



Thiga v Principal Secretary, Ministry of Education & another (Miscellaneous Judicial Review 40 of 2022) [2023] KEELRC 3313 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3313 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS JUDICIAL REVIEW 40 OF 2022**

**HS WASILWA, J
DECEMBER 20, 2023**

BETWEEN

LUCY WANGUI THIGA APPLICANT

AND

**THE PRINCIPAL SECRETARY, MINISTRY OF EDUCATION 1ST
RESPONDENT**

THE SECRETARY, TEACHERS SERVICE COMMISSION 2ND RESPONDENT

RULING

1. The Applicant filed Chamber Summons under certificate of urgency on 6th September, 2022, which was expressed under Order 53 Rule 1(1) & (2) of the [Civil Procedure Rules](#), section 8 & 9 of the [law Reform Act](#) and all other enabling provisions of the law, seeking for the following Orders; -
 - a. That this Honourable court may be pleased to grant leave to the Applicant to file a motion on Judicial Review for orders of certiorari, prohibition and Mandamus to remove unto this Honourable court for purposes of being quashed forthwith the Decision of the 2nd Respondent dated 9th March 2022 and all prior letters and reports which are the subject of the decision and further prohibit the Respondents from recommending the Applicant's dismissal on the basis of the 2nd Respondent's report dated 9th April 2018 and therefore compel the Respondents to reinstate the Applicant unto her former employment.
 - b. That the leave so granted do operate as a stay of the decision till this court further orders or directs.
 - c. That costs of this Application be in the cause.
2. The Application is supported by the statements of facts and the verifying affidavit of the Applicant deposed upon on 6th September, 2022.



3. In the affidavit, the affiant stated that she was appointed as a teacher in the civil service on 1st October, 2012 on permanent and pensionable terms, under TSC/NO S09629 and deployed to Ngobit Boys High School.
4. That she executed her assigned duties with all due diligence and skill and at no one time has she been reckless in the performance of her duties. However, on 21st March 2018, she received the 2nd Respondent's letter dated 27th February 2018 advising her to attend a disciplinary meeting that was scheduled for 21st March 2018.
5. She stated that she could not attend the said meeting, because she had taken ill and was hospitalized. Nonetheless, that she informed Stephen P.O Mudho of her illness and hospitalization in order to be excused from the hearing. Subsequently, she requested for another dated, however on 22nd May 2018, she received a dismissal letter from the 2nd Respondent dated 9th April, 2018 that took effect from 21st March 2018.
6. The basis of the termination was that, she had refused to report to G.G Rumuruti Secondary School upon release from Gatero Girls High School. She stated that contrary to the allegations in the letter, she received the said transfer letter on 10th January 2017 and therefore that she had not refused to report to the new school.
7. She stated that she appealed the dismissal by her letter dated 11th June 2018 but was never responded to. She sent a second appeal on 21st February 2019 and received a response by the letter 26th April 2019 which indicated that they had not received the first appeal and the current one was time barred.
8. Determine to have her Appeal heard, the Applicant send another letter informing the Respondent that her first Appeal was within time and attached the said Appeal for their action. She stated that the Respondent went mute until 19th January 2022, when she was directed to appear before the TSC County director's office Laikipia for the hearing.
9. After the hearing, she was informed by the letter dated 9th March 2022, that the hearing of the review case held on 28th February 2022 upheld the initial dismissal.
10. It is contended that the disciplinary procedure was not conducted as per the regulations and that proper procedure was not followed. She maintained that the decision to terminate her service was malicious, founded on fundamentally flawed conclusion of facts which negates the validity of the decision which hinges upon the proper appreciation and interpretation of facts.
11. She contends that the decision was irrational, unreasonable, oppressive and the same is tainted with absurdity and procedural impropriety.
12. She maintained that the Respondent did not consider her side of story as such the termination was unjustified.
13. The Application is opposed by the 2nd Respondent who raised a Notice of Preliminary Objection dated 30th January, 2023 based on the following grounds:
 1. The instant Application is time barred and grossly offends Section 9 (2) of the *Law Reforms Act* Cap 26 and Order 53 (2) and (3) of the *Civil Procedure Rules*.
 2. The instant Application for orders Mandamus is time barred as the same is in blatant breach of Section 12 (3) of the *Employment and Labour Relations Court Act*.



3. The instant Application for orders of prohibition as prayed is overtaken by events since dismissal of the Applicant was rendered in April 2018.
 4. The Application is fatally incurable and defective and hence bad in law and a gross abuse of the Court Process as the same seeks to circumvent the mandatory provisions of Section 90 of the *Employment Act*.
14. Directions were taken for the Preliminary Objection to be disposed of by written submissions which the 2nd Respondent filed on 3rd October, 2023 and the Applicant filed on 25th October, 2023.

2nd Respondent's Submissions.

15. It was submitted for the Respondent that the Applicant was an employee of the Teachers Service Commission (the Commission) until March 2018 when her service was terminated for breach of her terms of service. He argued that the Application herein is bad in law, fatally and incurably defective both in form and substance and an abuse of the Court process thus ought to be struck out.
16. It was submitted that the Judicial review application ought to be against Teachers Service Commission as established under Article 237 of the *Constitution* which, pursuant to Article 253 is a body corporate with perpetual succession capable of suing and being sued in its corporate name. On the contrast that the 2nd Respondent is an office holder and agent of the Commission responsible for the day to day management and implementation of the Commission's decisions, who can only be sued, in her official capacity, together with the Commission on whose behalf she acts.
17. Consequently, that in the absence of the Commission as a party to the suit, the Application cannot stand as the orders sought of Certiorari, Prohibition and Mandamus are not available against the 2nd Respondent. Nevertheless, that the Application offends the provisions of Section 9 (2) and (3) of the *Law Reform Act* as it was filed outside the six months' statutory period and no leave has been sought to file the application out of time.
18. It was submitted that even if the said application was filed within time, the applicant has not satisfied the statutory threshold to warrant the orders of Judicial Review in the nature of Certiorari, Prohibition and Mandamus because, Firstly, the order of mandamus seeks to quash the Appeal decision made in March, 2022, which will be in vain as it will not amount to a revocation of the substantive decision made on 21/3/2018 that terminated the Applicant's employment.
19. Secondly, on the orders of Prohibition sought, it was submitted that the same have been misconstrued, because the letter dated 9/4/2018 did not make a recommendation, rather it was communication of the determination and decision of the Commission. Hence the Applicant's dismissal was effected in March, 2018. Accordingly, an order of prohibition will have no consequence against a decision that has already been implemented. To support this position, the Respondent relied on the case of *George Philip M. Wekulo v Law Society of Kenya & another* [2005] eKLR where the Court held that;

"if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted."
20. It was also submitted that the order of mandamus to compel the reinstatement of the Applicant is not tenable in the instant case as it seeks to command enforcement of a private right and not a public duty. He elaborated that an order of mandamus is a form of a command directed to a person, corporation



- or tribunal requiring them to do a public duty which they are legally bound to perform. That the Applicant has not demonstrated the public or statutory duty placed upon the 2nd Respondent to perform which she has failed to perform.
21. Further, that the suit is underpinned on an employment contract. Consequently, an order of reinstatement cannot be urged through a judicial review application as it requires an interrogation of facts taking into account the provisions of Section 49 of the *Employment Act*, 2007.
 22. Additionally, that to order the reinstatement of the Applicant would be condemning the Commission unheard as it is not a party to the suit. In this they relied on the case of *Republic v College & 6 others; Osanjo (Exparte)* (Judicial Review Application E004 of 2021) [2022] KEELRC 1102 (KLR) where the Court while citing *Republic -Vs-Director General of East African Railways Corporation Ex-Parte George Nume Kaggwa* [1977]JeKLR held that in exercising its discretion to grant judicial review orders the Court should not grant orders in vanity it should grant orders capable of being implemented.
 23. Accordingly, that the Orders sought have been overtaken by events and are incapable of being implemented thus they should not be granted.
 24. On whether the Application is time barred, the Respondent submitted that the Claim in the Application is subject to the provisions of Section 90 of the *Employment Act* as such is time barred. He argued that the Application is only disguised as a judicial review proceeding to purposely circumvent the laws on limitation of time. To support this, they relied on the case of *Maurice Adongo Anyango versus Kenyatta International Convention Centre* [2018] eKLR, where the Court of Appeal while addressing an appeal with regard to filing of a judicial review proceeding instead of filing a Claim held as follows;

“ Furthermore, this Court has in several decisions held that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. See for instance Speaker of the National Assembly v Karume (supra). The appellant’s claim was based on a contract of employment. A specialized court exists to deal with employment matters and it would cause jurisdictional rivalry and/or confusion if courts would allow litigants to Shuffle between any courts, even if they are of equal status.
 25. Similarly, the cited the case of *Erick Samuel Bwibo v Teachers Service Commission & 2 others* [2021] eKLR where the Court rejected the clothing of employment contracts into judicial review proceedings holding that judicial review should not be invoked to remove prescribed time limitations under the *Employment Act*. A similar finding was made in the case of *Peter Ndegwa Nderitu v Teachers Service Commission* [2019] eKLR.
 26. The Respondent reiterated that the relationship that existed between the Applicant and the Commission was that of an employer and employee and that the Applicant was dismissed with effect from 21/3/2018 and the decision communicated vide letter dated 9/4/2018. Further, that the remedies sought are remedies under the *Employment Act*. Accordingly, the subject matter of the dispute falls within the purview of the *Employment Act* and the Applicant cannot escape the application of limitation under the said *Act*.
 27. On that basis, it was argued that the substance of this suit is statute barred a defect that cannot be cured through a judicial review application. It is on the above grounds that the Respondent submitted that the Application is fatally and incurably defective and ought to be struck out as a matter of law.



Applicant' Submissions.

28. The Applicant submitted from the onset that the 2nd Respondent's objections and arguments are without merit and should be dismissed by the court. He argued that it is imperative that the time for filing applications for judicial review commences upon service of the decision being contested. Accordingly, that the service date of the decision in question was on 9th March, 2022, therefore the present application was filed within the time limits.
29. In any event that the courts have consistently extended the time limits for filing judicial review applications where justice and equity warrant such extension. Further that given the gravity of the issues raised, the present circumstances warrant such consideration.
30. It was submitted that the courts have demonstrated that there is need for allowing an application on judicial discretion in extending time limits for filing applications for judicial review when substantial justice and public interest are at stake. He stated that the period of 6 months can be enlarged by application of Order 50 Rule 6 of the Civil Procedure Rules, which expressly provides for and grants the Court jurisdiction to enlarge time.
31. He submitted that under Order 53 Rule 4 of the Civil Procedure Rules, the Court may extend time for compliance with filing directions imposed at the grant of the leave. In view of the service date of the decision at hand, the present application conforms to the permissible timeframe. Therefore that the 2nd Respondent's Preliminary Objection is unmerited under Articles 47, 48 and 159 of the Constitution, section 10(1) of the Fair Administrative Actions Act, section 95 of the Civil Procedure Act, section 59 of the Interpretation and General Provisions Act, and the decision in Republic vs Kenya Revenue Authority Ex parte Stanley Mombo Amuti [2018] eKLR where the court while considering previously decided cases provide the basis for the legislative and judicial extension of time and the court held that:
- “...the *ex parte* applicant has sufficiently explained the delay and has established sufficient cause for this court to grant the extension of time sought. Accordingly, I allow the application dated 26th June 2018 and order that the application dated 20th June 2018 and filed on the same date be and is hereby admitted out of time and that the same is hereby deemed to have been duly and properly filed.”
32. The Applicant submitted that while Section 12(3) of the Employment and Labour Relations Court Act establishes specific time limits for labour dispute claims, it is crucial to differentiate labour disputes and Judicial Review applications. He elaborated further that Judicial review is a distinct legal avenue, focused on examining the legality, reasonableness, and fairness of administrative decisions and actions. Hence the present application for mandamus falls within the realm of judicial review rather than labour dispute claims.
33. Consequently, that the timeline prescribed for labour dispute claims may not be directly applicable to matters of judicial review. To support this, he cited the case of Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another, where the Court held that; -
- “...Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Additionally, court decisions should boldly recognize access to courts as a fundamental right guaranteed under the Constitution which can only be limited in a manner that can pass constitutional muster. It is a constitutional dictate that in applying the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favors the enforcement



of a right or fundamental freedom. Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of decisions. Courts should fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution.”

34. On whether the Order of Prohibition have been overtaken by events, the Applicant submitted that while it is acknowledged that the dismissal transpired in April 2018, the matter was reviewed and the decision of the review was communicated *vide* a letter dated 9th March, 2022 based on the decision made of 28th February, 2022. In any event that the plea for orders of prohibition pertains to the legality of the procedural aspects that led to the dismissal, rather than merely the act of dismissal itself. In that context, he argued that the date of dismissal serves as a pivotal juncture in the timeline of the contested process. However, the applicant’s case is anchored in examining the compliance of the entire procedure with legal norms, rather than merely the isolated event of dismissal. Thus, the contention that the application is overtaken by events does not accurately encapsulate the essence of the applicant’s claims. To support this view, the Applicant relied on the case of James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR where Odunga J, opined as follows:

“In my view, Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilized governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems, the focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualized discretion; from social controversy to commercial self policy to interest; and anything in between, As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness, and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.”

35. On the issue of Misjoinder, the Applicant submitted that it is a well-established legal principle under Order 1 Rule 9 that the misjoinder or non-joinder of parties should not defeat a suit. Furthermore, Article 159 (2) (d) emphasizes that justice shall be administered without undue regard to procedural technicalities. Therefore, that the court should focus on delivering substantive justice rather than technicalities. To support this argument, the Applicant cited the case of Makaka & 3 others v Pamba & 8 others (Civil Appeal 65 of 2018) [2023] KECA 603 (KLR) where Mumbi Ngugi JA held that;

“ In light of the above provisions, the trial court fell into error in dismissing the appellants’ claim on the basis that certain parties had not been joined in the suit. Its duty was to determine the issues in controversy between the parties before it.”



36. Also in *Republic v County Government of Mombasa & 2 others; Meru Central Dairy Cooperative Union Ltd (Ex parte Applicant)* (Judicial Review Application E025 of 2022) [2023] KEHC 3457 (KLR) the court stated that

“..... While it is true that the responsible accounting officer was not enjoined to these proceedings, I am not persuaded that that omission is necessarily fatal to the application. I find succour for this posturing in *Republic v Attorney General & another Ex parte Orbit Chemicals Limited* [2017] eKLR, in which proceedings were commenced against the Attorney General as opposed to the accounting officer concerned and the Court held that;

“... the failure to commence judicial review seeking the orders of mandamus against the accounting officer, though an irregularity, is not fatal. Considering the role of the Attorney General in such proceedings, the same ought not to be determined simply on nonjoinder or misjoinder of parties. This was the position adopted in *Consolata Kihara & 2 Others vs. The Director Kenya Trypanosomiasis Research Institute* Nairobi HC Misc Appl. No 594 of 2002 [2003] KLR 582, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for mandamus where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability... In the light of the foregoing, and granted that what is sought to be enforced is a consent order by the parties, I find merit in the application dated November 4, 2022. The same is hereby allowed and orders granted as hereunder....”

37. The Applicant submitted also that it has not challenged the corporate status of the 2nd Respondent, rather that its focus is on the actions and decisions made by the Commission which are unlawful. Further that the Commission is not a separate entity that can sue or be sued in its own name, but an entity represented by individuals such as the 2nd Respondent. In any event the Court in *Maureen Onsongo v EOH Limited an EOH/Copy Cat Limited Company* [2021] eKLR, ruled on the issues of non-joinder and misjoinder that;

“...misjoinder cannot be said to have rendered the suit so hopeless that it cannot be salvaged by an amendment of the statement of claim which can be done at any time before judgment as per Order 1 Rule 10(2).”, the applicant’s focus is on challenging the legality and fairness of the Commission’s actions, which is a legitimate concern.”

38. The Applicant maintained that the main issue in dispute is the decision made by the 2nd Respondent to terminate her employment, which was in breach of the principles of natural justice, that goes beyond a simple contractual dispute and is a matter of public interest.
39. On the limitations of time under Section 90 of the *Employment Act*, the Applicant submitted that the case goes beyond the scope of employment law, and the legal remedies sought are grounded in principles of natural justice and procedural fairness.
40. In conclusion, the Applicant urged this Court to dismiss the 2nd Respondent’s Preliminary Objection and uphold the principle that no suit shall be defeated by reason of the misjoinder or non-joinder of



parties and direct the case to proceed to address the substantive issues related to the fairness and legality of the Commission's actions.

41. I have considered the averments and submissions of the parties herein. The applicant sought leave to file a JR application to quash orders made by the respondents herein terminating her services. She also sought to have the leave granted to operate as stay.
42. The respondents raised a preliminary objection of numbers issued basically averring that the application is time barred and that orders being sought have been overtaken by events.
43. It is apparent that the preliminary objection raises issues that are both factual and legal.
44. It is therefore true that the preliminary objection goes beyond the pervuew of Mukisa Biscuit Case which matter can only be resolved after the consideration of facts before this court. I find the preliminary objection thus unmerited.
45. I will grant orders allowing the institution of the JR application but the same orders will not apply as stay.
46. The JR application be filed within 30 days from the date of this ruling.
47. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Jusa holding brief for Manyasa for 2nd Respondent

