



**Republic & 2 others v The Judicial Service Commission & 5 others; Manyasi (Exparte)  
(Judicial Review 299 of 2011) [2012] KEHC 3767 (KLR) (Civ) (4 July 2012) (Judgment)**

*REPUBLIC V JUDICIAL SERVICE COMMISSION &  
ANOTHER EXPARTE JOYCE MANYASI [2012] eKLR*

Neutral citation: [2012] KEHC 3767 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**CIVIL**

**JUDICIAL REVIEW 299 OF 2011**

**WK KORIR, J**

**JULY 4, 2012**

**BETWEEN**

**REPUBLIC ..... 1<sup>ST</sup> APPLICANT**

**REPUBLIC ..... 2<sup>ND</sup> APPLICANT**

**REPUBLIC ..... 3<sup>RD</sup> APPLICANT**

**AND**

**THE JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE JUDICIAL SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**THE CHIEF JUSTICE ..... 4<sup>TH</sup> RESPONDENT**

**THE CHIEF JUSTICE ..... 5<sup>TH</sup> RESPONDENT**

**THE CHIEF JUSTICE ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**JOYCE MANYASI ..... EXPARTE**

**JUDGMENT**

1. Through the notice of motion dated 13<sup>th</sup> December, 2011 the Ex-parte Applicant, Joyce M Manyasi prays for orders that:-



- (a) An Order Of Certiorari to remove to this Honourable Court to be quashed the decision of the Chief Justice signified by the letter dated 25<sup>th</sup> July, 2011 purporting to suspend the Applicant from performing her official duties in judicial service with effect from 25<sup>th</sup> July, 2011 and to subject the Applicant to disciplinary action.
  - (b) An Order Of Prohibition to prohibit the 1<sup>st</sup> Respondent from implementing or continuing to implement the decision of the Chief Justice dated 25<sup>th</sup> July, 2011 purporting to suspend the Applicant from performing her official duties in judicial service with effect from 25<sup>th</sup> July, 2011 and to subject the Applicant to disciplinary action.
  - (c) Judicial Review Order Of Mandamus directing the Respondents to reinstate the applicant to her employ as Chief Magistrate with all attendant rights and benefits.
  - (d) Costs.
2. The application is supported by grounds on its face. It is also supported by the application for leave, a statutory statement, a verifying affidavit sworn by the Applicant and annexures thereto all dated 29<sup>th</sup> November, 2011.
3. The respondents opposed the application by way of a replying affidavit sworn by Winfrida Boyani Mokaya the Registrar of the Judicial Service Commission which is named as the 1<sup>st</sup> Respondent in this case. The 1<sup>st</sup> Respondent shall henceforth be simply referred to as the Commission in these proceedings.
4. It is important to give a detailed account of the facts surrounding this application. The Applicant joined the Judiciary as a District Magistrate (Professional) in 1985. She eventually rose to the apex of the magistracy when she was promoted to a Chief Magistrate. In March, 2005 she was stationed at Machakos Law Courts as the in-charge. On 14<sup>th</sup> March, 2005 magistrates went on a go-slow. The next day she received a letter from her employer calling upon her to explain why she should not be disciplined in relation to the strike. She promptly replied to the letter on 16<sup>th</sup> March, 2005 and denied breaking her oath of office. However, through a letter dated 8<sup>th</sup> June, 2005 the Commission informed the Applicant that she had been retired in public interest with effect from 7<sup>th</sup> June, 2005. The Applicant was dissatisfied with the decision of the Commission and moved to court vide Nairobi High Court Misc. Application No. 920 of 2005, Republic Vs Evan Gicheru and 3 others, Ex-parte Joyce Manyasi seeking orders to quash the decision to retire her.
5. By a judgment delivered on 12<sup>th</sup> November, 2009 J. Gacheche and L. Njagi, JJ quashed the decision of the Commission and issued an order of mandamus directing the Commission to forthwith reinstate the Applicant in her employment. The Commission did not comply with the court order but instead on 10<sup>th</sup> December, 2009 the then Chief Justice, Evan Gicheru wrote to the Applicant requiring her to show cause why she should not be disciplined for gross misconduct. Thereafter the Applicant kept on exchanging letters with the then Chief Justice until he left office.
6. On 9<sup>th</sup> May, 2011 the Applicant once again applied to be reinstated in employment as per the court order of 12<sup>th</sup> November, 2009. This time round the Commission complied with the court order and through a letter dated 11<sup>th</sup> July, 2011 wrote to the Applicant reinstating her to employment and posting her to Milimani Law Courts. A similar letter dated 20<sup>th</sup> July, 2011 confirmed the lifting of the suspension of the Applicant. Through the same letter she was informed of her posting to Milimani Law Courts as a Deputy Registrar. The Applicant was also to be paid all unpaid dues for the period she was on suspension.



