



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

JUDICIAL REVIEW NO. 3 OF 2019

IN THE MATTER OF ARTICLE 165 (6) (7) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LAW REFORM ACT SECTION 8 (1) AND 9

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

COUNTY PUBLIC SERVICE BOARD,

KAKAMEGA COUNTYRESPONDENT

RULING

1. The applicant herein has filed a notice of motion dated 8th February, 2019 seeks for:-

1. An order of Certiorari to remove into this Honourable Court and quash the decision of the respondent revoking the appointment of the applicant to the position of Community Administrator for Nyoritis Area.

2. Costs of the application.

2. The application is premised on the grounds on the face thereof and is supported by the affidavit of one **Hillary Njuguna Kamau** herein referred to as the applicant.

3. It is the position of the applicant that he had applied for the position of Community Administrator of Nyoritis Community area with the respondent. That he qualified for the position and was appointed on 29th June, 2018. That on the 20th August, 2018 he was issued with a revocation letter by the respondent thereby revoking his appointment on the grounds that there were petitions and complaints against his appointment and that upon investigation, the respondent decided to revoke his appointment.

4. The application was opposed by the respondent on the grounds that the applicant is not properly enjoined in the application as the same was filed in the name of the Republic. Secondly that the applicant did not attach the decision which he wishes to challenge and thirdly on the ground that this court has no jurisdiction to handle the matter.

Case for applicant –

5. The case for the applicant was that the respondent vide a public notice dated 23/2/2017 had invited members of the public to apply for the position of a Community Administrator for Nyoritis Community area in Nzoia Ward, Kakamega County. The applicant applied and was shortlisted for interview. He was thereafter interviewed and was successful for the job. He was issued with a letter of appointment by the respondent dated 29th June, 2018.

6. Thereafter the applicant received a phone call from a person purporting to be from the Public Service Board who informed him to submit evidence showing that he was a resident of Nyoritis Community area. He submitted an affidavit accompanied by a copy of the title deed to his parcel of land situate at Nyoritis area, a clinic card and birth certificate. He also attached a letter from the Chief Moi's Bridge location confirming that the applicant has land at Nyoritis village. He also attached a letter from the village elder Nyoritis village confirming that the applicant was born at Nyoritis village and that his parents were Joseph Kamau Kuria and Emily Nafula.

7. Later the respondent revoked the appointment of the appellant vide a letter dated 20th August, 2018 in which the respondent stated that:-

“Following a petition/complain against your appointment to the position of Community Administrator for Nyoritis CAC 059 in Nzoia Ward, Likuyani Sub County, the County Public Service Board conducted investigations which included a public hearing session held at Nyoritis on 16th August, 2018.”

Consequently, the Board has revoked your appointment to the position.

Please take note.”

It is upon being issued with the said letter that the applicant filed the instant application after getting leave of the court to do so.

8. The applicant contends that he was not served with the alleged petition by the residents of Nyoritis area and accordingly that he was not given an opportunity to be heard before revocation was ordered. He further contends that the purported petition by the residents was outside the timelines stipulated by the respondent to forward any complaints to the respondent on individual candidates. Further that the decision to revoke his appointment was ill-motivated, in bad faith, improper and abuse of power. That the decision was made against the rules of natural justice and through irrational conclusion from the facts of the case. Therefore that the decision should be quashed and his appointment reinstated.

Respondent’s Case -

9. The respondent opposed the application vide the replying affidavit of its Chief Executive Officer one **Victoria Tumaini**. The deponent states in her replying affidavit that the verifying affidavit filed by the applicant in support of the application relates to a different matter in Kakamega High Court Misc. Application No. 13 of 2019 that was limited to an application seeking for leave to file an application for judicial review. That the orders sought herein have been overtaken by events as the position has already been filled as evidenced by annexed letters – letters of appointment marked “VT1-3”. That the revocation of the applicant’s appointment was done within the law after exercise of diligence by the respondent after it was established that he was not ordinarily a resident in Nyoritis by reason whereof he did not qualify to occupy the position. That the postal address of the applicant given is of Masinde Muliro University of Science and Technology based at Kakamega town which ordinarily means that he resides in Kakamega town. Further that the complains challenging the appointment of the applicant were raised by residents of the community which he was to serve and the respondent was under duty to act on it positively after exercise of due diligence which included hearings. That the applicant was given an opportunity to be heard and therefore that the decision was fair and reasonable.

Submissions -

10. **Mr. Indimuli** appearing for the applicant submitted that the applicant was not given an opportunity to be heard before his appointment was revoked. That the documents submitted by the applicant indicated that he was a resident of the area. That the notice to the public – marked “HNK-2” – invited member of the public to submit information on the suitability of the shortlisted candidates to the Secretary/CEO County Public Service Board by 23/10/2017 which was before the applicant was appointed. That the fact that the respondent went ahead to appoint the applicant meant that there was no complain against him. That there was no reason given for the revocation. Therefore that the decision of the respondent should be quashed.

11. **Miss Shimoli** appearing for the respondent submitted that the applicant has not included himself as the applicant in the notice of motion dated 8/2/2019. That failure to do so is fatal to the application. She cited the case of **Jotham Mulati Welamondi –Vs- Chairman Electoral Commission of Kenya (2002) eKLR** where Ringera J. (as he then was) dismissed an application for mandamus for being made in the name of the wrong person.

12. Miss Shimoli submitted that the applicant has not annexed the decision of the board that he is seeking that it be quashed. That failure to do so is fatal as the decision may after all not be there. To support that proposition she cited the case of **Republic –Vs- Ruiru District Land Disputes Tribunal & Another Ex parte Lucia Waitera Muiruri & Another (2014) eKLR**, where it was held that it is mandatory to annex a copy of the decision sought to be quashed as required under the provisions of order 53 rule of the Civil Procedure Rules.

13. Miss Shimoli further submitted that the application is pre-mature in that the applicant was supposed to appeal the decision of the board to the public service commission as provided by Section 77 of the County Governments Act, 2012. Therefore that the applicant did not follow the laid down procedure before resulting to court. To this end she relied on the case of **Daniel Wang’ombe Maina & 7 Others – Vs- Nyeri County Government and Another (2018) eKLR**. It was further submitted the orders sought will not serve any purpose as the position has been filled.

14. In reply Mr. Indimuli argued that failure to include the name of the applicant does not bar the court from granting the orders. That the decision that they are challenging is the revocation. Further that there is no sufficient evidence that the position has been re-filled. That no person has sworn an affidavit that he is occupying the position.

Analysis and Determination –

15. The issues for determination are:-

- (a) Whether the application has been properly drafted and whether failure to do so is fatal.

(b) Whether the court has jurisdiction to determine the application.

(a) Whether the application is properly drafted –

16. The applicant has not included himself as an applicant in the notice of motion. The respondent submits that failure to do so is fatal to the application and that it should be dismissed. The applicant submitted that this is a honest mistake that should be excused.

17. Ringera J. (as he then was) in **Jotham Mulati Welamondi –Vs- the Electoral Commission of Kenya Bungoma High Court Misc. Application No. 81 of 2002 (2002) 1 KLR** set out the proper format of drafting judicial review application when held that:-

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted and accordingly, the orders of Certiorari, Mandamus or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for Mandamus is:-

“REPUBLIC APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA RESPONDENT

EX PARTE

JOTHAM MULATI WELAMONDI”.

18. Article 159 2(d) of the Constitution of Kenya 2010 provides that when exercising judicial authority courts should be guided by the principle that justice shall be administered without undue regard to procedural technicalities. In the case of **Microsoft Corporation –Vs- Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 (2001) KLR 470; (2001) 2EA 460** the court considered the place of rules of procedure in the administration of justice and held that:-

“Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that...(a party) has attempted to comply with the rule(s)...but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue.”

19. In **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers Vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocates & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:-

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court.”

20. The only defect in the present application is that it does not mention the exparte applicant in the title/heading of the application. The affidavit in support of the motion together with the statutory statement clearly show that one Hillary Njuguna Kamau is the applicant. The defect in form in the application does not go to the substance of the application. The documents in support of the application gave the respondent sufficient notice as to who the applicant was. In such a scenario, the court is called upon to do substantial justice to the parties and not to dismiss the case on procedural technicalities. A mistake in form does not warrant the applicant to be chased from the seat of justice unheard. The court declines the invitation to dismiss the application on the said technicality.

(b) Jurisdiction –

21. It is the submission of the respondent that the applicant should have appealed the decision of the respondent to the Public Service Commission as provided by Section 77 of the County Governments Act, 2012. They hold the view that the application is premature for want of exhaustion of the appeal process before resulting to this court. The applicant countered the argument by stating that what they are challenging is the revocation itself as rules of natural justice were not applied before revocation. That this court has jurisdiction where rules of natural justice are not applied.

22. It is trite law that Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction - See **Owners of the Motor Vessel “Lilians” Vs Caltex Oil (Kenya) Ltd 1989 KLR.**

23. The requirement to follow the provided procedure before resorting to court has been settled by the Court of Appeal in several

authorities. This was reiterated by the said court in the case of **Kenya Ports Authority –Vs- Modern Holdings (E.A) Limited (2017) eKLR** where the court stated that:-

“In our view, that remains the law and the earlier decisions including Kenya Ports Authority V Kuston (Kenya) Limited, (supra) remain good law. We say, finally that where the Constitution or statute confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with the Constitution or statute. This has, time without number been stated by courts. We cite only two cases to demonstrate our point. Secretary, County Public Service Board and another V. Hulbhai Gedi Abdille, Civil Appeal No. 202 of 2015, where this Court said;

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”

Before Secretary, County Public Service Board & Another V Hulbhai Gedi Abdille, (Supra) was decided the court made a similar determination in Speaker of the National Assembly V James Njenga Karume, Civil Application No. Nai 92 of 1992 (Nai 40/92 Ur), saying:-

“...In our view, there is considerable merit in the submissions that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions ...”

24. In the case of **Republic –Vs- National Environment Authority exparte Sound Equipment Ltd, (2011) eKLR** the said court stated that it is only in exceptional circumstances that judicial review orders can be granted where the provided procedure has been by-passed. Said the court:-

“... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exception circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it”

25. Section 77 (2) (a) and (b) of the County Governments Act provides as follows:-

“77(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of-

(a) Recruitment, selection, appointment and qualifications attached to any office;

(b) Remuneration and terms and conditions of service;

26. The Section thereby provides a process of appeal to the Public Service Commission in disputes involving appointments by county governments. The applicant’s dispute was in respect to revocation of his appointment which appeal squarely fell within the mandate of the Public Service Commission. The applicant therefore did not exhaust the provided procedure before he filed the instant application with the court. It is my holding that the application cannot be heard and determined by this court for want of jurisdiction.

27. The upshot is that the application is dismissed for want of jurisdiction with costs to the respondent.

Delivered, dated and signed in open court at Kakamega this 3rd day of October, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Mukhwana holding brief for Indimuli for applicant

No appearance for respondent

Parties: Applicant - absent

Respondents - absent

Court Assistant - George

30 days right of appeal.