



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COURTS**  
**MISCELLANEOUS CIVIL APPLICATION NO. 391 OF 2013**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**CABINET SECRETARY MINISTRY OF HEALTH.....1<sup>ST</sup> RESPONDENT**  
**PRINCIPAL SECRETARY MINISTRY OF HEALTH...2<sup>ND</sup> RESPONDENT**  
**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**  
**EX PARTE: ELIZABETH AWINO ONYANGO**

**JUDGEMENT**

**Introduction**

1. By her Motion on Notice dated 14<sup>th</sup> November, 2013, the *ex parte* applicant herein, **Elizabeth Awino Onyango**, seeks the following orders:

1. **THAT an order of mandamus be issued to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein to lift the ex parte Applicant's letter of interdiction and to reinstate her back to her office forthwith.**
2. **THAT an order of Mandamus be issued to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to release the ex parte applicant's salary which is due to her since December, 2009.**
3. **THAT an order of prohibition be issued restraining the Respondents from taking any disciplinary action against the ex parte applicant.**
4. **Those Costs of this Application be provided for.**

**Ex Parte Applicant's Case**

2. The said Motion is supported by Statutory Statement filed 30<sup>th</sup> October, 2013, a Verifying Affidavit sworn on 29<sup>th</sup> October, 2013 and a further affidavit sworn on 15<sup>th</sup> May, 2014 both by the applicant.

3. According to the *ex parte* applicant, on or about 4<sup>th</sup> December, 2009, she received a letter of interdiction requiring her to show cause why disciplinary action should not be instituted against her on account of absence from duty without permission or without reasonable cause. The said letter also mentioned irregular encashment of Kshs 36,933/= though she was not required to show cause on this issue. She nevertheless addressed the issue in her response.

4. However despite the applicant's several reminders the Respondents have failed to address her issue and she has remained on interdiction to date without any good reason. As a result the applicant has been unable to compete for promotion or any other position in the Public Service. The applicant deposed that despite indicating to the Respondent that she was moving to the Court the Respondents were unmoved which indicates that the Respondents were handling the matter with impunity.

5. According to the applicant by paying her half the salary for over 3 years, the Respondents are not considerate of her economic status and further the respondents have not considered her issue despite the fact that no finding has been made on her case and she has never been called upon to appear before the disciplinary committee. As the Respondents have not afforded her a hearing, the applicant contended that her interdiction is unprocedural and illegal and though interdiction is meant for a particular purpose which should be achieved within a particular time frame, keeping her in indefinite abeyance amounts to punishment and giving her psychological torture hence it is in the interest of justice that the Respondents be restrained from further deliberations on her issue to preserve the ends of justice and take care of her interest.

6. According to the applicant the Respondent could not be trusted to make a sound decision in light of their exhibition of lack of the dispatch in handling the issue and can no longer be fair.

### **Respondents' Case**

7. On behalf of the Respondents, a replying affidavit was filed sworn by **Nahashon K N Thiongo** on 26<sup>th</sup> March, 2014.

8. According to him, the applicant was reported by the Chief Health Administrative Officer to have misappropriated government funds amounting to Kshs 528,752.60 for the financial year 2007/2008 and was consequently interdicted on 4<sup>th</sup> December, 2009 on half salary pending her showing cause why disciplinary action should not be taken against her.

9. Vide her letter dated 21<sup>st</sup> January, 2010, the applicant explained herself why the said action should not be taken against her and on 23<sup>rd</sup> September, 2013, the human resource committee sat and discussed the applicant's case and recommended that she be retired in public interest subject to the approval of the Public Service Commission. Accordingly, on 19<sup>th</sup> December, 2013 the deponent wrote to the applicant informing her of the said recommendation and her right to make representation before the Public Service Commission on the issue.

10. According to the deponent, the action contemplated by paragraph 3 of the Motion has already been overtaken by events hence an order of prohibition cannot issue. In his view the decision to interdict the applicant was made within the law and that judicial review remedies are remedies of last resort and the applicant has an available remedy of making representation against the recommendation to retire her on public interest at Public Service Commission.

### **Applicant's Submissions**

11. On behalf of the applicant, it was submitted that it is unfair to keep a person on indefinite interdiction as this amounts to injustice because the applicant cannot improve her career and in any event this made the applicant to live under mental torture. According to the applicant, the Code of Regulations for Civil Servants is clear that all disciplinary issues should be dealt with within six (6) yet the instant case has been pending for almost four (4) years without disciplinary measures being initiated by the Respondents.

