



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M KARIUKI & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 305 OF 2009

BETWEEN

SIMON M. NYAKUNDI APPELLANT

AND

THE HONOURABLE ATTORNEY GENERAL *on behalf of* THE PERMANENT SECRETARY

MINISTRY OF FOREIGN AFFAIRS RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (G. Dulu, J.) dated 1st October 2009

in

HC MISC APP. No. 802 of 2007)

JUDGMENT OF THE COURT

1. By a Notice of Motion dated 28th September 2007, the appellant, **SIMON M. NYAKUNDI**, in a Judicial Review application sought “an order for Certiorari to remove into court and quash the decision of the Permanent Secretary Ministry of Foreign Affairs conveyed by letter dated 16th May 2007 dismissing the appellant from employment in the Public Service. The appellant also sought an order for Mandamus to compel the respondent the **PERMANENT SECRETARY MINISTRY OF FOREIGN AFFAIRS** to reinstate him into employment with effect from 26th May 2005 and to pay the appellant his salary dues inclusive of interest at the rate of 12% per annum.”

2. The abridged facts that led to dismissal of the appellant from public service as stated in the “Statement of Facts” in support of the judicial review application are as follows:

“The appellant was employed in 1988 and worked in several positions in the Ministry of Foreign Affairs; that between 2003 and December 2004 the appellant was attached to the Kenya Embassy at Tehran in Iran as Second Secretary and his immediate superior was the Kenyan Ambassador in Tehran; that a letter dated 6th October 2004 from the Permanent Secretary Ministry of Foreign Affairs was written to the Kenya Mission in Tehran citing various allegations of misconduct on the part of the appellant as based on allegations made by the Ambassador; that upon seeing the said letter among others, the appellant sought

an appointment with the Ambassador and when he went to his office, the Ambassador spat on the appellant and directed him to return to Kenya; that on 16th December 2004, the appellant was arrested by Iranian Police while inside the Kenyan Embassy and which action was in contravention of the Vienna Convention; that the appellant was confined for 3 days by the Iranian authorities; that the appellant was subsequently deported to Kenya and which action violated the Vienna Convention on diplomatic immunity; that the alleged arrest and confinement was illegal, improper and against the Vienna Convention.”

3. In opposing the judicial review application, the respondent in a replying affidavit dated 21st July 2008 deposed by the then Permanent Secretary in the Ministry of Foreign Affairs, **Mr. Thuita Mwangi**, stated that vide a letter dated 18th May 2005, the Public Service Commission upon its own deliberations directed that the appellant be dismissed from service on account of gross misconduct with effect from 18th February 2005; that the decision of the Public Service Commission was conveyed to the appellant vide letter dated 26th May 2005; that the appellant appealed against the Public Service Commission decision to dismiss him and by letter dated 29th March 2006, the Public Service Commission indicated that the appellant’s appeal had been rejected; that the appellant applied for review of the Public Service Commission decision and his review was dismissed by letter dated 18th October 2006 and the appellant was advised and informed of this by letters dated 14th November 2006 and 16th May 2007.

4. The respondent submitted that the decision to dismiss the appellant was made by the Public Service Commission and not by the Permanent Secretary of the Ministry of Foreign Affairs; that the letter dated 16th May 2007 from the Ministry advising and informing the appellant of the decision of Public Service Commission cannot be the basis for a judicial review application; that the application for judicial review is fatally defective for misjoinder of parties as the decision to dismiss the appellant was made by the Public Service Commission.

5. The respondent contended that the decision to summarily dismiss the appellant was procedural and in accordance with the Public Service Regulations under the **Services Commissions Act, Cap 185 of the Laws of Kenya** (now repealed by **Section 34** of the **Public Service Commission Act No. 13 of 2012**) and that the decision to dismiss the appellant was made on 26th May 2005 and hence the judicial review application is time barred.

