REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

MISC CIVIL APPLI 802 OF 2007

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI TO QUASH THE DECISION OF THE PERMANENT SECRETARY, MINISTRY OF FOREIGH AFFAIRS COMMUNICATION ON THE 16TH DAY OF MAY 2007 DISMISSING THE APPLICANT FROM THE PUBLIC SERVICE

AND

AN ORDER OF MANDAMUS COMPELLING THE PERMANENT SECRETARY MINISTRY OF FOREIGN AFFAIRS TO REINSTATE THE APPLICANT HEREIN INTO THE PUBLIC SERVICE

BETWEEN

REPUBLIC …….…….....……. APPLICANT

V E R S U S

THE HONOURABLE THE ATTORNEY GENERAL FOR AND ON BEHALF OF THE PERMANENT

SECRETARY MINISTRY OF FOREIGN AFFAIRS……....RESPONDENT

EX-PARTE – SIMON M. NYAKUNDI

J U D G M E N T

Before me is a Notice of Motion dated 28th June, 2007 filed by Ogessa & Company advocates for ex-parte the applicant **SIMON NYAKUNDI**. The respondent is named as **THE ATTORNEY GENERAL** on behalf of the **PERMANENT SECRETARY MINISTRY OF FOREIGN AFFAIRS**. The application was said to have been filed under Order LIII Rule 3 of the Civil Procedure Rules and same was filed on 2nd October, 2007.

The orders sought are as follows-

1. THAT an Order of Certiorari do issue to remove to this Honourable Court and to quash the decision of the Permanent Secretary conveyed vide letter dated the 16th day of May, 2005 dismissing the applicant herein from the employment of the Public Service.

2. THAT an Order of Mandamus do issue compelling the Respondent the Permanent Secretary of the Ministry of Foreign Affairs to reinstate the Applicant herein in the employment of Public Service with effect from 26th day of May, 2005 and to pay the applicant his salary dues inclusive of interest at the rate of 12% pa wit*h *effect from 26th day of May, 2005 until payment in full plus costs of this Application.

The application was grounded on the **STATEMENT OF FACTS** dated 26th July, 2007 filed with the Chamber Summons for leave and the affidavit sworn by the applicant on 26th July, 2007, also filed with the Chamber Summons for leave. The affidavit annexes several documents and correspondences. There are letters written to the applicant from public offices or officers on the conduct of the ex-parte applicant at work. There are also letters relating to his disciplinary case, and dismissal from the Civil Service. It is contended in the **STATEMENT**, inter alia, that the applicant received a letter dated 26th May, 2005 terminating his service on account of gross misconduct; that the summary dismissal was contrary to the Public Service Commission Regulations made under the Service commissions Act ***(Cap. 185)*** and principles of natural justice as he was neither given an opportunity to defend himself or an opportunity to examine documents relied upon; that he appealed and also asked for review but that later he received a letter dated 16th May, 2007 from the Permanent Secretary Ministry of Foreign Affairs that his application for review had been disallowed; that he had not been availed a copy of the letter dated 18th October, 2006 which was said to have been posted on 25th May, 2007; that his dismissal was not done through the Ministerial/Departmental Advisory Committee and was therefore irregular.

The applicant also, through his counsel, filed written submissions dated 20th May, 2008. After giving the facts surrounding the dismissal of the applicant, Ms. Ogesa & Company advocates for the applicant contended that under Regulations 31(1) of the Public Service Commission Regulations it was provided that a public officer in respect of whom disciplinary proceedings are being held shall be entitled to a free copy of any documentary evidence relied upon for the purpose of pleadings and that despite request by the applicant, the said documents were not availed to him contrary to principles of fair trial and natural justice.

