



REUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIVIL APPLICATION NO. 7 OF 2013 (JR)

BENARD MALESI.....APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

AND

LAVENDAR SHIVACHI.....INTERESTED PARTY

RULING

1. This Court has been called upon to determine just one issue in this ruling - whether or not leave ought to be granted to the Ex-parte Applicant herein BENARD MALESI to apply for an order of Certiorari against the decision of the Teachers Service Commission Disciplinary Committee in Disciplinary Case No. 0041/07/2012/2013 relating to the Ex parte Applicant and one LAVENDAR SHIVACHI, the Interested Party herein.

That is the essence of the exparte Chamber Summons dated 04/10/2013 which is supported by the Ex parte Applicant's Supporting Affidavit sworn on 04/10/2013 and the Statement of Facts evenly dated.

2. According to the record, the said application was filed on 08/10/2013 and on 15/11/2013 the same was fixed for hearing on 14/05/2014. As a result of the non-attendance of parties, the application was adjourned and re-listed for hearing on 23/09/2014 and was eventually heard on 19/11/2014.
3. The Respondent, Teachers Service Commission (TSC) filed Grounds of Opposition and a Replying Affidavit in opposition to the leave being granted to commence the Judicial Review proceedings.
4. This Court has carefully perused all the material before it further to hearing the parties in their oral submission on the matter.
5. The Ex-parte Applicant's contention remains that TSC did not accord him an opportunity to present his defence in the disciplinary proceedings it conducted on 29/08/2012 and which resulted into the decision communicated to him by the TSC's letter dated 06/09/2012. This may be a valid ground which deals with how the process was undertaken hence falls squarely within the realm of judicial review.

The province of judicial review was well described by the Court of Appeal in the case of **Municipal Council of Mombasa –vs- Republic & Umoja Construction Ltd** in **Civil Appeal**

No 185 of 2001 (unreported) when it stated as follows: -

“Judicial Review is concerned with the decision making process not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision makers took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decisions.”

The above position was restated in the case of **Republic –vs- Kenya Revenue Authority exparte Yaya Towers Ltd (2008) eKLR** with the holding that the remedy of judicial review is concerned with reviewing not the merits of the decisions of which the application of judicial review is made but the decision making process itself.

6. TSC however raises the issue of limitation of time arguing that the events being complained of occurred sometimes in September 2012 whereas the application for leave was filed on 08/10/2013 well beyond the statutory time-bar of six months and that the application ought to be terminated at this point in time.
7. That TSC is a public body and discharges public functions hence is amenable to judicial review is not in doubt. Indeed to this end the Ex parte Applicant has a right to a fair administrative action under Article 47 of the Constitution of Kenya 2010.
8. However the exparte Applicant chose to come to Court under Order 53 Rule 1 and 2 of the Civil Procedure Rules hence bringing himself squarely within the confines of the said order, the province of judicial review.
9. Order 53 Rule 2 of the Civil Procedure Rules provides as under:-

“Leave shall not be granted to apply for an order of Certiorari to remove any judgment, order decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding as such short period as may be presented by an Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined at the time for appealing has expired.” (emphasis added).

Be that as it may, the Applicant has also not lodged any application for consideration by this Court on the possibility of the extension of time.

10. It is also on record that the exparte Applicant rightly exercised his right of appeal and lodged an appeal to the Appeals Tribunal.

The Applicant’s contention and reasons for preferring the proceedings herein is that whereas the parent Teachers Service Commission Act, Chapter 212 of the Laws of Kenya provided for an Appeals Tribunal, the current Teachers Service Commission Act No. 20 of 2012 which commenced on 31/08/2012 after the repeal of the parent Chapter 212 did not provide for such an Appeals Tribunal hence the exparte Applicant’s to commence these proceedings.

Section 50(3) of the TSC Act No. 20 of 2012 provides that:-

“All proceedings and decisions subsisting before the commencement of this Act virtue of the repealed Act, shall after the commencement of this Act be deemed as subsisting under this Act.”

I have also seen the letter dated 23/10/2012 by TSC to the exparte Applicant acknowledging his appeal and undertaking to revert thereafter. This Court has not been addressed on the currency or outcome of the said appeal, but in any event it has been severally held that the remedy of judicial review ought to be the last possible remedy available though the availability of other remedies is no bar to the granting of the judicial review relief. (See: **Republic vs. The Commissioner of Lands exparte Lake Flowers Limited, Nairobi HC Misc. Application No. 1235 of 1998 (unreported)** and **Zachariah Wagunza & Another v Office of the Registrar Academic Kenyatta University & 2 others (2013)e KLR**).

11.From the above analysis, this Court therefore takes the following position in this matter that:-

- a. *The application for leave to commence the judicial review proceedings is time-barred by dint of Order 53 Rule 2 of the Civil Procedure Rules.*
- b. *There is no application for extension of time for the consideration by this Court.*
- c. *There is an appeal pending against the decision of the TSC.*
- d. *The exparte Applicant has other possible remedial avenues including but not limited to the those provided under the Constitution of Kenya.*

12.The upshot is therefore that the prayer for leave to commence judicial review proceedings under Order 53 of the Civil Procedure Rules 2010 is hereby denied. The Chamber Summons dated 04/10/2013 is hereby dismissed with costs.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 5th DAY OF February 2015.

A. C. MRIMA

JUDGE