6. Upon hearing submissions by counsel, the trial court dismissed the appellant’s application for judicial review. In dismissing the application, the learned judge expressed himself as follows:

“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 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 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 ...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 documents filed including the letter dated 16th May 2005, is 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.”

7. Aggrieved by the dismissal of the judicial review application, the appellant has lodged the instant appeal raising the following compressed grounds:

“(i) That the judge erred in law by failing to consider that the provisions of Regulation 30 (1) (2) and Regulation 31 (1), Regulation 34 (3) (4) and (5) of the Public Service Commission Regulations was not adhered to.

ii. The judge erred in finding that the appellant had sued the wrong party.

iii. The judge erred in failing to find that the principles of natural justice were not adhered to by the respondent.

iv. The judge erred in failing to consider that the provisions of The Privileges and Immunity Act, Second Schedule thereof and Sections 5 and 7 of the Articles of the Vienna Convention having the force of law in Kenya were contravened.

v. The judge erred in failing to find that the Ministerial Human Resources Management Advisory Committee failed to provide an independent investigation report and exceeded its mandate as laid down in the Code of Regulations.

vi. That the judge erred in law by failing to consider the provisions of Kenya Foreign Service Regulations 2000.”

8. At the hearing of this appeal, learned counsel Mr. Ogesa appeared for the appellant while the respondent was represented by learned counsel Mr. K. Onyiso.

9. Counsel for the appellant reiterated the grounds of appeal urging that **Regulation 31(1)** of the Public Service Commission was violated to the extent that the appellant was not given all documents relied upon to make the decision to dismiss him; that the Public Service Commission merely sent the documents to the Permanent Secretary Foreign Affairs and no copy was sent to the appellant; that failure to send copies to the appellant violated the rules of natural justice. The appellant submitted that the core issue in this appeal is that the procedure and process followed by the Ministry to dismiss the appellant was not the procedure laid down in the Public Service Regulations; that the appellant was not heard at the Ministerial Human Resources Committee; that the Committee did not provide the appellant with an opportunity to rebut the allegations leveled against him; that the allegations on the appellant were of a criminal nature and the appellant has never been charged in a court of law; that the alleged misconduct took place at Tehran in Iran and some of the documents relied upon by the respondent were statements from Iranian citizens and that the statements by the Iranian citizens were never verified.

10. On the issue that the right party was sued, the appellant referred us to the letter dated May 18th 2005 from the Public Service Commission addressed to the Permanent Secretary Ministry of Foreign Affairs at page 71 of the Record. The letter conveys the decision of the Public Service Commission to dismiss the appellant with effect from 18th February 2005.

11. The respondent in opposing the appeal submitted that the trial court did not err in arriving at its decision; that there was no breach of any Public Service Commission Regulations; that the appellant sued the wrong party; that the Attorney General is an advocate or counsel for the respondent and in this case, the appellant filed suit against the advocate and not the client; that the Attorney General has no role to play in this matter save for being the advocate for the respondent; that the appellant in his judicial review application sought review of the merits of dismissal and that judicial review applications are not concerned with merits but procedure.

12. In reply, the appellant emphasized that what was before the trial court was a challenge of procedure and not the merits of the decision to dismiss the appellant from employment. We have considered the

grounds of appeal and submissions by counsel. As this is a first appeal, we are obliged to re-evaluate the evidence on record and arrive at our own conclusions. (See **Selle -vs-Associated Motor Boat Co. [1968] EA 123** and **(Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270)**). We are also cognizant of the fact that judicial review orders are discretionary orders. In **Republic -vs- Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) - Civil Appeal 160 of 2008** this Court stated that: **“Judicial review remedies are discretionary and the Court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law, not private law.”**

13. From the pleadings, the appellant sought an order of *certiorari* to allegedly quash the Permanent Secretary’s decision contained in the letter dated 16th May 2007. An order of *certiorari* quashes a decision already made and will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with. In the present case, the letter dated 16th May 2007 does not contain a decision made by the Permanent Secretary of the Ministry of Foreign Affairs. The letter conveys the decision of the Public Service Commission dismissing the appellant’s appeal for review of decision to dismiss him from public service on account of gross misconduct. The aforesaid letter was merely informing the appellant the decision which had been made by the Public Service Commission and earlier communicated to the appellant vide a letters dated 18th October 2006 and 14th November 2006. Our re-evaluation of the evidence on record and the aforesaid letters lead us to conclude that there is no decision made by the respondents in this case that is capable of being quashed by an order of *Certiorari*.

