



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO 155 OF 2015

BETWEEN

GEOFFREY SHERIDAN OUMA .....APPELLANT

AND

PUBLIC SERVICE COMMISSION OF KENYA.....RESPONDENT

*(An appeal from the ruling of Odunga, J. made on March, 2015*

*in*

*HCCC No 459 of 2004)*

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JUDGMENT OF THE COURT

**Background**

1. The appellant, **Geoffrey Sheridan Ouma**, was an employee of the Ministry of Education where he served in different capacities. In October 1988, he was seconded to the Kenya Industrial Research and Development Institute (KIRDI) at job group R. In 1993, the appellant was transferred back to the Ministry under Job Group L.
2. Aggrieved by that decision, the appellant filed a judicial review application dated 1st July, 2004 seeking an order of mandamus against the **Public Service Commission of Kenya** (the respondent) to *inter alia*, decide/correct the grading of the appellant according to the law and terms of service, to place/maintain him in Job Group R and to grant at least one promotion to coincide with the date of promotion to Job Group M. The application was premised on an amended statement dated 13th March, 2006 and an affidavit dated 26th March, 2003. The grounds upon which the appellant's application was based was that the respondent had breached the appellant's legitimate expectation that he would advance in his career until he retired and enjoy his benefits, and that the Permanent Secretary in the Ministry had abused his office, acted in bad faith and was biased in transferring the appellant from KIRDI.
3. In a judgment delivered on 4th May 2009, **Wendoh J** dismissed the application. The learned judge observed that the statement in support of the application had been filed un-procedurally and without leave of the court and that on that ground alone, the application ought to have been struck out. The learned judge however considered the merits of the application and held as follows:-

***“The Applicant is asking this Court to take over the powers of the Public Service Commission to promote him or place him in a particular job group but to do so this court would be usurping the powers of the Public Service Commission. In any event, an order of mandamus cannot lie to direct a body vested with a discretion to exercise it in a particular way, like promoting the Applicant and promoting him to a particular grade. The order of mandamus cannot avail as the court would be interfering with the powers vested with the Public Service Commission. The Applicant has not demonstrated that his redeployment to Job Group L was unprocedural or an illegality and the orders of mandamus would not issue in any event.*”**

***For all the reasons considered in this judgment, and the fact that this Application is incompetent, I hereby dismiss the application with each party bearing their own costs.”***

*(Emphasis supplied)*

4. The appellant was aggrieved by this order, and by a Chamber Summons dated 6th February, 2012 applied for a review of Wendoh, J's judgment seeking the following orders that:-

*“a. The Judgment/Order of Lady Justice Roselyne Wendoh delivered on the 4th day of May, 2009 be reviewed and set aside.*

*b. The original Notice of Motion be heard de novo according to law.*

*c. Cost (sic) be provided for.”*

The application was heard and determined by **Odunga J**, and in a ruling dated 4th March 2015, dismissed with no order as to costs. The learned judge held as follows:-

*“Having considered the grounds relied upon by the applicant in this application it is my view that the issues raised ought to have been raised in an appeal rather than in a review application. Apart from the incompetency of the application resulting from the failure by the applicant to bring himself within Order 45 of the Civil Procedure Rules with respect to the unexplained long delay in filing the application, it is also my view that the application for review is unmerited as it is an appeal couched as an application for review.”*

5. Aggrieved by that ruling the appellant filed this appeal. In his memorandum of appeal, the appellant has raised various grounds *inter alia*; that the trial judge failed to focus on the core issue of the dispute, which was that his transfer from KIRDI back to the Ministry was unlawful and contrary to the provisions of the Public Service Act (the Act); and that the learned judge failed to consider that the transfer was against the rules of natural justice as there was no evidence that the KIRDI's Board of Management was consulted before the action to transfer him was taken and that this unlawful order caused him untold suffering through no fault of his own.

6. The appellant sought the following orders that:-

*i) The judgment/order of Wendoh, J delivered on 4th May, 2009 and the ruling of Odunga, J delivered on 4th March, 2015 be set aside.*

*ii) The Public Service Commission do restore the appellant herein the grade of Job Group “R”.*

*iii) Costs of the appeal be awarded to the appellant.*

### **Submissions**

7. The appeal was heard by way of written submissions with oral highlighting. The appellant acted in person while learned counsel **Ms Joyce Ngelechei** represented the respondent.

8. In his submissions, the appellant challenged the jurisdiction of the High Court to determine the Judicial review application in view of the fact that the dispute between the parties was employment related; the judge ought to have issued directions referring the dispute to the Employment and Labour Relations Court; that the learned judge erred in failing to refer to the Public Service Act which clearly provides for the pre-requisite conditions for officers to be transferred to other stations; that the learned judge did not consider the substance of the appellant's case which was that the transfer from KIRDI to the Ministry was unjust; that no reasons were given for the transfer and it was evident that the Board of Management of KIRDI had not been consulted in the decision to transfer him from KIRDI. The appellant urged us to reverse the ruling of **Wendoh, J** and the judgment of **Odunga, J**, and issue an order compelling the respondent to restore him to Job Group R. The appellant urged us to allow his appeal.

9. The respondent opposed the appeal. **Ms Ngelechei** submitted that this Court cannot consider the issues raised by the appellant in the memorandum of appeal as these issues arise from the judgment of **Wendoh, J** while the impugned judgment in this appeal is that of **Odunga, J**.

10. On the substance of the appeal, counsel submitted that **Odunga, J** did not err when he considered the application before him in accordance with the legal provisions on review, which include section 8 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010; that the learned judge correctly exercised his discretion in dismissing the application as pursuant to section 85 of the Law Reform Act, the High Court does not have jurisdiction to review a judgment made in judicial review and that the application was made on 6th February 2012, two and a half years after the impugned judgment was delivered; that the appellant did not give a plausible explanation for the delay; that the court correctly found that the appellant did not satisfy the conditions upon which it could exercise its discretion in the appellant's favour. Counsel urged us to dismiss the appeal with costs.

### **Determination**

11. This is a first appeal, and; *“our primary role as a first appellate court is to re-evaluate, re-assess and re-analyse the evidence on the record and thereafter determine whether or not the conclusions reached by the learned trial Judge are correct.”*

[See **Ryce Motors Limited v Jonathan Kiprono Ruto & another [2016] eKLR (Civil Appeal No. 271 of 2009)**].

12. The basis of the impugned decision was an application dated 6th February 2012 in which the appellant sought, in the main, a review of the judgment made by **Wendoh J** on 4th May 2009 and an order that the original application for judicial review be heard *de novo*.

13. Order 45 of the Civil Procedure Rules provides as follows:-

**“1. (1) Any person considering himself aggrieved –**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

14. In the case of National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR (Civil Appeal 211 of 1996) this Court stated as follows:-

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”**

15. In United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR Madan JA stated that:

**“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”**

16. The grant of orders of review are discretionary, and this court is hesitant to interfere with the discretionary decision of the High Court unless it is shown that the decision was reached upon some misdirection of the law, that there was a misapprehension of the facts, that there were considerations that ought not to have been taken into account, or if the decision reached was plainly wrong.

17. On the question whether the High Court has power to review its own decisions on judicial review. Section 8(5) of the Law Reform Act specifies that:-

**“Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.”**

18. In Biren Amritlal Shah & another v Republic & 3 others [2013] eKLR (Civil Appeal No. 186 of 2004) this Court, considering an appeal similar to the instant appeal had to determine whether or not the High Court can review its own orders after exercising its judicial review jurisdiction. The Court had first considered the power of a court to conduct a review of its own decision and observed that:

**“Section 80 of the (Civil Procedure Act) is clear. It stipulates, that a review is allowed from an order or a decree from which an appeal is allowed or not allowed by the Act. It therefore follows that; the High Court can review its own orders or decrees in suits where the Court is exercising its ordinary jurisdiction.”**

19. In the same decision the Court considered those provisions in relation to the power of a court to order judicial review and stated as follows:-

**“With respect to judicial review the Court is exercising powers under Order 53 of the Rules wherein the procedure of judicial review are set out. It is noteworthy that, there is no provision for review by the Superior Court of its own decisions in judicial review, once rendered. Section 8(5) of the Law Reform Act does however specify that:**

**“Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.”**

**It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned judge of the High Court that, in exercising its special jurisdiction under the Law Reform Act, the High Court had no jurisdiction to review its previous order.”**

20. We reiterate that the jurisdiction of the High Court to review its orders emanating from judgments in applications of judicial review is fettered under section 8(5) of the Law Reform Act. In the case of John Macharia Gichigi V Commissioner of Police [2017] eKLR this Court stated as follows:-

***“We also agree with the submissions of both sides that orders issued with finality in the exercise of the said jurisdiction namely mandamus, prohibition and certiorari are not amenable to recall, review and setting aside.”***

Accordingly, the ruling of **Odunga, J** cannot be faulted, and this ground of appeal fails.

21. On the question of delay on the part of the appellant in filing his application for review, it is apparent that there was a prolonged and unexplained delay of two and a half (2½) years between the time that the judgment of **Wendoh, J** was delivered and the time that the appellant applied for a review of the application. In addition, the appellant did not produce any new evidence, and neither did he show that there were any errors apparent on the face of the record. The grounds upon which he based his application, which include that the trial court misapprehended the provisions of the Public Service Act, are grounds for appeal, and not for review. As such, we are not satisfied that the appellant made out a sufficient case for the grant of orders of review.

22. Having considered the rival submissions of the parties and the law, we find that in the circumstances of this case, the learned Judge reached the correct decision and we find no ground upon which we can interfere with that decision. Accordingly, this appeal is dismissed with no order as to costs.

**DATED and Delivered at Nairobi this 8<sup>th</sup> day of March, 2019**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

**DEPUTY REGISTRAR**