It was also contended that Regulations 34(3), (4) and (5) provided that a public officer shall be informed of the day the charge against him shall be investigated, and that no documentary evidence shall be used against a public officer unless he has been supplied with copies thereof or given access to the same. It was also contended that Regulation 30(1) (2) of the Public Service Commission Regulations provided specifically for the procedure to be followed in the case of a suspected criminal offence ***(if there was such an allegation like in the present case.)***

The applicant's counsel also filed further submissions dated 5th September, 2008. It was contended in the said submissions, inter alia, that the decision of the respondent was of a quasi judicial nature and within the realm of judicial review; that though the applicant requested for relevant documents he was not availed the same. Therefore the documents in the replying affidavit should not be taken as a basis for a decision as he was not given an opportunity to verify them and that the respondent did not take into account relevant considerations raised in the letters of the applicant ***(erroneously described as interested party)***. It was contended that the contention by the applicant that the Ambassador suffered the alleged injuries in a car accident in August, 2003, were not considered. It was also contended that the Ministerial Human Resources Management Advisory Committee failed to consider that the Legal advisor was absent, and also that Regulation G33 (12) (iii) did not confer powers on the Committee to recommend any action. It was also contended that the application was proper under Order LIII Rule 3(1) as there was no legal requirement of filing an affidavit in support of the Motion once leave is granted. Reliance was

placed on the Service Commissions Act **(*Cap. 185),*** and the Privileges & Immunities Act **(Cap. 179)**. Reliance was also placed on the case of **FLORA NJOKI NJERU -VS- CONTROLLER & AUDITOR GENERAL & ANOTHER [2006] eKLR** in which the plaintiff was ordered by the court to be reinstated. Reliance was also placed on the case of **REPUBLIC – VS- JUDICIAL SERVICE COMMISSION (*Kakamega H.C Miscellaneous Application No. 21 of 2005)* [2006] eKLR.**

In response, the respondent filed a replying affidavit sworn on 21st July, 2008 by **THUITA MWANGI**, the Permanent Secretary Ministry of Foreign Affairs. In the said replying affidavit, it was deponed, inter alia, that the applicant had assaulted the Kenyan Ambassador to Iran **Mr. BAGHA** on 15th December, 2004; that he was addressed to show cause and given an opportunity to refute the allegations against him; that the Ministerial Human Resource Management Advisory Committee after a meeting on 18th February, 2005 recommended the applicant's dismissal from service on account of gross misconduct; that it was in fact the Public Service Commission which dismissed the applicant and relevant letters were annexed; that the applicant was given an opportunity to appeal, which appeal was rejected; and that the applicant was also given an opportunity to apply for review, which he did, but same was also rejected. It was deponed that the applicant had sued the wrong party.

The respondent also, through the Attorney-General, filed written submissions on 15th July 2008. It was contended, inter alia, that the **STATEMENT OF FACTS AND VERIFYING AFFIDAVIT** should be in the name of the **REPUBLIC** which was not the case herein. In addition it was wrong to file a statement of facts supported by affidavit. Reliance was placed on the Supreme Court Practice Rules 1976 Vol. 1 paragraph 53 which states-

"***The statement should contain nothing more than the name and description of the applicant, the reliefs sought and the grounds on which it is sought. It is not correct to lodge a statement of all facts verified by an affidavit."***

Reliance was also placed on the case of ***THE COMMISSIONER GENERAL KENYA REVENUE AUTHORITY –VS- SILVANO OWAKI*** – Kisumu Civil Appeal No. 491 of 2000, wherein the Court of Appeal stated-

"***The facts should be contained in the verifying affidavit to enable the respondents file a response to the evidence contained therein which is not possible when the evidence is contained in the statement of facts as is the case herein."***

On the prayer for mandamus it was contended that the prayer for mandamus sought for reinstatement to employment not available. It was contended that an order of mandamus is in the form of a command issuing from the High Court directed to any person, corporation or inferior tribunal requiring them to do a public duty which they are legally bound to perform. That order of mandamus cannot apply to employment contracts. Reliance was placed on the case of ***DALMAS OGOYE –VS- KENYA NATIONAL TRADING CORPORATION (KNTC) Nairobi Civil Appeal No. 125 of 1996*** wherein the court of Appeal held-

"***The only remedy in a claim for wrongful dismissal is damages. Courts do not order reinstatement in such cases because such an order would be difficult to enforce. Besides, it would be plainly wrong to impose an employee who has fallen out on a reluctant employer."***

Reliance was also placed on the case of **REPUBLIC –VS- JUDICIAL SERVICE COMMISSION** – Kakamega High Court Miscellaneous Application No. 21 of 2005 and the English case of ***REPUBLIC – VS- ELECTRICITY COMMISSIONERS (1924) IKB 171 –*** that judicial review is not concerned with the merits of decisions of statutory bodies or tribunals but rather with public rights and decision making process. I will not highlight all the cases that were filed in the respondent's list of authorities. However, I observe that in the written submissions, the respondent's counsel does not appear to have addressed the prayer for orders of certiorari specifically.