14. In this appeal, the appellant contended that the alleged facts giving rise to his dismissal were criminal in nature and he was never charged with a criminal offence in relation to those facts; that since he was never charged, the grounds for his dismissal were never proven. We pay homage to the decision of the High Court in **James Mugeru Igati -v- Public Service Commission of Kenya (2014) eKLR** where it was stated that there is nothing in the Public Service Commission Regulations which suggest that disciplinary process is tied to criminal process that may arise from the same facts. There is no provision in the Public Service Commission Regulations which make it necessary for employers to follow police investigations, or findings or indeed criminal court decisions in resolving employment disputes. The Public Service Commission Regulations do not merge disciplinary processes with criminal trials. (See Public Service Commission Regulations 23 and 24).

15. In the judicial review application before the trial court, the appellant sought an order of mandamus to compel the respondents to reinstate him to employment in the public service. An order of mandamus can only be directed to a public officer who has a statutory obligation to perform the act complained about. In **Halsbury’s Law of England, 4th Edition Volume paragraph 89:-**

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.

Further at paragraph 90:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

16. It is not in dispute that the appellant was employed by the Public Service Commission and not the Permanent Secretary Ministry of Foreign Affairs. The appellant in its Notice of Motion dated 28th September 2007 sought an order of *Certiorari* to quash the decision of the Permanent Secretary contained in the letter dated 16th May 2007. The letter is addressed to the appellant and titled “Review of Case against Dismissal from Service”. The relevant excerpts of the letter states that “The Public Service

Commission in their letter Ref: No. D/NY/342 of 18th October 2006 disallowed your appeal.” The letter dated 16th May 2007 is a reply to the appellant’s letters to the Public Service Commission dated 19th July 2006 and 15th April 2007.

17. Our reading of these letters clearly shows that the appellant was aware that his employer was the Public Service Commission and the decision to dismiss him from employment was made by the Public Service Commission. The appellant was neither an employee of the Permanent Secretary Ministry of Foreign Affairs nor the Attorney General. The respondents have no statutory duty to employ or dismiss the appellant from public service. Consequently, an order for Mandamus to compel the respondent to reinstate the appellant to service cannot issue.

18. A fundamental issue that needs to be considered and determined is whether the respondent was the correct party to be sued. The appellant filed suit against the Attorney General on behalf of the Permanent Secretary Ministry of Foreign Affairs. Two pertinent questions arise in this regard. First, is the Permanent Secretary Ministry of Foreign Affairs a body corporate or legal person capable of suing and being sued? Second, is the Attorney General (AG) *qua* AG a competent respondent in these proceedings? The trial court held that in failing to sue the Public Service Commission, the appellant had sued a wrong party and there was a misjoinder.

19. In **Desai -v- Patel t/a Sandpipers Construction & Civil Engineering Services & 13 others (2001) KLR 120** it was held that a court has a right to stop an action at any stage when it is known that a wrong party is sued rather than allow the plaintiff to vex such party with litigation. We have examined the laws of Kenya and we are satisfied that the Permanent Secretary Ministry of Foreign Affairs is not a body corporate with power to sue and be sued in its own name. Contrast this with the Permanent Secretary to Treasury which was incorporated as a legal person under ***Cap 101*** of the Laws of Kenya.

20. On misjoinder of parties, the appellant referred this Court to the letter dated 18th May 2005 at page 71 of the Record. The letter is from the Public Service Commission and addressed to the Permanent Secretary of the Ministry of Foreign Affairs. The relevant excerpt of the letter states as follows: “I am directed to convey the decision of the Public Service Commission that Mr. **Simon Mokuu Nyakundi**, Senior Records Management Officer in your Ministry be dismissed from the service with effect from 18th February 2005 on account of gross misconduct.”

21. We have considered the contents of the above letter. The mere fact that the letter is addressed to the Permanent Secretary of the Ministry of Foreign Affairs does not make the Permanent Secretary a body corporate or person capable of suing and being sued. Further, the letter expressly states that the decision to dismiss the appellant from service was made by the Public Service Commission. The appellant by referring us to the letter dated 18th May 2005 did not demonstrate how this letter conferred standing on the respondent to be the proper party to be sued in this matter.

22. Under the Public Service Commission Act as read with **Articles 233 and 253** of the **Constitution**, the Public Service Commission is a body corporate and a legal person capable of suing and being sued in its own name. We draw a corollary in the case of **Attorney General -v- Kenya Commercial Bank, HCCC No. 329 of 2001**, where the Attorney General filed suit in his name on behalf of the **National Irrigation Board** which was a body corporate with power to sue and be sued. Ringera J. (as he then was) observed that the Attorney General’s institution of a suit for and on behalf of the National Irrigation Board which was a body corporate with power to sue and be sued in its own name was a legal misadventure and an action without juridical basis. All the relevant facts in the present suit point towards action by the Public Service Commission which is a body corporate.

23. The appellant submitted that the learned judge erred in failing to find that his arrest and confinement in Iran was unlawful and in contravention of the Vienna Convention on Diplomatic Immunity. The appellant was posted and deployed to Tehran as the Second Secretary at the Kenyan Embassy in Iran. A citizen of the sending state cannot invoke diplomatic immunity against his country; diplomatic immunity can only be invoked against the host/ receiving state. On the facts of this case, diplomatic immunity of the

appellant cannot be invoked against the Kenya Government which is the country that sent the appellant to Iran. The appellant was never accredited to Kenya as a diplomat; subject to very limited exceptions, a citizen of a country cannot have diplomatic immunity in his own home state. Further, diplomatic immunity in a foreign country can be lifted by the sending state. In this matter, the evidence on record does not show that the arrest of the appellant within the Chancery of Kenya in Tehran was subject of complaint by Kenya as the sovereign country whose Chancery was violated, if at all. In our view, the appellant has no *locus* to complain about any violation of the Chancery of Kenya; the *locus* to complain rests with the sovereign Republic of Kenya. Based on the foregoing analysis, the appellant's submission that the provisions of the Vienna Convention were violated has no merit.

24. We note the respondent's submission that judicial review is concerned with process and not merits of the decision. In our view, subject to **Article 47** of the **Constitution** and the provisions of **Fair Administrative Action Act of 2015** the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. (See also **Republic -V- Secretary of State for education and Science ex parte Avon County Council (1991) 1 All ER. 283 285**).

25. As regards the right to be heard and violation of the rules of natural justice, we have re-examined the record and are satisfied that the appellant was given the opportunity to respond to all allegations of misconduct made against him. The appellant exercised his right to be heard by writing numerous letters and memos filed on record in regard to the allegation.

26. In this matter, we have re-evaluated the evidence on record and come to the determination that the appellant neither joined the Public Service Commission as a party nor sought an order to quash the decision made by the Commission to dismiss him from service. We have also made a finding that the appellant was neither employed nor dismissed by the Permanent Secretary for the Ministry of Foreign Affairs but by the Public Service Commission. The letter dated 16th May 2007 was not the letter that dismissed the appellant from public service and we find that there is no decision in the letter that can be quashed. Based on these findings, we conclude that the trial court did not err in declining to grant the orders of certiorari and mandamus as prayed for by the appellant. The upshot is that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 22nd day of April, 2016

M. K. KOOME

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JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR