



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
MISC CIVIL APPLI 408 OF 2009

IN THE MATTER OF AN APPLICATION BY OMBOKE VICTOR TOM FOR LEAVE TO APPLY FOR
ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, THE POLICE ACT CAP. 84 AND THE
LAW REFORM ACT CAP. 26 ALL OF THE LAWS OF KENYA

BETWEEN

OMBOKE VICTOR TOM.....APPLICANT

VERSUS

THE COMMISSIONER OF POLICE.....RESPONDENT

JUDGEMENT

The chamber summons dated 3.07.2009 is filed by Omboke Victor Tom, seeking leave by this court to commence Judicial Review proceedings in the nature of an order of certiorari to call for and quash the decision of the Commissioner of Police (Respondent) of 15.05.2009 dismissing the applicant's appeal against dismissal from the police force. The Applicant also seeks leave to apply for an order of mandamus to compel the Respondent to reinstate him into the force and that the costs be provided for. The application is supported by statutory statement dated 3.07.2008 and the verifying affidavit of the Applicant of the same date. The grounds upon which the application is brought are that the decision to dismiss the Applicant is in direct breach of principles of natural justice, and was made in excess of the Respondent's powers. The Applicant was represented by Siagi Advocates, while Ms Kimaiyo appeared on behalf of the Respondent and filed notice of preliminary objection, and grounds of opposition.

It is the Applicants' case that the Applicant was a police officer based in Bomet Police Station Rift Valley Province and on 9.04.2009 he was on duty when he was confronted with some rowdy youths who wanted to stone him and intended to snatch the firearm. He fired one bullet to the ground which scared the youths who then fled. He managed to escape. He reported to his OCS later. On 10.04.2008, the OCS called him and asked him to sign a defaulter sheet and was asked to continue with normal duties. Without any statement being recorded from him or inquiry being done, on 15.04.2008 he was asked to sign a dismissal signal although he had not been given the copy of the charges. He appealed against the decision to the Head Quarters Disciplinary Appeals Board which held a meeting on 21.04.2009 and the Board

recommended his reinstatement but by letter dated 15.05.2009 his appeal was dismissed by the Commissioner of Police.

Ms. Kimaiyo relied on the preliminary objection and grounds of opposition filed. The first ground is that the application is incompetent for not complying with Order 53 Rule (1) (3) which is untenable because notice pursuant to Rule 1 (3) has been served on the Registrar and it is duly acknowledged by the Registrar and is on record.

At this stage the Applicant only needs to demonstrate that he has an arguable case with chances of success. Even before considering the merits of the chamber summons, I do find that the same is defective in that there is no evidence contained in the affidavit to support the chamber summons. All the evidence has been placed in the statement which is contrary to Order 53 Rule 1 (2) Civil Procedure Rules. That rule requires that all the evidence to be contained in the verifying affidavit while the statement should only contain the names and description of the Applicant, the reliefs sought and the grounds upon which it is sought. That Rule reads as follows:-

“Order 53 Rule 1 (2) - An application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.”

In the instant case, the verifying affidavit is only made up of 4 paragraphs where the Applicant introduces himself, refers to the statement, then annexes the copies of his documents and confirms that what he was deponed to is the truth. The affidavit does not contain any evidence. The Court of Appeal in **SILVANO ONEMA OWAKI – VS – COMMISSIONER GENERAL KENYA REVENUE AUTHORITY CA 45/00** the court did confirm that it is the verifying affidavit which is of evidential value in a Judicial Review application but not the statement.

The court said:- **“We would observe that it is the verifying affidavit not the statement to be verified which is of evidential value in an application for Judicial Review. That appears to be the meaning of Rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53 (1) 7:- “The application for leave ‘by a statement’. The facts relied on should be stated in the affidavit (See R – Vs – Wandsworth Jj. Ex p. Read (19420 1 KB. 28 (1) ‘The statement’ should contain nothing more than the name and the description of the Applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit”.**

The application as presented does not have any facts to support it and is therefore incompetent and will be struck out.

As to the merits of the Application, the Applicant is alleging that the Respondent acted in excess of his powers but nowhere in the pleadings has the Applicant referred the court to the statutory provisions that governed the said employment and how the Respondent has acted in excess thereof.

The Applicant has exhibited minutes or report of the Disciplinary Board meeting held on 21.04.2009 where his case was considered. He has also annexed his appeal and the results of the appeal. He can not therefore allege that rules of natural justice were breached. It seems there was some of hearing undertaken.

In Mr. Siagi’s submissions, the Applicant merely acted in self defence by firing one bullet to the ground when he was accosted by a crowd of rowdy youths and that that was not cause for the Applicant to be dismissed. If this court were to go into the cause of the dismissal it would be overstepping its bounds. Judicial Review is concerned not with the merits of the impugned decision but with the decision making process. It is not the concern of this court whether the Commissioner’s decision is correct or wrong. It seems the Applicant wants this court to reconsider the decision of the Respondent. That is the mandate of

the Civil court. The relationship between the Applicant and Respondent being employer and employee, maybe the best forum for the Applicant to have his matter adjudicated is the ordinary Civil Court for common law remedies in law of contract.

Apart from the chamber summons being defective, it seems the Applicant is before the wrong forum for articulation of his rights. His application is therefore dismissed with each party bearing their own costs.

Dated, Read and Delivered at Nairobi this 5th day of October 2009.

R.P.V. WENDOH

JUDGE

Present

Mr. Siagi –for Applicant

Muturi – court clerk