I will start with the objections to the **STATEMENT** and **AFFIDAVIT**. The two documents as filed

have been attacked by the respondent because they are not headed **REPUBLIC -VS-.** In my view that objection has to fail. In the case of **FARMERS BUS SERVICE –VS- THE TRANSPORT LICENSING APPEAL TRIBUNAL (1959) E.A. 779** the Court of Appeal for East Africa held that the Notice of Motion should have the **REPUBLIC** as the applicant. In my view, this only applies to the heading of the Notice of Motion, not the **STATEMENT** and **VERIFYING AFFIDAVIT**. This is so because Order 53 rule 4 specifically provides that the **STATEMENT** and **AFFIDAVITS** accompanying the application for leave are the documents to be served with the Notice of Motion and to be relied upon. The law does not state that those documents should be amended in any way. The relevant part of rule 4 provides-

*"**4(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought and the hearing of the motion except the grounds and reliefs set out in the said statement."***

The second objection that the affidavit does not contain the evidence, but the statement contrary to law, will also not succeed. Indeed, the affidavit is brief. However, it annexes all the documents relied upon, which is basically the evidence relied upon. I find that the affidavit and statement as filed comply with the legal requirements.

Having considered the law and the submissions herein, I will not allow the application. Firstly, judicial review remedies are directed against specific public officials and public institutions challenging the legality of their exercise of public authority or failure to perform public duties. The respondent herein is the **ATTORNEY-GENERAL** on behalf of the **PERMANENT SECRETARY MINISTRY OF FOREIGN AFFAIRS.** The decision being challenged is the dismissal of the applicant. The facts disclosed show that the decision to dismiss was made by the Public Service Commission on advice from the Ministerial Advisory Committee. The applicant knew all along that the decision to dismiss him was made by the Public Service Commission. The Public Service Commission, should have been made a party so that it could respond to the application. It was not. The failure of the applicant to specifically make the Public Service Commission a party means that the said Public Service Commission could not possibly defend itself. Though the applicant states in prayer 1 that the decision to dismiss him was a decision of the Permanent Secretary, there is no evidence that the Permanent Secretary dismissed him, or that he had powers to do so. In fact all the documents filed including the letter dated 16th May, 2005 signed by Mr. Kabuthia for the Permanent Secretary on the decision arising from the request for review of the dismissal, clearly showed that the decision regarding dismissal was from the Public Service Commission. Therefore, in my view, the Permanent Secretary was the wrong party, and the orders of certiorari and mandamus sought are not available against the Permanent Secretary. On that ground, the application will fail.

The other reason why this application will fail is that the applicant has not demonstrated to the court what bias, unfairness, unlawfulness, unreasonableness or failure to satisfy the principles of natural justice was visited upon him. He was informed of the charges against him and given an opportunity to respond. There does not appear to have been any secret charge or complaint that was considered, which he was not aware of. He was given all opportunities for appeal and review. He appealed and asked for a review, but was not successful. In judicial review proceedings, the court is not able to determine the merits of the decision. Going into and determining the issues as to what was considered in the decision of the Public Service Commission will be going into the merits of the decision, which the judicial review court is ill equipped to determine. I find no impropriety, or unfairness or bias or breach of public duty that could persuade me to grant the judicial review orders sought. On this ground also the application will fail.

I do not find it necessary to go into the issue of the specific availability of the certiorari and the mandamus orders prayed for in this case. This is because I find that the applicant has not satisfied the primary requirements in judicial review proceedings that is bringing the correct party complained of to court by filing proceedings against that party, and also failure to demonstrate the breach or breaches, which form the basis of bringing judicial review proceedings.

Consequently, I dismiss the application. I award costs to the respondents.

Dated and delivered at Nairobi this 1st day of October, 2009.

GEORGE DULU

JUDGE.

In the presence of-

Mr. Ogessa for ex-parte applicant

Mr. Menge for the respondent

David Court Clerk.