12. The applicant was of the opinion that the Respondents were just out to ruin the Applicant's life since with interdiction, she cannot compete for promotion, look for greener pastures or apply for any Government scholarship. According to her as the Respondents have acted ultra vires there is need for intervention by the Court to make sure that the Respondents act within the law and the Applicant is treated with dignity and fairness and the Court must make sure that due process is followed and justice is done equally to all citizens.

13. Since the 3<sup>rd</sup> Respondent is the Chief Legal adviser, he was sued for his failure to advise the Ministry of health.

### **Respondents' Submissions**

14. On behalf of the Respondents it was submitted that during the pendency of these proceedings, a meeting was convened on 25<sup>th</sup> September, 2013 at which the applicant's conduct was discussed and a recommendation made to the Public Service Commission to retire her in public interest. This action, it was submitted occurred before the stay orders were granted on 30<sup>th</sup> October, 2013 hence the grant of the orders sought herein would not reverse the recommendation to retire the applicant and would not stop the Public Service Commission from dealing with the same. In the Respondents' view the grant of the orders sought herein would be in vain.

15. According to the Respondents. Since the disciplinary action has already been taken against the applicant,, an order of prohibition cannot issue and they relied on **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**. Based on the same decision, it was submitted that the ex parte applicant has not shown that the contemplated disciplinary action was in excess of jurisdiction or in contravention of the natural justice hence prohibition cannot issue.

16. Similarly, it was submitted, based on the same decision that mandamus cannot issue. According to the Respondents, they have discretion to exercise disciplinary action against the ex parte applicant hence if mandamus were tom issue to lift the interdiction and reinstate the applicant, the Court would be usurping the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's jurisdiction. In their view the Court can only issue mandamus to compel the said Respondents to proceed and conclude the disciplinary action against the applicant which cannot be granted as the same was not sought.

17. It was further submitted that there are other more convenient remedies such as the applicant showing cause why she should not be retired in the public interest.

18. The Respondents therefore urged the Court to dismiss the application.

### **Determinations**

19. Having considered the material before me it is my view that the substantive issue for determination in this application is whether the interdiction of the applicant including the period thereof was lawful and justifiable and whether the same was reasonable and fair.

20. Article 47(1) and (2) of the Constitution provides as follows:

***1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

21. Disciplinary action is no doubt an administrative action and under Article 47(1) of the Constitution, a person being subjected to such a process is entitled to an expeditious, efficient and fair process. Such a

process, if it takes an unreasonably long period may well be construed to be an unfair process and may justify the grant of judicial review. It may similarly amount to abuse of power and discretion. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC:**

**“A power which is abused should be treated as a power which has not been lawfully exercised..... Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations. It is no defence for a public body to say that it is in this case rational to change the tariffs so as to enhance public revenue. The change of policy on such an issue must pass a much higher test than that of rationality from the standpoint of the public body. The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”**

22. In this case, the letter of interdiction was dated 4<sup>th</sup> December, 2009. By the time the applicant instituted these proceedings on 30<sup>th</sup> October, 2013, she contended that no decision had been made with respect to her status and that she was still on interdiction. However the Respondents’ position was that vide a letter dated 19<sup>th</sup> December, 2013, a decision was made that she be retired in public interest. However, on 30<sup>th</sup> October, 2013 this Court stayed further disciplinary proceedings in respect of the Applicant herein.

23. That being the position, it would follow that any step taken in pursuance of disciplining the applicant subsequent to the said order was null and void. As was held in **Judicial Service Commission vs. The Speaker of the National Assembly & Others Petition No. 518 of 2013:**

**“The President’s actions were predicated on actions taken by the**

**National Assembly resulting in a petition to the President under Article 251(3). The validity and bona fides of this petition is in contention. If, as the Petitioner contends, it was invalid for having been the result of a process in Parliament that took place in violation of a Court order, then the President's acts would have been based on an invalid act; and as the Court observed in the case of *Clarke and Others v Chadburn and***

**Others [1985] 1 ALL ER 211, an act done in wilful disobedience of a Court order is both a contempt of Court and an illegal and invalid act which cannot effect any change in the rights and liabilities of others."**

24. In the case of **Democratic Alliance v President of The Republic of South Africa & Others (263/11) [2011] ZASCA 241**, the Supreme Court of Appeal of South Africa quoted with approval what the former **Chief Justice Mahomed** of South Africa in an address on the Independence of the Judiciary in Cape Town on 21<sup>st</sup> July, 1998 stated that the mandate of the legislature is to make only those laws permitted by the Constitution, and

