



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISCELLANEOUS CIVIL APPLICATION 186 OF 2006

THE REPUBLICAPPLICANTS

VERSUS

THE MUNICIPAL COUNCIL OF EMBU.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION OF KENYA.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

PRISCAH NJAMBI IREGI

ELIJAH BUURI MUGUTI

ANDERSON NJUE MAKENDA

EDITH WAMUYU GIKANDI.....EXPARTE APPLICANTS

JUDGMENT

The four exparte applicants moved this court vide the application dated 20/12/2006. The application was basically seeking the following order:-

“ That the applicants be granted leave to file an application for an order of certiorari to quash the decision of the Public Service Commission made

on 2/11/2006 and an order of mandamus to

compel the Municipal Council of Embu to reinstate

the applicants to full service.”

The same was supported by the statement of facts and the affidavit of the 4th ex parte applicant namely Edith Wamuyu Gikandi. In paragraph 4 of her affidavit, she has given the list of the documents she has annexed in support of the application. These are:-

- (a) Letters dated 25/4/2002 interdicting the applicants from service.*
- (b) Letters dated 13/9/2002 lifting the interdiction.*
- (c) Letter dated 8/9/2003 preferring charges against the applicants.*
- (d) Letter dated 30/9/2003 referring the charges to the committee for deliberation.*
- (e) Letter dated 29/10/2003 informing the applicants of their conviction.*
- (f) Letters dated 15/7/2005 informing the applicants of the dismissal of their first appeal against termination.*
- (g) Letters dated 2/11/2006 informing the applicants of the dismissal of their 2nd appeal.*

She appears to have filed another affidavit dated 19/2/2007 with the Notice of Motion. I agree with counsel for the Respondents that the said affidavit was filed without the leave of the court and obviously in contravention of Order LIII Rule 4 of the Civil Procedure Rules. The said affidavit is therefore not properly before the court and the same calls for striking out. The same along with its annexures is therefore struck off. I would nonetheless find that the application is supported by the affidavit made at the time of the application for leave was made. That would have assisted the ex-parte applicants but again, there is no evidence that the Respondents were served with the same. This therefore leaves the notice of motion bare and unsupported by any affidavit and this is fatal to the same. This therefore makes the ex-parte applicants notice of motion irredeemably defective and on that basis alone, the same should be dismissed.

I have nonetheless taken the trouble to keenly go through the submissions filed by all 3 counsels in this matter and the law applicable and although this be an academic exercise, I feel I should point out the other pertinent issues that arise out of these submissions.

Even assuming for the sake of argument that there was compliance with Rule 4 of Order 53, would the Notice of Motion have succeeded? The other fatal flaw that was pointed out by counsel for 2nd and 3rd Respondents was that the order or decision meant to be quashed has not been attached to the ex-parte applicant's pleadings. That unfortunately is so. The decision by the Public Service Commission which is said to have been made on or about 2nd November 2006 did not form part of the annexures annexed to the affidavit in support of the application for leave. This is actually the reason why I listed the annexures in question at the beginning of this Judgment. That decision is glaringly absent. Instead, the document dated 2/11/2006 is the brief letter communicating the Public Service Commission's decision to the Town Clerk Embu Municipal Council. Even again assuming that the said letter is quashed? Of what consequence would that be? The decision in question would still remain intact. That is why it is of paramount importance that the decision sought to be quashed be annexed to the application. Indeed Order 53 Rule 7 (1) makes it mandatory for the decision sought to be quashed to be annexed to the pleadings. It states as hereunder:-

“ In the case of an application for an order of

of certiorari to remove any proceedings for the purpose of their being quashed the applicant SHALL NOT question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to so to the satisfaction of the court.”

There was no explanation given as to why the said decision was not annexed or indeed leave sought from the court for the application to proceed without the same. This is another reason why the notice of motion is fatally defective. I would also like to state that the writ of mandamus applies to a public body/official which is by law mandated to perform some duties but which the public body or official has refused to perform.

In this case reinstatement of the ex-parte applicants to their employment/jobs is not a public duty. Rather, it is as rightly submitted by counsel for the Respondents herein a contractual relationship between an employer and employee. Even if again for the sake of argument, the orders of certiorari were issued, the order for mandamus sought would not lie. Indeed, it is trite law now that a court cannot force an employed on an unwilling employer and the only recourse such an employee would have against the employer is a claim for damages as a civil remedy. Whichever way one would like to look at this proceeding therefore, the same was a non-starter from the word “**go.**” It is not just bad in law; but the substantive orders sought did not lie.

In the circumstances, I find and hold that the notice of motion before me lacks merits, the same is also bad in law and it calls for dismissal. The same is therefore dismissed with costs to the Respondents.

W. KARANJA

JUDGE

2/7/2009.

Delivered, signed and dated at Embu this 2nd day of July, 2009.

In presence of:- Mr Kathungu for 1st Respondent

N/A by the others but Mr. Njiru was in court a few minutes ago

W. KARANJA

JUDGE

2/7/2009