7. Things took a new twist when the Chief Justice who is the 2<sup>nd</sup> Respondent herein suspended the Applicant through a letter dated 25<sup>th</sup> July, 2011. She was also required to show cause why disciplinary action should not be taken against her. The Applicant was suspended without pay. The Applicant wrote back asking for particulars of the accusations against her. In the same letter she asked to be paid an alimentary allowance during the suspension. She was supplied with particulars through a letter dated 22<sup>nd</sup> September, 2011. By a letter dated 18<sup>th</sup> October, 2011 the Applicant was informed by the Secretary to the Commission that she would be paid an alimentary allowance pending the determination of her disciplinary case. Thereafter the Applicant filed this application seeking the aforesaid orders.
8. As per the statutory statement, the grounds upon which the Applicant seeks relief are:-
  - (a) The decision the subject matter of this Application is ultra vires the powers of the Respondents.
  - (b) The decision sought to be impugned was made contrary to the rules of natural justice; despite the gravity of the accusations and their consequence on the Applicant's reputation, career, status and livelihood.
  - (c) The decision the subject matter of this Application is arbitrary, unreasonable, biased, based on extraneous considerations, malicious and actuated by bad faith.
  - (d) The decision is inconsistent with the Applicant's rightful and legitimate expectations and, ex facie, unfair.
  - (e) The decision the subject matter hereof is unreasonable and violates the Applicant's constitutional right to administrative action that is efficient, lawful, reasonable and procedurally fair, and, my right to secure protection of the law.
  - (f) The matters being raised currently as the basis for the current disciplinary action did/ought to have arisen in the previous disciplinary action or court case.
  - (g) The decision under attack gravely and unfairly shatters and/or puts to suspense the Applicant's life, livelihood, career and professional growth.
  - (h) On the whole, the decision is capricious, unfair, unlawful and has the deliberate consequence of shattering the Applicant's credit, standing, life and livelihood without cause or justification.
9. It is the Applicant's case that the 2<sup>nd</sup> Respondent acted unlawfully and in excess of his powers by suspending her. On this point counsel for the Applicant submitted that under Part IV of the Third Schedule of the Judicial Service Act No. 1 of 2011 (hereinafter simply referred to as the Act) the 2<sup>nd</sup> Respondent can only suspend a judicial officer where the officer has been convicted of a serious offence or where proceedings for dismissal have been taken and as a result of those proceedings, the 2<sup>nd</sup> Respondent considers that the officer ought to be dismissed. The Applicant submits that the action by the 2<sup>nd</sup> Respondent to suspend her without following the law was actuated by bad faith. The Applicant supports her claim of bad faith on the part of the 2<sup>nd</sup> Respondent by pointing to the fact that she was suspended without pay despite the Act providing that an officer on suspension should be paid an alimentary allowance. The Applicant further submitted that the action by the 2<sup>nd</sup> Respondent of suspending her without following the law denied her fair administrative action as contemplated by the Constitution.
10. The Applicant also submitted that the matters being raised in the current disciplinary action are res judicata as they are matters which ought to have been dealt with in J.R. Misc. Application No. 920 Of 2005.



11. On their part the respondents submitted that the Applicant is subject to the disciplinary process of the Commission as provided by the Constitution and some of the disciplinary powers of the Commission have been delegated to the 2<sup>nd</sup> Respondent by the Act. The respondents therefore argue that the 2<sup>nd</sup> Respondent in exercising the delegated powers was not acting in his own capacity but on behalf of the Commission and there was therefore no basis in law to join the 2<sup>nd</sup> Respondent in his individual capacity to these proceedings.
12. The respondents further submitted that the decision in J.R. Misc. Application No. 920 of 2005 only faulted the procedure used to retire the Applicant in public interest and not the disciplinary proceedings that had been taken against her. The respondents cite the fact that the court did not issue an order of prohibition in support of this contention. It is therefore the respondents' case that the previous judicial review proceedings did not bar the Commission from executing its constitutional and statutory mandate in so far as the disciplining of the Applicant is concerned.
13. The respondents finally submitted that the 2<sup>nd</sup> Respondent suspended the Applicant because the Commission was contemplating severe disciplinary action against her including dismissal with loss of all benefits.
14. Having brought out the positions of the parties in this case, it is clear that the issues for determination are:-
  - (a) Whether the 2<sup>nd</sup> Respondent in suspending the Applicant breached the provisions of the Act;
  - (b) Whether the 2<sup>nd</sup> Respondent was wrongly joined in these proceedings;
  - (c) Whether the issues raised by the 2<sup>nd</sup> Respondent in the letter suspending the Applicant are res judicata;
  - (d) Who should meet the costs of this application?
15. There are issues that I need to get out of the way before proceeding further. It was submitted that the 2<sup>nd</sup> Respondent was wrongly enjoined to these proceedings. In support of this argument counsel for the respondents cited the decision of J. Gacheche and L. Njagi, JJ in the already cited J.R. Misc. Application No. 920 of 2005. This is what the court said in that case:-

“In the instant case, we note that in addition to making the Commission the Respondent, the Applicant has also joined the Chief Justice as the 1<sup>st</sup> Respondent, the Registrar who was the Secretary to the Commission as the 2<sup>nd</sup> Respondent, and the Attorney general as the 4<sup>th</sup> Respondent. In our view, whatever these officials did, it was done in the name of the Commission. For instance, when the 1<sup>st</sup> Respondent wrote the letter of interdiction, he did so under powers delegated to him as Chairman of the Commission. Similarly, the letter from the Registrar was only signed by that officer as the Secretary to the Commission. It was therefore the Commission which was acting through its officials, and the acts of those officials were acts of the Commission.”
16. I think the position in the above quoted case applies to the case before me. The 2<sup>nd</sup> Respondent in suspending the Applicant was exercising the powers delegated to him under Paragraph 15 of Part IV of the Third Schedule of the Act. He was therefore carrying out the mandate of the Commission when he communicated to the Applicant. It was therefore superfluous for the Applicant to make him a party to these proceedings. It would have been enough for the Commission alone to be named a respondent in these proceedings. The Applicant cannot however be faulted for being extra careful. In a country where parties thrive on technicalities it is better to include the wrong party than to leave out a party



who ought to be included in the proceedings. No harm has been done to the Applicant's cause by the inclusion of the 2<sup>nd</sup> Respondent in these proceedings.

17. The other issue is whether the complaints for which the Commission seeks to discipline the Applicant are res judicata. The Applicant claims that when the court gave its orders in J.R. Misc. Application No. 920 of 2005 the orders stopped the Commission from ever dealing with the allegations that had led to her being retired in public interest. The respondents however argue that the judgment only addressed the unlawful manner in which the Applicant was retired but did not consider the grounds for her retirement. It is the Commission's case that the court did not stop it from considering afresh the complaints leveled against the Applicant. The Commission therefore argues that it can still conduct disciplinary proceedings against the Applicant since the court did not prohibit it from doing so.
18. It is not disputed that the complaints that had been made against the Applicant in 2005 are the same complaints that were made against her in 2011. The question therefore is whether the Commission is barred from proceeding against the Applicant in respect to those complaints.
19. Among the prayers sought in J.R. Misc. Application No. 920 of 2005 was:-

“An order of prohibition directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents restraining them by themselves, their agents, servants, or further decisions, resolutions and measures aimed at implementing the decisions of the Judicial Service Commission to retire the Applicant on the purported grounds of public interest.”

The court reached its decision in the following words:-

“For the above reasons we find that the procedure for retiring judicial officers on grounds of public interest was not followed to the letter, and that failure to do so renders both the decision making process, as well as the decision itself, flawed.... We, accordingly move to this Honourable Court and quash the decision of the 3<sup>rd</sup> Respondent made purportedly to retire the Applicant on grounds of public interest effective from 7<sup>th</sup> June, 2007 and in the circumstances, we find that the said retirement was not only null and void, but it was improper. It cannot therefore lie.

20. We also grant her an order of mandamus directed at 3<sup>rd</sup> Respondent to halt forthwith the implementation of its aforesaid decision AND further direct that it reinstates her in employment forthwith as a Chief Magistrate.”
21. The Commission is therefore right when it submits that it was not prohibited from taking action on the complaints that it had against the Applicant. The Commission has also correctly pointed out that judicial review is about the decision making process and not the merits of the decision. The purpose of judicial review is to ensure that public bodies and officials perform their functions in good faith, without malice and in accordance with the law. Once the court has clarified the law the public body may decide to retake the decision or abandon the decision altogether. Judicial review remedies are not meant to curtail public bodies from exercising their statutory powers. In some cases the orders issued by the court may bar a public body from ever taking action in respect to a particular issue. Only when the orders have the effect of stopping further action can a party claim that a matter is res judicata. In the instant case however it is clear that the Commission was never barred from substantively dealing with the complaints against the Applicant. The Commission is therefore at liberty to restart the disciplinary process. The Applicant cannot be allowed to use the judicial review mechanism to shield herself from a process that is provided by the law. I therefore reject the submission that the Commission cannot



deal with the complaints that had been raised against the Applicant before she obtained the orders of certiorari and mandamus in J.R. Misc. Application No. 920 of 2005.

22. The question of the day in this matter is whether the 2<sup>nd</sup> Respondent in suspending the Applicant acted ultra vires the provisions of the Act. The Applicant relies on Paragraph 17 of Part IV of the Third Schedule to demonstrate that the 2<sup>nd</sup> Respondent exceeded his powers by suspending her. The said paragraph provides that:-

“17(1) Where an officer has been convicted of a serious criminal offence, other than such as are referred to in paragraph 28(2), the Chief Justice may suspend the officer from the exercise of the functions of their office pending consideration of their case under this Schedule.

- (2) The Chief Justice may suspend from functions of their officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers the officer ought to be dismissed.
- (3) While an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine.
- (4) An officer who is suspended shall be required to comply with such conditions as may, by regulations, be prescribed.”
23. The grounds upon which the 2<sup>nd</sup> Respondent can suspend a judicial officer are found in sub-paragraphs (1) & (2). In the first instance he can suspend an officer where the officer “has been convicted of a serious criminal offence.” That situation does not apply to this case because no evidence has been placed before the court to show that the Applicant has been convicted of a serious criminal offence.
24. The other ground is where “proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed.” Before I proceed further I must state that some words are missing from sub-paragraph (2). In my view the missing words ought to have been between the words “their” and “officer”. Considering the wording of sub-paragraph (1) I guess the omitted words in sub-paragraph (2) are “office an” so that the sub-paragraph would read:-

“The Chief Justice may suspend from the exercise of the functions of their office an officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed.”

25. Whatever the case the editorial glitch in that sub-paragraph does not make it lose its meaning. It only points to the fact that the Act has some errors which need to be corrected as soon as practicable. For instance, another glaring error is found in Paragraph 15 of the Third Schedule which refers to interdiction and suspension as being under paragraphs 17 and 18 respectively instead of paragraphs 16 and 17 as appears in the Act.
26. In my understanding Paragraph 17(2) empowers the 2<sup>nd</sup> Respondent to suspend an officer once proceedings for dismissal of the officer have started. The question therefore is whether disciplinary proceedings had been taken against the Applicant at the time of her suspension. According to the respondents, proceedings had commenced by the time she was being suspended. The letter dated 25<sup>th</sup> July, 2011 which suspended the Applicant and the replying affidavit clearly bring out this fact. This fact has not been challenged by the Applicant. The fact that proceedings had started therefore gave the 2<sup>nd</sup> Respondent the authority to suspend the Applicant. The argument that the respondents acted ultra vires cannot therefore be sustained.



27. The Applicant also argued that her suspension was driven by bad faith. She claims that failure to grant her an alimentary allowance at the time of her suspension is enough evidence of bad faith. It is not disputed that the letter of suspension was not accompanied by information about the grant of an alimentary allowance. It is agreed however that the allowance was granted so soon after her suspension. The Act does not state when the allowance is to be granted. Common sense and fairness would dictate that the allowance should be granted upon suspension so that an officer may not suffer any unnecessary hardship. After all a judicial officer remains an officer notwithstanding suspension. He/she cannot engage in any other means of earning a living. In the circumstances of this case, I cannot however use the slight delay on the part of the Commission to grant the Applicant an alimentary allowance as evidence of bad faith. The delay is understandable considering that regulations under Paragraph 17(3) for the provision of an alimentary allowance may not have been made at the time the Applicant was suspended.
28. It was also submitted on behalf of the Applicant that her suspension went against her legitimate expectation to fair administrative action. The Applicant, like every other citizen of this country, has legitimate expectation of being taken through a fair administrative process whenever there is contact with the administration. I have in this judgment demonstrated that the respondents have conducted themselves in a fair and legal manner towards the Applicant. There is therefore no breach of the Applicant's legitimate expectation to a fair administrative process.
29. At the end of the day, it is clear that until this stage the respondents have not taken any wrong step in so far as the Applicant's disciplinary case is concerned. That being so, this application fails and the same is dismissed with costs to the respondents.

**DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY, 2012**

**W. K. KORIR, J**