**"...to defer to the judgment of the court, in any conflict generated by an enactment challenged on constitutional grounds .... A democratic legislature does not have the option to ignore, defy or subvert the court. It has only two constitutionally permissible alternatives, it must either accept its judgment or seek an appropriate constitutional amendment, if this can be done without subverting the basic foundations of the Constitution itself."**

25. It follows that the letter dated 19<sup>th</sup> December, 2013 was of no legal effect.

26. With respect to the recommendation allegedly made on the 25<sup>th</sup> September 2013, as the effect itself states, the same was a mere recommendation which was subject to ratification by the Public Service Commission. It was not, on its own a decision capable of being given effect to without more. It is true that where a decision has been made, a party cannot seek to prohibit the same without having the same quashed. However where the decision is in the process of being made and the only "decision" made was that the action in question be undertaken, I do not see why the Court cannot in those circumstances prohibit the "decision" from being implemented even without quashing the decision that the same be undertaken. In other words there is nothing to bar the Court from prohibiting a recommendation from being transmuted into a decision notwithstanding the fact that there is no prayer seeking to have the recommendation quashed. That is my understanding of the decision of the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** where the Court expressed itself as follows:

**"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...Prohibition 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.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**  
[Emphasis mine].

27. It is therefore clear that the Court was emphatic that the remedy of prohibition is only lost where a

decision has been made and not where the proceedings in question are still continuing and are in the process of being implemented. Accordingly, since the applicant herein is seeking in effect to stop the Respondents from concluding the disciplinary proceedings, the mere fact that a recommendation for consideration by the Public Service Commission that she be retired in public interest has been made, is not a ground to decline to entertain an application seeking to prohibit the fulfilment of the said recommendation.

28. In any case, it is doubtful whether a prayer seeking to quash the recommendation if sought would have been capable of being granted taking into account the fact that the Public Service Commission is not bound by the said recommendation. In *Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. II page 808 para 1508* it is stated that:

**“The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be found.”**

29. In *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354* the Court stated:

**“The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application.”**

30. In my view, to keep an employee on interdiction for a period of nearly 4 years before making a decision either way, is not only a violation of Article 47 but is an abuse of power. Such action ought not to be countenanced by any Court of law. As was aptly held in *Royal Media Services (Ltd) vs. Commissioner of Customs & Excise Nairobi H.C. Misc. Application No. 383 of 1995 [2002] 2 EA 576*, any judiciary worth its salt should grasp and uphold the letter and spirit of the constitution of its country and stand as a strong wall against any action of the officials of the Government which is irrational, capricious or arbitrary and term the same as unconstitutional.

31. Whereas there is no specific timeline within which disciplinary actions ought to be commenced and concluded such proceedings ought to be considered in light of Article 259(8) of the Constitution which provides that if a particular time is not prescribed by the Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. Four years delay in determining disciplinary proceedings is prima facie unreasonable.

32. It was submitted that since the applicant's case is now scheduled for consideration by the Public Service Commission, this Court ought not to grant the orders sought as to do so would amount to usurping the powers of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. In the Respondents' view the Court can only compel the Respondents to hear and conclude the applicant's case. However, as the said order is not sought such an order is similarly incapable of being granted. In other words the Respondents would wish this Court to fold its arms and leave the applicant, who the Court has found has had her constitutional rights under Article 47 violated, without a convenient, beneficial and effective remedy. It is however well recognised that there cannot be a wrong without a remedy unless there is an express prohibition by statute or otherwise. It is therefore my view that to decline to give an effective remedy to the applicant and leave her at the mercy of the Respondents who has shown lethargy in expeditiously determining her case would be to abet injustice and this Court cannot allow itself to be used as an instrument of perpetuating injustice.

33. Having considered the application the order which commend itself to me and which I hereby grant is an order of mandamus compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to lift the ex parte applicant's interdiction, reinstate her to her office forthwith and release her unpaid salary accrued as a result of the said interdiction.

34. With respect to the prayer for prohibition, restraining the Respondents from taking any disciplinary action against the ex parte applicant cannot be granted in the manner sought since to do so would amount to permanently barring the Respondents from taking any disciplinary action against the applicant in future, merits notwithstanding.

35. The costs of this application are awarded to the applicant to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Dated at Nairobi this day 14<sup>th</sup> of October, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Were for the Applicant***

***Cc Patricia***