rule 4(1) states, also unambiguously, that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

26. In the instant application, the grounds of judicial review for which judicial review reliefs are sought are stated in the statutory statement to be "1. Unreasonability/irrationality; II bad faith; and, III. Unprocedural." I gather this to mean that the applicant's application is based on the three traditional grounds of illegality, irrationality and procedural impropriety.

27. These grounds were defined and explained in the English decision of English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the

> European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

28. The court will intervene and may grant the remedy for judicial review if any of these traditional grounds of judicial review is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

29. Turning back to the applicant's application, what the applicant has captured as the ground of irrationality is the contention that the draft regulations are not accessible or cannot be retrieved from the web link provided by the 1st and 2nd respondents. It his contention that if the regulations are not accessible, there cannot be said to have been public participation. The second reason why the regulations are impugned on ground of irrationality is that there are regulations in existence and, therefore, there is no need to formulate other regulations addressing the same issue.

30. The 1st and 2nd respondents have demonstrated that contrary to the applicant's allegations, the website from which the draft regulations are to be obtained has not only been accessible but that any person interested in accessing the draft regulations has accessed them from the website. Beyond accessing the regulations, the stakeholders and members of the public have acted and responded to the PSC's call and submitted their memoranda for consideration. If, for any reason the applicant was unable to access the PSC's website or access the regulations, there is nothing to show that the applicant made any attempt to raise the issue of inaccessibility of regulations with the respondents.

31. It is worth noting that the public notice notifying the stakeholders and members of the public was out as early as 26 March 2024 but it was not until 30 April 2024 that the applicant initiated these proceedings, by way an application for leave, in the first instance. In these circumstances, I would agree with the respondents that if the applicant was acting in good faith, he would not be coming to court more than a month after the notice was published, and after the deadline for submission of the memoranda, to complain about the inaccessibility of the PCS's website or the draft regulations.

32. One other reason why I find the ground of irrationality to be untenable is because since the application is made on the assumption that the applicant has been unable to access the impugned regulations, he cannot be complaining about the content of the regulations he has not seen. For reasons I have given, the applicant could, and can still access the regulations but if his case is that he cannot submit his memorandum because he has been unable to access the regulations, it is illogical that he would be complaining about the content of the regulations.

33. Be that as it may, his apprehension that it is unclear whether the regulations are complementary to or a substitute of the existing regulations has been answered, adequately, in my view, by Mr. Mulati, that it is expressly stated in draft regulations, more particularly regulation 22 thereof, that the existing regulations will be revoked at the commencement of the new regulations or, rather when the new regulations come into force.

34. The upshot is that there is nothing irrational or unreasonable about the publication of the notice, the requirement to access the regulations through a weblink or the regulations themselves. Going by the standards laid out in the Council of Civil Service Unions versus Minister for the Civil Service (supra), it cannot be said that the applicant's decision in publishing the draft regulations in the manner it did is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. There is also nothing to suggest that the rules are outrageous, or they defy logic or accepted moral standards or that no sensible person applying his mind to the question of whether those regulations are necessary could have drafted the same regulations.

35. As far as the ground of illegality is concerned, it has been demonstrated, to my satisfaction, by the 1st and 2nd respondents, that they have not only the constitutional and statutory mandate to make the regulations in issue but also that they have an obligation to do so. The PSC is itself established under Article 233(1) of *the Constitution*. According to Article 252(d), a commission such as the PSC may perform any functions and exercise any powers prescribed by legislation in addition to those functions conferred by *the Constitution*.

36. The *Public Service Commission Act* is the legislation or among the legislations to which reference has been made in Article 252(d). Section 76 of that Act enjoins the PSC to make the regulations for the removal of the Director of Public Prosecutions. It reads as follows:

> 76. Petition for removal of the Director of Public Prosecutions
> A petition for the removal of the Director of Public Prosecutions under Article 158 of *the Constitution* shall be made in accordance with regulations made by the Commission.

37. In the face of these constitutional and statutory provisions, I do not see anything untoward in the PSC making the impugned draft regulations. Needless to repeat, in making the regulations, the PSC is not only exercising its constitutional and statutory mandate but it is delivering on its public duties. In addition to these constitutional and statutory provisions, Mr. Mulati has gone further to explain

why the Commission felt it necessary to make the draft regulations. In paragraph 15 of his affidavit he has deposed as follows:

> "15. That having used and applied the said Regulations from 2017 to date, the Commission found them inadequate deemed it fit to improve the same by developing the current draft in order to inter alia:
>
> i. provide clarity on the procedure for lodging a petition for removal of the OPP;
>
> ii. provide a sample format of lodging petitions for the removal of the OPP;
>
> iii. guide on the timelines to be complied with by parties in the determination of petitions for the removal of the OPP;
>
> iv. to provide for the rules of natural justice (fair administrative action) when determining petitions for the removal of the OPP:
>
> v. provide clarity on the meaning of the grounds upon which the OPP may be removed from office; and
>
> vi. guide the Commission and the parties on how petitions for removal of the OPP are determined."

38. The applicant has not contested the inadequacies singled out in the existing regulations and neither has it been contested that these inadequacies will be addressed in the manner suggested by the PSC in the proposed regulations. It has also not been demonstrated that in drafting the new regulations the PSC has acted ultra vires *the Constitution* or the Act.

39. In the final analysis, I do not agree with the applicant that any of the actions taken by the 1st and 2nd respondents in making the regulations is tainted by illegality. Again, going by the standards laid out by Lord Diplock in Council of Civil Service Unions versus Minister for the Civil Service (supra), I am satisfied that the 1st and 2nd respondents have demonstrated that they understand correctly the law that regulates their decision-making power and that they have given effect it. They have neither committed an error of law nor acted outside it. There is no evidence that the 1st and 2nd respondents have acted in bad faith either as suggested by the applicant or at all.

40. The last ground which the applicant describes as "unprocedural" is what I understand to be the judicial review ground of procedural impropriety. This ground is, apparently, based on the same facts as the ground of illegality and irrationality. It is based on the ground that the public have not been given the opportunity to participate in the making of the regulations because they have not accessed the draft regulations. For the reasons I have given, this is not factually correct. The 1st and 2nd respondents have demonstrated this allegation is malafides and, in any event, the regulations have always been accessible and, therefore, available.

41. One final thing I need mention is that while the notice published by the PSC required the memoranda to be submitted on or before 26 April 2024, the applicant's application for leave was filed on 30 April 2024. Yet the applicant has sought the reliefs for certiorari and prohibition to quash the notice inviting the memoranda and to prohibit public participation respectively. It is clear that at the time of filing of the application, the memoranda had been received and the public had already submitted their memoranda. It follows that even if the applicant had proved the judicial review grounds, I would be hesitant to exercise my discretion in his favour for the reason that the application has been overtaken by

events; and, secondly, because of the delay in initiating these proceedings which, in these circumstances, is inordinate.

42. The Court of Appeal in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR explained when judicial review reliefs may issue. As far as the order of prohibition is concerned, the court, cited Halsbury's Law Of England, 4th Edition, Vol.1 at pg.37 paragraph 128 and held that:

> " It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law Of England, 4th Edition, Vol.1 at pg.37 paragraph 128." (Emphasis added).

The court also noted:

> " ...prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision. (Emphasis added).

And on the order of certiorari, the court said:

> " Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

43. The PSC cannot be prohibited from receiving submissions from the stakeholders or from members of the public because the suit was filed after the memoranda had been submitted and received and after the conclusion of the public participation exercise. Again, quashing the notice inviting submission of memoranda from the stakeholders and the members of the public generally would be an exercise in futility for the same reason that the notice had expired when the suit was filed. As a matter of fact, the impugned notice had served the purpose for which it was intended.

The inevitable conclusion I have to reach in these circumstances is that there is no merit in the applicant's application. It is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 1 NOVEMBER 2024

NGAAH JAIRUS

JUDGE