IN THE HIGH COURT
AT NYERI
Miscellaneous Civil Application 22 of 2009

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
AND
IN THE MATTER OF PUBLIC SERVICE COMMISSION
(L

OCAL AUTHORITY OFFICERS REGULATIONS)

to date at Ksh.12,000/= per month and terminal dues as he had been dismissed despite the direction by the permanent secretary, Ministry of Local Government that he be reinstated; That the decision of the 1st respondent was made to defeat the interest of justice in that CMCC No.2886 of 2001 was pending; The decision was to take effect retroactively in that it was made on 18th July, 2001 and was to take effect from April, 1993. Finally that obtaining a decision to dismiss the application after 9 years is an abuse of the displinary process.

The Notice of Motion was further based upon the affidavit of the applicant described as a supporting affidavit sworn on 12th February, 2002. He deponed therein that he was employed by the 1st respondent in 1990 as an accounts assistant III and posted to Nyeri Municipal Council. He worked diligently until 1993 when the 2nd respondent purported to summarily dismiss him from employment. The 2nd respondent had no such powers, the same being vested in the 1st respondent. In 1996 the 2nd respondent asked the Ministry of Local Government to approve the dismissal but he was rebuffed. In 2001, the 2nd respondent reported to the council that he had dismissed the applicant from employment but the Ministry termed the dismissal irregular and unprocedural. However on 18th July, 2001 the 1st respondent ratified the dismissal aforesaid without according him a fair hearing. The decision of the 1st respondent was null and void to the extent that it purported to have effect retroactively. Finally he deponed that there was pending in court CMCC No.2886 of 2001 hence the decision of the 1st respondent amounted to interference with fair hearing and disposal of the said case and was intended to influence the outcome of the same.

The 1st respondent reacted to the application by filing grounds of apposition to the effect that the application was misconceived, frivolous, blatant abuse of the court process, fatally and incurably defective. Through **Rosemary Amisi Owino**, a replying affidavit was filed. She deponed that she was a Senior Personnel Officer with the Public Service Commission. That disciplinary proceedings against the applicant were commenced in 1993 following his admission in writing that he had fraudulently issued receipt books from which revenue was illegally collected and shared out between himself and one, **Ngare.** On 13th April, 1993 the applicant was given a show cause letter formally charging him and was given 7 days to exculpate himself. However the applicant did not offer any representation to the said charge. On 29th September, 1993, the 2nd respondent recommended that the services of the applicant be terminated and approval of the 1st respondent be sought. The matter was forwarded to the 1st respondent and the same was deliberated upon and the applicant was dismissed from service on account of gross misconduct on 18th July, 2001, which dismissal took effect from the 13th April, 1993.

On the part of the 2nd respondent, **Richard Kiana Gikuhi**, the then town clerk responded through a replying affidavit in which he deponed that the application was misconceived, incompetent, bad in law, incurably defective, an abuse of the process of the court, scandalous, frivolous and vexatious. That the procedure adopted in filing the application was wrong and did not comply with the mandatory provisions of the law. The application was in any event subjudice as the applicant had made a similar application in HC.MISC. Civil Application No.766 of 2001. The application was statutory barred in so far as it seeks an order of certiorari to quash the dismissal of the applicant in 1993 as clearly provided for under order LIII rules 2 and 7 thereof of the Civil Procedure Rules. Further mandamus was not available to the applicant as his reinstatement is not a public duty. The application was an abuse of the court process as the applicant had filed a suit against the 2nd respondent seeking payment of the alleged salary arrears and terminal dues in Milimani CMCC No.2886 of 2001. Finally he deponed that the applicant was afforded a proper hearing before the 2nd respondent and he admitted the theft.

It would appear that the 3rd respondent did not file a replying affidavit but was contend with the grounds of apposition and Notice of Preliminary Objection filed.

This suit was initially filed in the High Court of Kenya at Nairobi. Following several interlocutory applications and rulings herein, **Ransley J** as he then was ordered on 27th January, 2004, that the same be transferred and heard by this court. However whilst the suit was pending in this court, the Honurable the Chief Justice issued practice directions which had

the effect of taking away the jurisdiction of the upcountry High Court stations, from hearing Judicial Review and constitutional matters. Accordingly, on 17th September, 2007, **Kasango J** transferred this case back to the judicial review and constitutional division of the High Court of Kenya at Nairobi pursuant to the said practice note. When the application came up again for hearing before **Wendoh J,** on 28th May, 2009 **Mr. Wahome**, learned counsel for the 2nd respondent successfully applied to have the same re-transferred to this court since the Chief Justice's directives aforesaid had by then been rescinded and or revoked. However by then and pursuant to the order issued by **Nyamu J** on 26th October, 2009 some of the parties i.e. the applicant and 2nd respondent had already filed their written submission.

Eventually when the matter came before me for hearing, parties agreed to canvass the application by way of written submissions as previously directed by **Nyamu J**. The parties who had not filed and exchanged written submissions by then eventually did so. I have carefully read and considered all the submissions on record together with the authorities cited.

Unfortunately this application will have to be determined on the procedural flaws committed by the applicant in filing and prosecuting the instant application. First and foremost,, the substantive Notice of Motion is wrongly intituled. Part of the intitulement suggests that the application has been brought in the name of the applicant. At this stage, the substantive Notice of Motion unlike at the leave stage, ought to be made in the name of the republic. Judicial Review proceedings are totally different from any other ordinary proceedings. It is only the Republic and not an individual who can seek orders of judicial review. In the case of **Farmers Bus Service & Others VS The Transport Licensing Appeal Tribunal (1957) EA 779** the court held that; **"….prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted…."** Similarly in the case of **Kenhon Kijabe Hill Farmers Co. Society V The District Officer (Naivasha) HC.MISC. No.280 of 1996** (UR), **Aganyanya J** (as he then was) quoting from the farmers case (supra) reiterated that **"Prerogative orders are issued in the name of the crown (now Republic) and the application for such orders must be correctly instituted….."** He went on to observe that **"Application for prerogative orders are totally different from ordinary pleadings in civil matters and the court cannot deal with the present application in the form in which it is as it is incompetently before court…"** It should be noted that just like in the farmer's case, the applicant in this case had also brought the action in his name as opposed to the Republic. Yet again in the case of **Pagrex International V Minister for Finance & others HCCC No.875 of 2001, Nyamu J (**as he then was) observed;

"…..In addition the application has not been brought in the name of the Republic but in the name of the applicant (see heading)….. The Republic cannot be the applicant and the respondent at the same and in the same cause. See court of appeal decision in Mohamed Ahamed V Republic 1957 EA 523 where it was held "prerogative order" now read Judicial orders are issued in the name of the crown (now read Republic)."

Though these latter two decisions are from the High Court and therefore non-binding on me, I am however persuaded that they represent the proper position in law.

The applicant in a bid to counter that position has relied on the case of **Boyles V Gachure (1969) EA 385** in which it was held that wrong procedure does not invalidate the proceedings if it does not go to jurisdiction and no prejudice is caused to the applicant. Accordingly to the applicant, the alleged wrong format does not prejudice the respondents. Further, in the farmers case, the court of appeal ordered for the amendment of the suit rather than dismissal. First and foremost it should be noted that the case of **Boyes V Gachure** (supra) was not a judicial review matter. It was a suit to compel the defendant to remove a caveat from a parcel of land. Had it been a judicial review application, I am certain the reasoning would have been different. Secondly, the applicant did not seek from this court leave to amend the intitulement. The court cannot therefore grant what it has not been asked for. In any event being a judicial review application, I doubt whether there are any provisions in order LIII that provide for such amendments. The only document amenable to amendment in judicial review application that I am aware of is the statement of facts and nothing else. Thirdly, it is trite law that judicial review proceedings are a special jurisdiction that is neither criminal nor civil. Accordingly the civil procedure act and the rules made thereunder are

inapplicable. Accordingly issues of substantial justice and or, prejudice are irrelevant considerations.

Considering all the foregoing, I am satisfied that having brought the application in his name rather than the republic, the application is incurably defective and ought to be struck out.

Next is the statutory statement under order LIII rule 1 of the Civil Procedure rules. Such statutory statement is required to contain only the name and description of the applicant, the relief sought and the grounds upon which the relief is sought. In the **Commissioner General, Kenya Revenue Authority V Silvano Onema Owaki T/A Merenga Filing Station, Civil Appeal Number 45 of 2000** (UR), the court of appeal observed that;

"….The statement is required by rule 1(2) of order LIII of the Civil Procedure Rules to set out the name and description of the applicant, the relief sought, and the ground on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case…."

And in the case of R V Wandsworth (1942) 1 KB 281, it was further held that;

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

However what do we have before us. Yes there is a statement of facts. That statement contains the name and description of the applicant. It does not contain the relief sought and the grounds thereof. Thereafter, it contains what the applicant refers to as to facts relied on. These facts are required to be in the verifying affidavit and not the statement. That being the case again, the applicant has failed to comply with the mandatory provisions of the law and as such the statement of fact is liable to be struck out.

In response, the applicant has submitted that under order LIII rule 4(2) there is a provision for amendment of statement of facts and that he had notified the parties herein his intention to do so. It is therefore not a fatal defect. That on 21st October, 2009 the applicant filed a notification to amend the statement of fact dated 11th December, 2001. That may well be so. But did the applicant carry through his intention to amend his statement? No. Accordingly the above submissions are irrelevant and do not at all advance the applicant's case against the respondents' submission that the said statement of facts as drawn is fatally defective on the above grounds.

There appears also to be problem with the supporting affidavit to the notice of motion. The supporting affidavit is shown as having been sworn on 12th February, 2002 and yet leave to commence judicial review proceeding was granted to her applicant on 13th February, 2002. It appears therefore that the affidavit in support of the substantive motion was sworn before leave to commence judicial review proceedings was granted. That by itself renders the affidavit incompetent.

Finally I would wish to consider the applicant's failure to cite section 8 (1) and (2) of the Law Reform Act. It is section of the said Act that donates to the High Court jurisdiction to grant judicial review orders. It is worded in these terms;

"(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order."

It is thus therefore imperative that the said section of the law be cited in an application for judicial review. Failure to do so no doubt renders the motion incompetent and fatally defective. Where else would this court then derive the jurisdiction to entertain such applications. The applicant concedes that the application did not expressly mention the provisions of the Law Reform Act. However he wants to hide behind the rubric **"All other enabling provisions of law…"** This rhubric cannot possibly be referring to judicial review

proceedings or sections 8 and 9 of the Law Reform Act aforesaid. That rubric would only come to the aid of the applicant if he was not sure under what law he was moving the court. In this case, the applicant was certain that he was coming to court for orders of certiorari and mandamus which are only made in judicial review proceedings. He knew where to find the law. He knew or must be taken to know that section 8 of the Law Reform denotes to this court power to issue judicial review orders. Judicial review being a special jurisdiction which is neither civil or criminal, a party cannot hide behind the said rhubric in abid to avoid the express provisions of the law.

The applicant has submitted that the 1st and 3rd respondents cannot oppose the application as they had complied with the order of this court issued on 23rd May, 2002. This order was issued by **Rimita J.** By that order, **Rimita J,** allowed the substantive motion ex-parte. In other words the current notice of motion had earlier been dealt with by **Rimita J** and allowed. However as it is apparent on the record, the order by **Rimita J** was subsequently set aside. Accordingly this argument by the applicant does not hold any water at all.

The applicant too has submitted that the firm of **Wahome Gikonyo & Co. Advocates** was not properly on record when it filed and prosecuted the application dated 18th July, 2002 as it had not filed an appropriate notice of appointment of advocates to prove that it was duly appointed to act for and on behalf of the 3rd respondent. That submission cannot possibly be correct. The record shows that on 22nd July, 2002 **Messrs Wahome Gikonyo & Company Advocates** filed Notice of appointment of advocates to act for the 2nd respondent and not 3rd respondent. The application itself was brought on behalf of the 2nd and not 3rd respondent as claimed by the applicant. It cannot therefore be said that every proceeding founded on that application were incompetent and incurably defective for that reason. It should be remembered that this is the application that set aside the order of **Rimita J** aforesaid. That being my view of the matter the authority of **Mactoy V United Africa Co. Ltd (1961) 3 ALL E.R 1169** cited by the applicant is irrelevant. In any event even if there was that defect, the applicant ought to have raised it with the judge who dealt with the application to set aside. In any event, the applicant I note, never sought to set aside, vacate or vary the said order on that ground. I would advance the same argument in response to the applicant's other submission that there was no applicant's application by notice of motion dated 18th February, 2002 and that what was in court on 23rd May, 2002 was the applicant's application by notice of motion dated 12th February, 2002. The perception of the judge who heard and granted the application cannot visited upon an innocent litigant. Further parties knew the application which was in court and had been canvassed before the learned judge.

The applicant has also faulted the leaned judge for entertaining an application brought under order 1XB rule 8, XXI rules 21 and 25 of the civil procedure rules in judicial review proceedings which are neither civil nor criminal. Accordingly those provisions of the Law were inapplicable in the circumstances of this case. Indeed any application in judicial review can only be brought under order LIII of the civil procedure rules. My simple answer to this submission is that though it may be true, it is nonetheless belated. It ought to have been raised and canvassed before the judge who entertained the application. To ask me now to rule on the same is tantamount to asking me to sit on appeal on the decision of the judge of this court, something which is frowned upon.

The conclusion I have thus come to with respect to this application is that it is incompetent, incurably defective and bad in law. Accordingly it is struck out with costs to the respondents.

In deciding this dispute overly on technical grounds, I am not oblivious to the recent amendments to the provisions of section 1A and 1B of the Civil Procedure Act which came into effect on 23rd July, 2009. The courts including this court in interpreting the Civil Procedure Act or exercising any power must take into consideration the overriding objective as defined in the said Act. Some of principal aims of the overriding objective include the need to act justly in every situation, and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. However these are judicial review proceedings strictly governed by order LIII

of the Civil Procedure Rules. Save for this particular order other provisions of the Civil Procedure Act and the rules made thereunder are inapplicable. Further it has been said constantly that judicial review is a special jurisdiction that is neither civil or criminal. That being the case the principles enunciated above may not come in handy in the circumstances of this case.

Dated and delivered at Nyeri this 25th day of January, 2010.

M.S.A. MAKHANDIA
JUDGE