Manyasi v Judicial Service Commission & another (Civil Appeal 309 of 2012) [2017] KECA 442 (KLR) (14 July 2017) (Judgment)

Joyce Manyasi v Judicial Service Commission & another [2017] eKLR

Neutral citation: [2017] KECA 442 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 309 OF 2012

PN WAKI, RN NAMBUYE & K M'INOTI, JJA

JULY 14, 2017

BETWEEN

JOYCE MANYASI ..... APPELLANT

AND

THE JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

THE CHIEF JUSTICE ..... 2ND RESPONDENT

(Appeal from the judgment and decree of the High Court at Nairobi, (Korir, J.) dated 4th July 2012 in JR. APP. NO. 299 OF 2011)

JUDGMENT

1. At all material times ***the appellant, Joyce Manyasi*** was employed by the ***1st respondent***, ***the Judicial Service Commission*** as a Chief Magistrate, based at Machakos. On 14th March 2005, some magistrates in parts of the Republic went on strike or go-slow, bringing the work of the courts to a standstill in the affected stations. One of those stations was Machakos, where the appellant was in charge. It was alleged that as a result of the strike, the appellant did not sit in her court and that no business was transacted in the entire station, forcing litigants to waste the day and accused persons, who had been ferried from prison to the courts for hearing of their cases, to spent the day in the cells.

2. The next day, 15th March 2005, the Chief Justice, in his capacity as the chairperson of the 1st respondent wrote to the appellant notifying her that she had been interdicted and calling upon her to show cause why disciplinary proceedings should not be commenced against her. The appellant replied by a letter dated 16th March 2005 and denied participating in the strike or absenting herself from duty. The 1st respondent deliberated on the matter on 7th June 2005 and by a letter dated 8th June 2005 informed the appellant that she had been retired in public interest under ***Regulation 28*** of the ***Judicial ServiceCommission Regulations,*** in force at that time.

3. The appellant was aggrieved by the turn of events and on 12th July 2005 took out judicial review proceedings primarily to quash the 1st respondent's decision to retire her in public interest. By a judgment dated 12th November 2009, the High Court held that the 1st respondent had not complied with regulation 28 before retiring the appellant in public interest because it did not notify her that it intended to retire her in public interest; did not give her the specific complaints against her; did not give her the substance of any report detrimental to her; and did not give her the opportunity to show cause why she should not be retired in public interest. Accordingly it quashed by *certiorari* the retirement of the appellant and also issued an order of *mandamus* compelling the 1st respondent to reinstate her forthwith.

4. After passage of considerable period toing and froing, in which the appellant and the respondent exchanged numerous correspondence, the 1st respondent reinstated the appellant vide a letter dated 11th July 2011 and posted her to Milimani Commercial Courts as a Deputy Registrar. Matters however took a dramatic turn on 25th July 2011 when the Chief Justice informed the appellant in writing that disciplinary action was contemplated against her, and suspended her from duty. The letter set out in detail the complaints against the appellant, which included unprocedural handling of a case, running two hotels in Malindi, one of which was the subject of a case before her, colluding with *Imams* to write negative letters against fellow magistrates, receiving Kshs 80,000/=, offer of a Mercedes Benz vehicle, shoes and golden rings as inducement to rule in favour of parties, nepotism, abuse of office and participation in an unlawful strike while based in Machakos. The appellant was advised to treat the allegations against her as the charges she was to face in the disciplinary proceedings and that during her suspension she would draw no salary.

5. By a letter dated 4th August 2011, the appellant's advocates applied for what they called a clear statement of the charges, detailed particulars of the allegations against her, and all information, documents or materials on which the complaints were based. They also sought payment of the appellant's salary during the suspension. The information was supplied by the 1st respondent vide a letter dated 20th September 2011 but on 27th September 2011 the appellant wrote asking for more particulars which were not forthcoming. By a further letter dated 18th October 2011, the 1st respondent advised the appellant that she would be paid an alimentary allowance in accordance with the ***Judicial Service Act,2011***, ***(the Act)*** pending the determination of her disciplinary case.

6. On 13th November 2011 the appellant filed another judicial review application in the High Court, praying for an order of *certiorari* to quash her suspension, an order of *prohibition* to stop the disciplinary action and an order of *mandamus* to compel the 1st respondent to reinstate her as a Chief Magistrate. The application was based on the grounds that the Chief Justice is empowered by the Act to suspend only a judicial officer who has been convicted of a serious offence or against whom proceedings for dismissal have been taken, which was not the case as regards the appellant. The appellant also contended that the Chief Justice had acted on extraneous considerations; in violation of the rules of natural justice; unreasonably and in violation of her right to fair administrative action and legitimate expectation; and on matters that were *res judicata*, having arisen in the previous judicial review application.

7. The 1st respondent opposed the application vide a replying affidavit sworn on 11th May 2012 by its registrar, ***Winfrida Boyani Mokaya***, who took issue with joinder of the Chief Justice in the application whilst he was acting in his capacity as the chairperson of the 1st respondent and in exercise of delegated powers. The registrar further deposed that in the first judicial review application, the High Court had declined to issue an order of *prohibition*, meaning that the 1st respondent was free to continue disciplinary proceedings against the appellant and that the court did not determine the application on merits but instead confined itself to the impugned decision making process by the

1st respondent. It was further deposed that the 1st respondent was lawfully suspended from duty under the Act because disciplinary proceedings were contemplated against her and that she was duly furnished with details of the allegations against her. The 1st respondent therefore denied that the disciplinary proceedings were *res judicata* or in violation of any of the appellant's rights.

8. Korir, J. heard the application and identified three main issues for determination, namely whether the appellant's suspension was in violation of the Act; whether the Chief Justice was properly joined in the application; and whether the application was barred by res judicata. By the judgment which is impugned in this appeal, the learned judge held that the first judicial review application did not bar the 1st respondent from taking disciplinary proceedings against the appellant and therefore res judicata did not apply; that at the time the appellant was suspended, disciplinary proceedings had been commenced against her and therefore the 1st respondent had not acted in breach of the Act; and that the Chief Justice was improperly joined in the application, having acted in his capacity as the chairperson of the 1st respondent, which was the only proper party to sue.

9. Those are the holdings that have aggrieved the appellant in this appeal. The appeal is premised on the grounds that the learned judge erred in holding that the appellant's suspension was within the provisions of the Act; by failing to find that the suspension was in bad faith; by failing to hold that the intended disciplinary proceedings were *res judicata*; and by failing to hold that the Chief Justice was a necessary party in the application.

10. Urging the appeal, ***Mr. Wachira***, who held brief for ***Mr. Miyare,*** the appellant's learned counsel, submitted that the appellant's suspension was in bad faith because the 1st respondent failed to give concrete reasons for the suspension, despite numerous requests. It was urged that some of the complaints against the appellant were unsigned and by anonymous persons and others were the same complaints relating to the magistrates' strike which had been determined in the first judicial review application. It was also submitted that the suspension, coming so soon after the appellant's reinstatement, smacked of bad faith. Regarding the decision by the 1st respondent not to pay the appellant any salary for the duration of her suspension, counsel argued that in addition to being evidence of bad faith, it was also unreasonable within the Wednesbury principles (See ***Associated Provincial Picture Houses Ltd v. WednesburyCorporation [1948] 1 KB, 223).*** Relying on a Canadian arbitral award in ***Lac Des Iles Mines Ltd v. United Steelworkers Local 9422, 2015 CanLII 7267,*** it was submitted that a decision made in bad faith is grounded, not on rationality, but on antipathy towards an individual for irrational reasons, and is therefore amenable to judicial review.

11. On joinder of the Chief Justice in the application, the appellant submitted that the decision to suspend her without pay was made by the Chief Justice in his personal capacity and not as the chairperson of the 1st respondent. Accordingly we were urged to find that the learned judge erred by holding that the Chief Justice was wrongly and unnecessarily joined in the application.

