



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Judicial Review 248 of 2012

**N THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW
PROCEEDINGS**

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: THE STATE CORPORATION ACT, CAP 446 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF: THE AGRICULTURE FINANCE CORPORATION ACT CAP.323 OF
THE LAWS OF KENYA**

AND

**IN THE MATTER OF: THE AGRICULTURE FINANCE CORPORATION STAFF
REGULATION MANUAL**

BETWEEN

NASIEKU TARAYIA G.....APPLICANT

AND

**THE BOARD OF DIRECTORS
AGRICULTURE FINANCE CORPORATION.....1STRESPONDENT
AGRICULTURE FINANCE CORPORATION.....2NDRESPONDENT**

R U L I N G

On 14th June 2012, the applicant herein Nasieku Taraiya filed a chamber summons application

seeking leave to be allowed to commence judicial review proceedings for an order of Certiorari, to remove into this court and to quash the decision of the 1st respondent made on 23rd November 2010 conveyed to the applicant on 24th November 2010 by the managing director of the 1st respondent on behalf of the respondents purporting to terminate the applicant's services with the 2nd respondent with effect from 1st December 2010.

The application is supported by the statutory statement dated 13th June 2012 and the verifying affidavit sworn by the applicant on 13th June 2012 and annexures thereto.

It is premised on nine grounds which for convenience can be summarized into the following four grounds:

- (1) That the decision purporting to terminate the applicant's services was made contrary to the law as it violated the rules of natural justice.
- (2) The respondents acted *ultra vires* their administrative powers by failing to refer to or obtain a written concurrence from the Government of Kenya through the Ministry of Agriculture which was the appointing authority before terminating the applicant's employment.
- (3) That the respondents failed to adhere to procedures stipulated in their staff regulation manual which included serving her with a notice to show cause rendering the respondent's action null and void **abinitio**.
- (4) That the respondents are subject to this court's supervisory jurisdiction.

The application was argued *ex parte* before me on 5th July 2012. Mr. Wasuna, learned counsel for the applicant submitted that though the application sought leave to apply for orders of certiorari and it had been filed more than six months after the decision challenged by the applicant was made, it was not caught up by the 6 months limitation period imposed by Section 9 of the Law Reform Act which was replicated in Order 53 Rule 2 of the Civil Procedure Rules.

Order 53 Rule 2 states that -

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding 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 or such shorter period as may be prescribed by any 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 or the time for appealing has expired”.

Counsel relied on the holdings by the High Court in two authorities namely; Republic –Vs- Judicial Commission of Inquiry into the Goldenberg Affair, Ex parte Mwalulu & 8 Others [2004] eKLR and Republic –Vs- Maseno University Staff Disciplinary Committee & Another Misc. Appn No.963 of 2007 for the proposition that the statutory limitation period prescribed under Order 53 Rule 2 of the Civil Procedure Rules applies only to the formal orders specified therein, namely; judgment, order, decree, conviction or other proceedings and that it does not apply to decisions which are nullities.

Mr. Wasuna went further to submit that the Board of the 2nd respondent did not have power to terminate the applicant's services since the applicant had been hired as Deputy Managing Director and subsequently as Acting Managing Director of the 2nd respondent by the Ministry of Agriculture and that it was only the Permanent Secretary, Ministry of Agriculture who was mandated to terminate her services.

According to the applicant, the 1st respondent acted in excess of its jurisdiction in terminating her employment and that its decision was therefore a nullity bringing it outside the 6 months statutory limitation period. Mr. Wasuna also urged the court to find that in making the impugned decision, the

board failed to observe the rules of natural justice by failing to notify the applicant why it had lost confidence in her so that she could defend herself.

