



**Mwangi v Public Service Commission & 2 others (Judicial Review
1 of 2023) [2024] KEELRC 790 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 790 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
JUDICIAL REVIEW 1 OF 2023
ON MAKAU, J
APRIL 12, 2024**

BETWEEN

KIRATHE MWANGI APPLICANT

AND

THE PUBLIC SERVICE COMMISSION 1ST RESPONDENT

COUNTY GOVERNMENT OF MURANG'A 2ND RESPONDENT

**MINISTRY OF PUBLIC SERVICE, GENDER, SENIOR CITIZENS AFFAIRS &
SPECIAL PROGRAMMES 3RD RESPONDENT**

JUDGMENT

1. By a Notice of Motion dated 17th May 2022 the applicant seeks the following orders:
 - a. An order of certiorari to bring into the High Court for purposes of being quashed the decision of the Public Service Commission dated the 13th day of October 2021 in an Application for Review regarding payment of salary arrears arising from wrong placement: Mr.Kirathe Mwangi P/NO.198500035548 former Mortuary foreman: salary scale 14.
 - b. An order of prohibition against the Respondents prohibiting the said Respondents whether by themselves, their servants, agents, officers or whosoever otherwise from unlawfully acting upon or enforcing or continue to enforce or maintain or continue to maintain the decision to disallow and close the case on the application of review regarding salary in arrears of the Applicant.
 - c. An order of mandamus to compel the Respondents to review the wrong job placement occasioned by discrimination of the ex-parte applicant by his employer.
 - d. Costs of this application be provided for.



2. The motion is premised on the grounds set out on its body, statutory statement, verifying affidavit sworn on 12th April 2022 and supporting affidavit sworn on 17th May 2022. In brief the applicant's case is that he appealed to the PSC against a decision of the County Public Service Board Murang'a to deny him his salary arrears. The PSC dismissed the appeal vide a decision communicated to the 2nd and 3rd Respondent on 13th November 2019. The decision was not communicated to him contrary to the PSC (County Government Public Service Appeals) Regulations, 2016.
3. He contended that the foregoing conduct amounts to breach of his legitimate expectation under fair administrative action Act, read with Article 47 of the Constitution. He further averred that the respondents have deprived him of his right to natural justice, access to justice under Article 48 of the Constitution and equal protection of the law under Article 27 of the Constitution.
4. He contended that unless the orders sought are granted, the respondents will proceed to calculate his pension based on erroneous pay scale in violation of his rights.
5. The respondents have opposed the motion by filing grounds of opposition and Replying affidavits. The 1st Respondent's case is that it dismissed the applicant's appeal and communicated the decision to the parties by a letter dated 13th November 2019. Subsequently, the applicant lodged application for review and upon consideration, it disallowed the application by a decision dated 13th October 2021 (impugned decision).
6. The 1st Respondent contended that the application herein is incompetent and improperly before the court for the following reasons: -
 - a. Leave to file the motion was sought more than six months after the impugned decision.
 - b. The leave was granted by a court without jurisdiction.
7. The 2nd Respondent's case is that the High Court, where the suit was originated had no jurisdiction over the dispute because it related to Employment and Labour Relations. It further averred that the application has not met the requirements set by Order 53 of the Civil Procedure Rules; that the Order of Prohibition is already spent; and that the Order of Mandamus sought is misplaced.
8. The 2nd Respondent further averred that the impugned decision was within the law since the applicant is not complaining about the conduct of the hearing but just the failure to communicate the decision to him directly. Consequently, the 2nd respondent sees no prejudice suffered by the applicant and prayed for the suit to be dismissed with costs.

Applicant's Submissions

9. The applicant submitted that he has the locus standi to bring this suit for enforcement constitution. For emphasis, he cited Article 22 and 258 of the Constitution. He further submitted that he has the right to sue after exhausting the alternative mechanism before the PSC.
10. He further submitted the PSC delayed its decision on the appeal for more than the four months provided by section 20 of the PSC (County Government Public Service Appeals Procedure) Regulations, 2016 to receive, hear and determine an appeal. He submitted that the PSC denied him oral hearing contrary to Regulation 13 of the said Regulation. The PSC also failed to communicate its decision on his application for review in writing, and within 14 days as required by Regulation 23 of the Regulations. Consequently, he submitted that his right to access to justice and right to fair administrative action were violated contrary to Article 47 and 48 of the Constitution. For emphasis, he cited the case of Elizabeth Barganza v Tysons Habenga Civil Appeal No.285 of 1997 (UR) where



the Court of Appeal set aside a judgment that was delivered fifteen (15) months after the date of the hearing.