12. Turning to the provisions of the Act, counsel urged that the only instances when the Chief Justice is allowed to suspend a judicial officer are when the officer has been convicted of a serious criminal offence or where proceedings for dismissal against the officer have been undertaken and the Chief Justice deems it fit to suspend the officer pending the outcome of the proceedings. It was contended that in the appellant's case, she was not convicted of any criminal offence and that no disciplinary proceedings had been undertaken before she was suspended. Citing the judgment of the High Court in ***Republic v. Institute of Certified Public Accountants of Kenya Ex parte Vipichandra Bhatt t/a Bhatt & Co, HC Misc. App. No. 285 of 2006*** and ***Stephen Mwenesi v. Law Society of Kenya & 2 Others, Misc. App. No. 158 of 2009***, the appellant submitted that a body like the 1st respondent can only do what is permitted by the statute and no more. The appellant added that the decision to suspend

her without any pay was in breach of ***paragraph 17(3) of Schedule 3*** of the Act, and therefore *ultra vires*, null and void.

13. Lastly the appellant submitted that the complaint against her based on the magistrates' strike was judicially determined in the first judicial review application and could not therefore form the basis of further disciplinary proceedings against her. In her view, the matter was *res judicata*.

14. Mr. Mansur, learned counsel for the respondents opposed the appeal, submitting that it was wholly lacking in merit. It was contended that the appellant had not established the charge of bad faith against the respondents and that the same could not be sustained. The suspension of the appellant was pursuant to disciplinary proceedings, which the 1st respondent was allowed by the Constitution and the Act to undertake. As evidence that the 1st respondent was acting in good faith, it forwarded to the appellant the detailed allegations and charges against her to enable her prepare her defence. Citing Selvarajan v. Race Relations Board [1976] 1 All ER 12, it was submitted that while the 1st respondent had a duty to act fairly, that did not demand of it to hear lawyers, or to put to the appellant each and every detail of the case against her. It would suffice if the broad grounds were given and all the other details availed at the disciplinary hearing. As regards non-payment of alimentary allowance, counsel submitted that it was not evidence of bad faith because it was ultimately paid in accordance with the 1st respondent's letter of 18th October 2011, the payment of which was confirmed by the appellant herself.

15. Turning to the joinder of the Chief Justice, the respondents maintained that in suspending the appellant the Chief Justice was exercising powers delegated by the 1st respondent and therefore there was no basis for joining him in the application in his personal capacity.

16. On whether the 1st respondent had acted *ultra-vires* the Act, counsel submitted that the 1st respondent had an express constitutional mandate under Article 172(1) (c) to among others, receive and investigate complaints against registrars, magistrates and other judicial officers and staff and to discipline and remove them from office. Under the Act, it was contended, the 1st respondent is empowered to delegate to the Chief Justice the power to interdict, suspend, or reprimand a judicial officer and that regulation 17(2) of the Third Schedule to the Act empowered the Chief Justice to suspend a judicial officer against whom proceedings for dismissal have been taken. It was submitted that in ***JudicialService Commission v. Gladys Boss Shollei & Another, CA No. 50 of 2014,*** this Court recognized the power of the 1st respondent to undertake disciplinary proceedings against judicial officers.

17. The respondents further submitted that by the letter of 25th July 2011, it informed the appellant of her suspension and also that disciplinary proceedings were being initiated against her and gave to her the detailed complaints against her, which formed the basis of the disciplinary proceedings. Drawing analogy from ***Judicial Service Commission v Mbalu Mutava & Another, CA. No. 52 of 2014,*** the respondents submitted that the appellant's suspension was in public interest to ensure that a judicial officer against whom grounds existed for dismissal should not continue to exercise judicial powers when his or her conduct was under scrutiny. In those circumstances, it was submitted, the Chief Justice did not act *ultra-vires* in suspending the appellant.

18. On whether the intended disciplinary proceedings were *res judicata,* the respondents submitted that they were not because in the first application, the High Court quashed the retirement of the appellant on public interest after it found that the prescribed procedure was not followed and that it did not consider the merits of the decision to retire the appellant in public interest. In addition it was contended that the High Court declined to issue an order of *prohibition*, even though it was prayed

for, which would have had the effect of barring the 1st respondent from instituting further disciplinary proceedings against the appellant.

19. Lastly the respondents introduced an extraneous issue in the appeal, which was not before the High Court, namely the vetting of the appellant as required by section 23 of Schedule 6 of the Constitution. It was urged that because the appellant has not been vetted, she cannot be allowed to exercise or discharge the functions of a judicial officer.

20. We have anxiously considered the record of appeal, the two judgments of the High Court, the grounds of appeal, the written and oral submissions by respective counsel and the authorities that they relied upon. We shall consider each ground of appeal in turn.

21. The appellant submits that the learned judge erred by refusing to quash her suspension on the ground that it was in bad faith. As evidence of that bad faith, she relies on the timing of the suspension soon after her reinstatement, the failure by the respondents to supply her with all the particulars and details she had requested and the initial decision by the 1st respondent not to pay her salary when on suspension.

22. In our view, the evidence that the appellant has cited is not, in the circumstances of this case, evidence of malice or bad faith on the part of the respondents. It is to be noted that in the first application, the High Court did not prohibit the 1st respondent from taking disciplinary action against the appellant, either on the grounds of the alleged strike or any other valid ground. In addition, the attempted retirement of the appellant in public interest and her subsequent suspension, were by two different Chief Justices, so that it is difficult to say two separate Chief Justices were purely motivated by antipathy towards her.

23. As regards the failure by the respondents to furnish the appellant with the particulars and details that she wanted, we are not persuaded that the same amounts to evidence of bad faith because that failure is easily and reasonably explained away. In the letters of 25th July 2011 and 20th September 2011 the 1st respondent gave to the appellant fairly detailed grounds upon which her suspension and disciplinary proceedings were based. Looking at those charges, we cannot say without the appellant responding to them, that they are baseless or motivated by bad faith. There is nothing in the charges that impels us to conclude that they are motivated by bad faith. In our view, the information that the 1st respondent supplied to the appellant is also detailed enough for her to know what is alleged against her and to enable her mount to her defence. With respect, some of the issues that the appellant has raised in this appeal, such as bad faith, are what she is expected to raise before the disciplinary tribunal. It must be appreciated that the power to undertake disciplinary proceedings in respect of judicial officers is constitutionally and statutorily vested in the 1st respondent and unless it is demonstrated that the 1st appellant is acting in excess of jurisdiction or otherwise abusing its powers, no court is entitled to usurp the functions of the 1st respondent or to substitute its views for those of the 1st respondent.

24. Nor do we agree that the initial failure to pay the appellant a salary during her suspension is *ipso facto* evidence of bad faith. When the appellant's advocates raised the issue of payment of salary during suspension, it was confirmed by the letter of 18th October 2011 that she would be paid an alimentary allowance, which the appellant acknowledges was indeed paid. We cannot fault the learned judge for rejecting the argument.

25. On the joinder of the Chief Justice, we do not think much turns on it in this appeal. Although the learned judge held that in the circumstances of this appeal the Chief Justice ought not to have been made a party once the 1st respondent was sued as a respondent, he nevertheless found that the presence of the Chief Justice in the application was a mere misjoinder which did not in any way invalidate or render the application incompetent. We need not say more on that ground of appeal.

26. The next ground, and the crux of this appeal, is whether in suspending the appellant the respondents acted *ultra vires* the Act. The Third Schedule to the Act makes provision for the appointment, discipline and removal of judicial officers and staff of the Judiciary. *Article 260* of the Constitution defines a judicial officer to mean a registrar, deputy registrar, magistrate, *Kadhi* or the presiding officer of any other court or tribunal established by an Act of Parliament. It is common ground that the appellant, being a magistrate was a judicial officer within the meaning of the Constitution.

27. Section 17 of the Schedule provides thus:

> 17. (1) Where an officer has been convicted of a serious criminal offence, other than such as are referred to in paragraph 28(2), the Chief Justice may suspend the officer from the exercise of the functions of their office pending consideration of their case under this Schedule.
>
> 2. The Chief Justice may suspend from the exercise of the functions of their officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed. (sic)"

28. We would agree with the learned judge that section 17(2) has typographical mistakes and ought to read:

> "The Chief Justice may suspend from the exercise of the functions of their office an officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed." (Emphasis added).

29. The appellant contends that as of the date that she was suspended, no disciplinary proceedings had been taken out against her and therefore the suspension was in violation of clause 17, null and void. The letter of 25th July 2011, which suspended the appellant, informed her that disciplinary action was contemplated against her. After setting out the charges against the appellant, which we have already adverted to, the letter continued as follows:

> "The above charges constitute a serious breach of conduct for a judicial officer and cannot be condoned in a modern Judiciary. Severe disciplinary action which might include dismissal with loss of all benefits is now contemplated against you, but before this is done, you are asked to show cause why the intended action should not be taken against you. Your reply, if any, should reach this office within 21 days from the date hereof, failure to which the intended action will be taken without further reference to you. Meanwhile, you are suspended from the functions and performance of your official duties with effect from 25th July 2011...Please treat the contents of this letter as charges framed under section 25(1) of Part IV of the 3rd Schedule of the Judicial Service Act, 2011." (Emphasis added).

30. As is evidently clear, the letter of 25th July 2011 did not simply suspend the appellant. For all intents and purposes it initiated the disciplinary proceedings against her. It set out the complaints and charges against her and asked her to respond to them. The letter put her on notice that the disciplinary action against her could result in her dismissal. The letter also asked her to treat the allegations against her as charges for purposes of her disciplinary proceedings.

31. In these circumstances we are not persuaded by the argument that the appellant was suspended in the absence of disciplinary proceedings against her. To read section 17 as the appellant invites us to do is to interpret the statute in a rather artificial and abstract manner. The letter of 25th July 2011 informed the appellant that disciplinary proceedings were being started against her, gave her a list of allegations against her and requested her to treat them as charges and then suspended her from duty pending the

hearing and determination of the disciplinary proceedings. We do not read in section 17 anything that would bar the 1st respondent from suspending an officer the moment that he is informed that he is subject to disciplinary proceedings and given the charges against him.

32. We would agree, as this Court stated in ***Judicial Service Commission v MbaluMutava & Another*** (supra), that suspension of a judge or a judicial officer who is subjected to removal or disciplinary proceedings is informed by public interest to ensure that such officer does not discharge the duties of the offices until the proceedings are concluded. The rationale for that arrangement is the high integrity that is demanded of a judicial officer, which would be gravely compromised if an officer against whom proceedings have been initiated for alleged lack of integrity, continues to discharge the duties of the office in a "business as usual" manner.

33. The last ground of appeal is that the disciplinary proceedings were res,judicata. We do not hesitate finding that this argument equally has no merit. The circumstances under which res judicata can be successfully raised were articulated by this Court in Uhuru Highway Development Ltd v. Central Bank of Kenya Ltd & Others, CA. No. 36 of 1996 and do not apply at all in this case. We have pointed out that in the first judicial review application the High Court did not prohibit the 1st respondent from ever taking disciplinary proceedings against the appellant either on grounds of the alleged strike or any other grounds. Secondly the High Court determined the first application on procedural and due process issues after it found that the 1st respondent failed to follow the prescribed procedure before purporting to retire the appellant on public interest. Lastly, even if the issue of the strike was addressed on merit, which it was not, the charges that the appellant faces in the disciplinary proceedings are not the same as those on which the 1st respondent had purported to retire her on public interest.

34. We have ultimately concluded that the High Court did not err in dismissing the appellant's application for judicial review. This appeal has no merit and is hereby dismissed. Due to the circumstances of this appeal, we make no orders on costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2017

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar