



Republic v Teachers Service Commission & another; Wangila (Exparte Applicant) (Miscellaneous Application E006 of 2023) [2023] KEELRC 2795 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2795 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
MISCELLANEOUS APPLICATION E006 OF 2023**

MA ONYANGO, J

NOVEMBER 2, 2023

**IN THE MATTER OF: AN APPLICATION FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS
IN THE MATTER OF: PROCEDURAL UNFAIRNESS
IN TERMINATION OF EMPLOYMENT**

BETWEEN

REPUBLIC APPLICANT

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

**TEACHERS SERVICE COMMISSION REVIEW COMMITTEE 2ND
RESPONDENT**

AND

AQUINUS WANJALA WANGILA EXPARTE APPLICANT

RULING

1. By a Notice of Motion dated January 13, 2023, filed pursuant to sections 1A, B and 3 of the [Civil Procedure Act](#), order 53 rule 1 and 3 of the [Civil Procedure Rules, 2010](#), the [Law Reform Act](#) and all other enabling provisions of the law, the *ex-parte* applicant seeks orders that:
 - a. The *ex-parte* applicant herein be granted leave to apply for the remedy of judicial review in the nature of *Certiorari* to remove into the honourable court for purposes of quashing the Teachers Service Commission’s decision to dismiss from service Aquinas Wanjala Wangila on July 11, 2012.
 - b. The *ex-parte* applicant herein be granted leave to apply for the remedy of judicial review in the nature of *Certiorari* to remove into the Honourable court for purposes of quashing the



Teachers Service Commission Review Committee's decision to uphold the dismissal from service of Aquinas Wanjala Wangila on March 11, 2023(sic)

- c. The *ex-parte* applicant herein be granted leave to apply for the remedy of judicial review in the nature of an order of Declaration that the dismissal from service of Aquinas Wanjala Wangila on July 11, 2012 by the Teachers Service Commission was not in accordance with fair procedure.
 - d. The *ex-parte* applicant herein be granted leave to apply for the remedy of judicial review in the nature of an order of Declaration that the decision to uphold the dismissal from the Teachers Service Commission of Aquinas Wanjala Wangila by the Teachers Service Commission Review Committee on March 23, 2023 was procedurally unfair and improper.
 - e. This honourable court be pleased to grant *ex-parte* applicant leave to file a motion for judicial review in the nature of Mandamus to compel the respondent herein, Teachers Service Commission, to forthwith reinstate into the teachers' service, the *ex-parte* applicant, Aquinas Wanjala Wangila
 - f. Costs of this application be provided for
2. The Application is anchored on the grounds that are on the face of the Application, the Supporting Affidavit and a Verifying Affidavit both sworn by Aquinas Wanjala Wangila on even date. In summary, the grounds are that the *ex parte* applicant was unfairly, improperly and unlawfully terminated from employment of the Teachers Service Commission in a process that was filled and blemished with procedural unfairness; that both the Teachers Service Commission and the Teachers Service Commission Review Committee did not follow the laid down process in arriving at the decisions to terminate Aquinas Wanjala Wangila from employment as is required by the rules of fair procedure and practice; that the *ex-parte* applicant's right to administrative action was infringed and that his disciplinary process was not expeditious, efficient, lawful, reasonable or procedurally fair; that the *ex-parte* applicant's dismissal from the teachers service without reason or warning issued was procedurally improper and without any justifiable cause; that the *ex-parte* applicant's dismissal from the teachers service was procedurally improper, and thereby rendering it illegal, unfair and unlawful for violating the provisions of sections 41(1), 44(4), 43,20 and 45(2) of the *Employment Act* as read with rules 139, 145,146,149,151,153,154,155 and 156 of the *Teachers Service Commission Code of Regulations for Teachers, 2015*.
 3. The respondents filed Grounds of Opposition dated February 17, 2023 and contended that the application herein offends the provisions of order 53 of the *Civil Procedure Rules, 2010* as the application for leave should be via Chamber Summons as opposed to Notice of Motion as presented by the applicant; that the republic should not have been named as an applicant in this initial stage of the proceedings as at the stage of seeking leave, only the aggrieved party should appear as applicant. Further, that the Application is misconceived and bad in law as the contract between the *ex parte* applicant and the 1st respondent was a purely private employment contract donating private rights to the interested party hence should not seek enforcement through judicial review. It is averred that the notice of motion is incurably defective, bad in law and ought to be struck out with costs as the decision of the disciplinary committee to dismiss the *ex-parte* applicant was not dependant on the review panel and that the disciplinary committee was well clothed with requisite mandate to render its decision to dismiss him; that whilst the *ex parte* applicant had a right to seek review which he duly exercised, the substantive decision has already been made and that the review panel mandate is either to reverse the decision of the discipline committee or to uphold the same; that it is trite and a settled principle in law that the court shall not make orders in vain, that quashing the decision of the review panel would



