



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

MISC CIVIL APPLI 604 OF 2008

**IN THE MATTER OF AN APPLICATION BY CHARLES KIMATHI BUNDI FOR JUDICIAL
REVIEW ORDERS OF MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF THE POLICE ACT (CAP 20) OF THE LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE COMMISSIONER OF POLICE..... 1ST RESPONDENT

HON. ATTORNEY GENERAL..... 2ND RESPONDENT

THE MINSITER FOR INTERNAL SECURITY.....3RD RESPONDENT

EX PARTE

CHARLES KIMATHI BUNDI

JUDGMENT

Charles Kimathi Bundi, the ex parte Applicant herein, filed this Notice of Motion dated 21/10/08, against the Commissioner of Police, the Hon. the Attorney General and Minister for Internal Security, seeking an order of mandamus to compel the Respondent to deploy or assign duties to the applicant and to reinstate his salary and an order of prohibition to prohibit the Respondent from withholding his salary. The Applicant also prays for costs of the application. The application is supported by the verifying affidavit of the applicant sworn on 29/9/08 and a statement of facts of the same date. The Applicant was represented by Mr. Kaburu Miriti Advocate who filed skeleton arguments on 23/3/08 in support of the Notice of Motion.

The application was opposed and one Kalicha Roba, an Assistant Commissioner of police, swore an affidavit dated 4/3/09 in reply. Mr. Bosire appeared on behalf of the Respondents.

The Applicant was employed as a police officer on 5/12/90 and worked as such till 17/4/03 when together with others, he was charged with the offence of failing to prevent theft in Cr.C 3308/03. The matter was heard and the applicant was discharged on 8/9/03. Upon discharge, he reported back to work. During the pendency of that case, he was on full pay till September 2007. On 4/10/07, he received a letter from the OCS Kisumu Inland Container Depot Department interdicting him and to his surprise, the letter was dated 18/6/02. That he has reported on duty since September 2002 but he had not been assigned any duties. That the letter requested him to surrender his kit and equipment which he did on 26/7/06. That in September 2007, his salary was stopped and yet he is still a police officer. He exhibited all documents in support of his case as CKM 1. They include the proceedings in Cr. C 3308/03 where at page 34 – 35 thereof, the magistrate acquitted him because the prosecution had been conducted by an unqualified prosecutor. It was not determined on the merits. It is the applicants contention that the letter of interdiction dated 4/10/07 (at page 38 of bundle) was illegal and contrary to the procedure and rules of natural justice, that though his salary was stopped he had never received a letter of dismissal from the force and there is no explanation given as to why the salary has been withheld. That the stoppage of his salary is contrary to rules of natural justice as he was never told the reasons for that act. That the Respondent has not indicated when the decision to stop the Applicant's salary was relayed to him and the interdiction should have been communicated immediately but not after 5 years.

In opposing the application, Kalicha deponed that he is aware of the letter of interdiction dated 18/6/02. That the Applicant's privileges and powers were put in abeyance although he continued to receive full salary until September 2007 and that the continued paying of salary was due to the delay in conveying the information to the officer in charge of payments. That the Applicant was dismissed from the police force but has refused to collect the letter of dismissal from the police. That the interdiction was proper and in accordance with S 44 of the Police Act Cap. 84 Laws of Kenya. Mr. Bosire, counsel for the Respondent urged that the issue of salary is contractual and the Applicant should have filed an ordinary civil claim in the court but not come by way of Judicial Review.

Though Kalicha Roba deponed that the applicant was dismissed from duty and that he refused to collect his letter of dismissal, since the Respondent was the author of the letter, it was incumbent up on the Respondent to lay such letter before the court. It is not enough to just allege and leave it at that. The Respondent had a duty to lay before the court all the evidence they have enabled the court fairly determine this matter. So far there is no evidence laid before the court to demonstrate that the Applicant has been dismissed from the force.

The letter of interdiction dated 18/6/02 is said to have been received on 4/10/07, 5 years after it was allegedly written. The Respondent does not really have an explanation for that delay. The letter clearly states that the Applicant remains a police officer but that his powers and privilege are left in abeyance. This is in accordance with S. 44 of the Police Act. Since no letter of dismissal has been shown to this court nor the reasons for dismissal given, what is in operation is the letter of interdiction. It means that for all intents and purposes the applicant is still a police officer but on interdiction. If there is any due process to be followed in dismissal of a police officer, it has not yet been put into effect.

From a reading of Kalicha's affidavit and especially para. 4 thereof, it seems that when on interdiction, the Applicant was not entitled to salary. He deposes that the Applicant continued to receive salary due to a delay in the conveyance of the information to the officer in charge of the payroll. The effect of this would be that the applicant is not supposed to be receiving his pay when still on interdiction. So can the prayer for mandamus that the salary be released issue? The decision to stop the Applicant's salary has not been challenged in this application. If the decision to stop salary is still in place, an order of mandamus can not issue. That decision should be quashed first before the Respondent can be compelled to pay. In the case of **KENYA NATIONAL EXAMINATION COUNCIL V REP. ex parte GITHINJI CA 266/96** the Court of Appeal set out the nature and scope of judicial review orders.

An order of certiorari lies to quash a decision made in excess or without jurisdiction or where a

decision has been made without observing the rules of natural justice. There is a decision to stop the Applicant's salary. That is what the applicant is challenging and so he should have sought an order of certiorari to quash it before he can seek any other reliefs.

Mandamus lies to compel a public body or officer to perform a public duty which the body has refused or neglected to perform. Before such an order can issue, there must have been a demand. A party can not however direct the public body on how to perform the said duty. In the above cited case of **KNEC V R** (supra) the Court of Appeal said that an order of mandamus and prohibition can not lie to quash a decision already made but only an order of certiorari can do that. As regards an order of mandamus. That court further said that the court can not direct the public body to act in a particular way. In this case, the Applicant wants this court to direct the 1st Respondent to deploy him, reinstate him and release his salary. If he is still on interdiction as seems to be the case, the court would be usurping the Respondent's powers in ordering a reinstatement. Besides, the relationship between the Applicant and Respondent is a contractual arrangement that would be better dealt with at another forum. Similarly, this court can not order payment of salary if the Applicant is on interdiction as it would be usurping the Respondent's powers. All the Applicant should have asked the court is to compel the Respondents to comply with the law and the Applicant would have to demonstrate which statutory provisions have been contravened by the Respondent.

Can prohibition issue? Prohibition lies to prohibit a public body from acting contrary to the rules of natural justice or the law. It can not however issue to quash a decision but can only be made to prevent the making of a contemplated decision. In the instant case, there is clearly a letter of interdiction, the salary has already been stopped and an order of prohibition would not be an effective remedy in the circumstances. That decision would need to be quashed first before such an order can issue. The result is that none of the orders can issue for the reasons given in this judgment. May be the applicant should pursue common law remedies on employment contracts or approach the court in the proper manner. The court finds that the notice of motion lacks merit and is therefore dismissed with each party bearing their own costs.

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

R.V.P. WENDOH

JUDGE

Delivered in the presence of:

Charles Kimathi Bundi - in person

No appearance for Respondent

Court clerk Muturi