11. The Applicant submitted that he is entitled to the order of certiorari because he was given wrong job placement throughout the years he served from 18th June 1979 to 25th December 2017 when he retired. He assessed the salary arrears caused by underpayment at Kshs.499,174. For emphasis, he cited Republic v Kenya National Examination Council Exparte Gathoni and others Civil Appeal No.266 of 1996 (UR) where the Court of Appeal held that certiorari is granted to quash a decision which has already been made.
12. As regards order of prohibition, he submitted that the impugned decision was influenced by error and he was denied hearing. Further, it was unreasonable and unfair. Consequently, the order of prohibition was merited.
13. Finally, the applicant submitted that an order of mandamus should be granted to compel the respondents to pay him salary arrears arising from wrong placement. Further, the respondents should also be compelled to compute his pension in line with the correct salary scale. For emphasis, he relied on the case of Republic v Kenya National Examination Council, supra.

Respondents' submissions

14. The 1st Respondent submitted that the High Court lacked jurisdiction to entertain this suit pursuant to Article 162 (2) (a) and 165 (5) (b) of the Constitution, section 89(1) of the Public Service Commission Act, 2017 and Section 12 of the Employment and Labour Relations Court Act. It submitted that it raised preliminary objection challenging the jurisdiction of the High Court and instead of the court downing its tools, it ordered transfer of the suit to this court.
15. It submitted that the transfer was illegal since the court did not have jurisdiction. It urged this court to be guided by the decision in Mustafah Otieno Ochieng v The Governor, Bomet County & 15 others, Kericho ELRC Petition No.E015 of 2022.
16. The 1st Respondent further submitted that the application for order of certiorari is incompetent because leave was sought outside the six months prescribed under order 53 rule 2 of the Civil Procedure Rules.
17. Finally, the 1st Respondent submitted that the application lacks merit because it had the jurisdiction to hear and determine the application before it. Further, it gave the reasons for its decision.
18. The 2nd Respondent on the other hand reiterated its averments in its Replying Affidavit and Grounds of Opposition that the impugned decision was made in exercise of lawful jurisdiction. Consequently, it argued that the application lacks merits and the reliefs sought are not tenable. For emphasis, it cited several precedents which were not availed to the court for consideration.

Issues for determination and analysis

19. Having considered the pleadings, evidence and submissions filed, the following issues fall for determination: -
 - a. Whether the Notice of Motion is fatally incompetent and improperly before this court.
 - b. Whether the applicant has laid sufficient basis to warrant judicial review orders sought.
 - c. Who should pay costs of the suit.



Fatal incompetence

20. The respondents contended that the suit is incompetent because leave was sought out of time, and also because the court which granted the leave to bring judicial review proceedings lacked jurisdiction. Order 53 Rule 2 of the Civil Procedure Rules provides that: -

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for purposes of being quashed unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act, and where the proceeding is subject to appeal and time limited by law for bringing the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

21. In this case there is no denial that the impugned decision was made on 13th October 2021 and the application for leave to quash the same was filed in High Court on 12th April 2022. The period between the date of the decision and date of filing the application for leave was exactly six months. Consequently, I find that the application for leave was filed within the limitation period of six months prescribed by Order 53 Rule 2 above.

22. As regards the question of Jurisdiction, there is no dispute that leave was sought and obtained from the High Court. Thereafter the respondents’ counsel raised the issue of jurisdiction on 4th July 2023 and the court agreed and then directed the matter to be placed before this court.

23. The 1st Respondent contends that the suit is incompetent because the High Court lacked jurisdiction to grant the leave sought and to transfer the suit to this court. The applicant has not rebutted that allegation. The question that arises is whether an order made by a court without jurisdiction is a nullity.

24. In the case of *Owners of Motor Vessel Lillian “S” v Caltex Kenya Ltd (1989) 1 KLR*, the Court of Appeal held that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step... A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

25. The Court went on to quote a paragraph from “Words and Phrases Legally defined”- Volume 3: I-N page 113, thus: -

“Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

26. In *Mustafah Otieno Ochieng v The County Government of Bomet & others*, supra, Nderitu J refused to transfer suit to High Court after the respondents objected to the suit on ground that ELRC lacked jurisdiction over the suit. I believe, that is what the Judge in the suit should have done on 4th July 2023 when the jurisdiction of the court was challenged.

27. I say so because, the court acknowledged that it had no jurisdiction over the suit and therefore the order granted to bring the Judicial Review proceedings was a nullity. There was, in my view, no competent suit capable of being transferred from the High Court to this court. The corollary to the foregoing is that there is no competent suit before me since the court which granted leave to allow filing of the same lacked jurisdiction.



Reliefs

28. In view of the foregoing holding, the court will not consider the merits of the application. Consequently, I strike out the Notice of Motion dated 17th May 2022. Even if I was to go to the merits of the matter, nothing much would come out of it because the decision on the appeal remains unchallenged. What is impugned is the decision on the review application. Due to the history of the dispute, I will not condemn the applicant to pay costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