- be of no consequence whatsoever as the substantive decision to dismiss the *ex parte* applicant would still be valid; and lastly, that even if this court would be inclined to quash the decision of the discipline committee, the same would be untenable as the prayer is time barred as per the provisions of section 9(2) of the [Law Reform Act](#) and section 90 of the [Employment Act](#)
4. The 1st respondent also filed a Replying Affidavit to the instant Application and reiterated that in determining the applicant's disciplinary case, it acted impartially and accordingly the resulting decision was fair, just and appropriate based on the merits of the case, evidence adduced before it and the nature of the offence committed by the applicant under the provisions of the code.
 5. The court directed that the application be disposed of by way of written submissions. I have perused the record and found only submissions for the *ex-parte* applicant.
 6. The *ex-parte* applicant submits that contrary to the Respondent's averments in the grounds of opposition, the instant application is not bad in law. According to the applicant, although the application is erroneously titled Notice of Motion, it is grounded on sections 1A, B and 3 of the [Civil Procedure Act](#) and order 53 rule 1 and 3 of the [Civil Procedure Rules](#). It is contended that the *ex parte* applicant duly filed his Statement describing the parties, the reliefs sought and the grounds on which the reliefs are sought. Counsel for the *ex parte* applicant further submitted that article 159(2)(d) of the [Constitution](#) provides that courts and tribunals shall administer justice without undue regard to procedural technicalities.
 7. The *ex parte* applicant submitted that article 47 provides that every person has a right to fair administrative action but the rights of the *ex parte* applicant to administrative action were not observed as he was dismissed from Teachers Service Commission unfairly, improperly and unprocedurally.
 8. It was submitted that both respondents did not follow the laid down process in arriving at the decisions to terminate the *ex parte* applicant from employment as required by rules of fair procedure and practice.
 9. It was submitted that since his misconduct was occasioned by a medical condition, the BOG ought to have recommended to the TSC Secretary to send the *ex parte* applicant on leave or other appropriate directions as the case may be as per rule 146(10)(b) of the Code of Regulations for Teachers.
 10. It was the *ex parte* applicant's submission that his grievance against the 2nd respondent is that being distressed by the decision of the 1st respondent, he made an appeal for review of the 1st respondent's decision but the said review was unduly delayed for 7 years amounting to denial of an expeditious review and thereby severely disadvantaging him.
 11. It was thus submitted that the test for grant of leave is for the court to ascertain whether the application discloses a *prima facie* case meriting the filing of judicial review. It was submitted that the *ex parte* applicant has disclosed a *prima facie* case for trial as evidenced by the real issues raised to warrant a hearing and determination by the court.
 12. It was submitted that the *ex parte* applicant has met the threshold required to be granted leave to apply for the remedy of judicial review in the nature of orders sought in the instant application.

Determination

13. The applicable law on leave to commence judicial review proceedings is order 53 rule 1 of the [Civil Procedure Rules](#), which provides that no application for judicial review orders shall be made unless leave of the court is sought and granted.



14.

Order 53 rule 2 provides that no leave shall be granted unless the application is made within 6 months from the date of the decision that is impugned. The rule reads-

[Order 53, rule 2.] Time for applying for certiorari certain cases.

2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its 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 a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

15. Order 53 is derived from section 9 of the Law Reform Act which provides-

9. Rules of court

1. Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—
 - a. prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or *certiorari* is sought;
 - b. requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;
 - c. requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.
2. Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of *mandamus*, prohibition or *certiorari* shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.
3. In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

16. In the case of *Ako v Special District Commissioner Kisumu & another* [1989] eKLR the Court of Appeal observed:

It is plain that under sub-section (3) of section 9 of the Law Reform Act cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits for enlargement of time



17. The decision which the *ex parte* applicant seeks to be quashed is the 2nd respondents decision made on March 23, 2022. The 6 months expired on September 23, 2022 while the instant application is dated January 13, 2023 and was filed on February 2, 2023.
18. Both section 9 of the [Law Reform Act](#) and order 53 rule are couched in mandatory terms. As observed by the Court of Appeal, the time for filing JR proceedings under order 53 cannot be enlarged as the timelines are statutory.
19. The application herein having been made after the time prescribed in the law had lapsed, the court cannot grant the orders sought by the *ex parte* applicant.
20. In the circumstances the application herein lacks merit. The same is dismissed with no orders for costs.

DATED, DELIVERED VIRTUALLY AND SIGNED AT ELDORET THIS 2ND DAY OF NOVEMBER 2023.

M. ONYANGO

JUDGE