Having carefully read through the applicant's pleadings and having considered Mr. Wasuna's submissions and authorities cited, I wholly appreciate the holding in those authorities regarding the application of Order 53 Rule 2 of the Civil Procedure Rules as submitted by counsel. I am however aware of a Court of Appeal decision in which the Court of Appeal while not specifically ruling on the proper interpretation to be given to Order 53 Rule 2 expressed the view that even an application for an order of certiorari challenging a minister's decision had to be filed within six months in order not to be caught up by the statutory limitation period. I have in mind the case of Aga Khan Education Service Kenya –Vs- Republic & Others, Civil Appeal No.257 of 2003 where the Court of Appeal was considering whether leave to apply for an order of Certiorari to quash a minister's decision directing that a Primary School be managed by the Aga Khan Education Services Kenya had been properly granted owing to claims that the application for leave had been filed more than 6 months after the minister's decision. The Court of Appeal expressed itself in the following terms:

We agree with Mr. Inamdar that the burden is on an applicant for leave to satisfy the judge that leave ought to be granted. As we stated elsewhere in this judgment, if it is apparent from the material placed before a judge that the application for leave is made more than six months from the date of the decision sought to be challenged, then in the words of Section 9 (3), "**Leave shall not be granted**".

It is obvious from this authority that the Court of Appeal was of the view that Order 53 Rule 2 of the Civil Procedure Rules applied to all decisions made by statutory/public bodies/or public officers and not only to the formal orders prescribed therein.

Having pointed out those two contrasting legal positions on the interpretation of Section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, I do not find it necessary in this case to make a finding on whether the applicant's application was time barred by operation of the law or not because in my view the more fundamental question for my determination is whether the applicant is entitled to leave sought herein given the long delay of over 1½ years before instituting these proceedings.

The court record shows that the instant application for leave was filed on 13th June 2012 while the evidence tendered by the applicant shows that the decision of the respondents to terminate her services was communicated to her by letter dated 24th November 2010.

Having considered the evidence placed before me in this application, I find that the said delay was inordinate and unreasonable and is not sufficiently accounted for.

In my view, applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration by the court in deciding whether or not to exercise its discretion in either granting or denying leave depending on the circumstances of the case under consideration.

I am persuaded and supported in this view by the opinion of Lord Hope of Craighead in the House of Lords decision in the case of Regina –Vs- London Borough of Hammersmith and Fulham (Respondents) and Other Exparte Burkett & Another (FC) (Appellants) [2002] UKHL 23 where he said the following on the need for an applicant to move the court promptly:-

"On the other hand, it has repeatedly been acknowledged that applications in such cases should be brought speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in *O'Reilly –Vs- Mackman* 2Ac 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision; see also *R –Vs- Dairy produce Quota Tribunal for England and Wales, Exparte Caswell* [1990] 2Ac 738. But decisions as to whether a petition should be dismissed on the ground of delay are made in

the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in *Swan –Vs- Secretary of State for Scotland 1998 SC 479, 487*:

“It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such at the petitioners should not be allowed to proceed, we take into account the situation which time was allowed to pass”.

In this case, the applicant has not offered good or satisfactory reasons to explain why being aggrieved by the impugned decision she did not move with reasonable speed to institute judicial review proceedings to have her grievances addressed. The fact that the parties were pursuing amicable settlement in the matter does not hold much substance as the reason for a delay of over 1½ years since the applicant being an Advocate of the High Court of Kenya must have been aware of the remedy of judicial review and nothing would have stopped her from instituting proceedings seeking appropriate reliefs as the said negotiations for settlement were going on. It is therefore my finding that the applicant has not offered a satisfactory explanation for the said delay. The said delay is in my opinion inordinate, unreasonable, inexcusable and unexplained.

It is worth pointing out at this juncture that even where leave is granted, the court at the end of the substantive proceedings for judicial review is entitled in the exercise of its discretion to refuse to grant judicial review remedies where there is evidence to show that the applicant sat on his/her rights and failed to seek relief in good time and with due diligence.

Having failed to exercise due diligence in seeking relief, the applicant has been out of the 2nd respondent’s employment since 1st December 2010 and since the 2nd respondent had to continue running its operations, it is reasonable to conclude that the applicant was replaced by another person who has been working with the 2nd respondent for the same period of time. Given this scenario even if the application was allowed, I am doubtful whether the remedy of certiorari would at the end of the day serve any useful purpose given that even if the applicant was to succeed in the main hearing, the effect of the order will be to quash the decision to terminate her services but it will not reinstate the applicant to her previous position.

The applicant has not prayed for leave to apply for an order of mandamus to compel the respondents to reinstate her to her former position in the event that the court eventually concurs with her position that her termination from employment was not done in accordance with the law. In the premises, I fail to see how an order of certiorari would eventually benefit the applicant in the circumstances of this case.

Let me state at this point that I am alive to the principle of law enunciated in the case of **Njuguna Vs Ministry of Agriculture (2000) 1EA 184** regarding the test which the court should apply in deciding whether or not to leave to applicants seeking to commence judicial Review proceedings. The court of appeal held that the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive application.

Applying that principal to the present case, even if I was to keep aside for a moment the critical factor of the inordinate and unreasonable delay in instituting the instant proceedings, on the material placed before me, it is my finding that the applicant has prima facie not established an arguable case that the relief sought might be granted on the hearing of the substantive motion. I have come to this conclusion on the basis of three main reasons which are the following;

To start with, the applicant has not prima facie established that the decision to terminate her services was *ultra vires* the powers of the Board (1st respondent). Though it has not been expressly stated by the applicant in her verifying affidavit or in the letter terminating her services dated 24th November 2010 what position the applicant occupied before her services were terminated, it is apparent from the

documentation availed to the court in this matter more specifically the letter dated 27th August 2008 in the bundle of documents marked GNT 11 that the applicant had been redeployed from the position of Acting Managing Director of the 2nd Respondent to the position of General Manager, Business Development. This means that by the time her services were being terminated unlawfully or otherwise, the applicants designation was General Manager, Business Development not Acting Managing Director the position to which she had been appointed on 17th January 2003 by the Ministry of Agriculture.

This may explain why her letter of termination was signed by one Zakayo Magara who described himself as the Managing Director. Under Section 9 of the Agricultural Finance Corporation Act, Cap.323 of the Laws of Kenya (The Act), the statute governing the operations of the 2nd respondent, the only position which required concurrence of the minister in the ministry concerned in making appointments and by analogy in terminating the holders services was the position of the General Manager of the corporation which in my view would be equivalent to the position of the Managing Director. Under Section 10 of the Act all other members of staff were under the Board's mandate.

Secondly, the applicant failed to exhibit the staff regulation manual in order to demonstrate her claim that such a manual did actually exist and that disciplinary procedures contained therein were not followed before the impugned decision was taken by the 1st respondent.

Thirdly, the applicant's major complaint in this case as I understand it is that her services were terminated unlawfully without the 1st respondent following its own internal disciplinary procedures and without following the law.

Since the parties enjoyed an employer-employee relationship which is contractual in nature, it is my opinion that the applicant has an alternative remedy of instituting civil action for damages for alleged unlawful termination of employment which remedy would be more beneficial and efficacious than the judicial review remedy of certiorari sought in this case.

The law is that judicial review is a remedy of last resort and parties aggrieved by the administrative actions of public/statutory bodies should first pursue alternative remedies before instituting judicial review proceedings unless it can be demonstrated to the satisfaction of the court that judicial review was more convenient, beneficial and efficacious than the alternative remedy available to the applicant – see the case of Republic –Vs- National Environment Management Authority, Exparte Sound equipment Limited - C/Appeal No.84/2010 (H.C. Misc. Civil App. ELC.7 of 2009).

Though in this case the applicant has not even disclosed the existence of an alternative remedy, it is common knowledge that such a remedy exists under the Employment Act and the Industrial Courts Act which empowers the Industrial Court to grant appropriate reliefs in all employment and labour related disputes.

Since the applicant has an alternative remedy which in my view will serve the applicant's interests better and is more convenient and effectual than the remedy for which leave is being sought in this case, I find no good reason to exercise my discretion in allowing the instant application for leave.

For the foregoing reasons, it is my conclusion and finding that the instant application dated 13th June 2012 is not merited and it is hereby dismissed with no orders as to costs.

Dated, Signed and Delivered by me at Nairobi this 13th day of July, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence - Court Clerk

Mr. Odhiambo for Applicant

N/A for 1st Respondent

N/A for 2nd Respondent