



**Monyenye v National Police Service Commission & 3 others (Judicial Review E001 of 2023) [2023] KEELRC 3245 (KLR) (11 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3245 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
JUDICIAL REVIEW E001 OF 2023**

**JW KELI, J**

**DECEMBER 11, 2023**

**IN THE MATTER OF APPLICATION BY DENIS MARONGA MONYENYE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT AND THE KENYA CONSTITUTION 2010 AND IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT SECTION 8 AND 9, CAP 26 LAW OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 27,28,41, 47,48, 50, 236(B) OF THE CONSTITUTION 2010 LAWS OF KENYA**

**BETWEEN**

**DENIS MARONGA MONYENYE ..... APPLICANT**

**AND**

**THE NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL POLICE ..... 2<sup>ND</sup> RESPONDENT**

**THE SUB-COUNTY POLICE COMMANDER OF KAKAMEGA .... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**



## RULING

(On whether leave granted should operate as stay)

1. On the 17<sup>th</sup> November 2023 the Kenya Police, sub- county police commander, Kakamega Central, Valerian Obore, issued the Exparte Applicant, a Police Constable, with letter of interdiction from duty on basis that he had been arrested by EACC officers from Bungoma within Kakamega township on allegations of receiving a bribe of Kshs. 2000/-, an offence under the *Bribery Act*. Aggrieved by the interdiction decision the Exparte Applicant vide chamber summons application dated 27<sup>th</sup> November 2023 and filed on even date sought the following reliefs:-
  - a. The Honourable Court be pleased to grant leave to the Applicant to institute judicial review proceedings for orders of Certiorari and Prohibition against the decision to interdict the applicant as per the communication/ letter dated 17<sup>th</sup> November 2023.
  - b. The leave granted to operate as stay of the decision to interdict the applicant and reinstate his salary to full pay.
  - c. The *status quo* may remain and the applicant may continue to operate in current position capacity and/or duties
  - d. The Court be pleased to remove into this Court and quash the proceedings, decision and /or directives as per the interdiction letter dated 17<sup>th</sup> November 2023.
  - e. The costs of the application may be in the motion.
2. The Exparte Applicant filed his verifying affidavit sworn on the 27<sup>th</sup> November 2023 to support the grounds stated in the application. He annexed as DM1 the letter of interdiction dated 17<sup>th</sup> November 2023. Stated no charges had been preferred against him on the allegations of bribery , that he was not an accused person and did not fall under the purview of the applied provision of law for the interdiction. That the investigations by EACC have been in abeyance as the allegations were fabricated against him. That his attempt to appeal was rejected on basis of being late yet the letter stated he was to appeal within 7 days of receipt of the letter.
3. That the procedure under the *National Police Service Commission (Discipline ) Regulations* 2015 was not complied with before the interdiction.
4. The Court on the 27<sup>th</sup> November 2023 granted leave to the exparte applicant to institute judicial review proceedings for orders of Certiorari and Prohibition against the decision to interdict the applicant as per the communication/ letter dated 17<sup>th</sup> November 2023. The proceedings are yet to be filed.
5. The Court directed for hearing interpartes whether or not the leave should operate as stay. The Hon Attorney General through Stafford Nyauma, Principal State Counsel entered appearance for all the respondents on the 5<sup>th</sup> December 2023 and that was it. The Respondents did not even appear for the hearing interpartes.

### Hearing

6. The Application is unopposed. The Counsel for the Exparte Applicant argued the application orally on the 8<sup>th</sup> December 2023. The facts are taken as per pleadings and documents filed.



7. On whether the leave was to operate as stay, the counsel argued three grounds for the grant of the orders. First, demonstration of irreparable harm; Counsel submitted that the Ex parte Applicant's salary had been reduced to half. Evidence from the Bar is not admissible. There was no evidence to that effect before court. That the Ex parte Applicant had been directed to vacate the police quarters and asked to report to the OCS twice every week yet he was now staying at his ancestral home over 100km away. They relied on the decision in *R v National Transport authority and 10 others*. Secondly, on whether a final decision had been made, Counsel said this was not an issue and relied on the decisions in *Jared Benson Kagwana v Attorney General* and *Taib Ali Taib v Minister of Local Government and others* HC Misc Application no. 158 of 2006 where judges held that where the decision sought to be stayed is complete the Court cannot stay the same unless it is a continuing process in which case the Court considers the completeness or continuing nature of the implementation. According to the Ex parte applicant a final decision has not been made. The Court found that the foregoing decisions were cited in *R v Nairobi City County Assembly Service Board Ex parte Applicant Pauline Sarah Akuku* (2022)eKLR. The Ex parte Applicant stated that internal affairs orderly proceedings had not commenced to lead to final decision. The third ground of stay addressed by the Ex parte Applicant was for the Court to guide itself to avert the greater injustice and relied on the observation by Justice Odunga in *Beatrice Kwamboka v Leader of Majority Party of the Nairobi County Assembly* (2016) eKLR to effect that the court in deciding on whether to stay proceedings should exercise judicial discretion and opt for the lower injustice.
8. The Ex parte Applicant urged the Court to be guided by judgment of Radido J in *Kazungu Ngumbao Jeremiah & 3 others v Attorney General & 2 others* (2015)eKLR Where the judge upon hearing the case on merit held that a police officer was entitled to a hearing before interdiction or suspension.

#### **Determination.**

9. The Court granted leave as sought. The Court is not convinced that there was issue of irreparable harm as the Ex parte Applicant was still on salary as per payslip annexed as DM3 even if it was half as alleged as he can still recover the full salary in event the interdiction is set aside. The application then rests on decision as to whether granting stay at this stage would be tantamount to making a final decision.
10. The leave sought and granted was for the Ex parte Applicant to institute judicial review proceedings for orders of Certiorari and Prohibition against the decision to interdict him as per the letter of interdiction from duty dated 17<sup>th</sup> November 2023.
11. The decision sought to be quashed is the interdiction from duty letter dated 17<sup>th</sup> November 2023. It is the opinion of the Court that this is the final decision as far as the instant proceedings are concerned. The decision by Radido J *Kazungu Ngumbao Jeremiah & 3 others v Attorney General & 2 others* (2015)eKLR while persuasive on position of the law was a final decision of the Court.
12. I noted all the above authorities relied on by the Ex parte Applicant were cited in decision before my brother Dr. Gakeri J. in *R v Nairobi City County Assembly Service Board Ex parte Applicant Pauline Sarah Akuku* (2022)eKLR who after appreciating the authorities in a similar application for leave to operate as stay was of the opinion that:- ,”50. Based on the judicial authorities cited above , the Court is of the view that a stay at this stage would be tantamount to granting the substantive orders sought by the Ex parte Applicant and would be inappropriate , inefficacious and is likely to occasion confusion and disruption”. I am persuaded this would be the result in the instant case where though not charged or taken through the internal mechanisms of the employer, the Ex parte Applicant has sought leave to quash the interdiction decision. I do find it would be tantamount to granting final orders in the proceedings if the stay order is granted as prayed.



13. I am further guided by decision of Maraga J (as he was then ) in *Taib a Taib v Minster of local Government & 3 others* HC Misc. 158 of 2006 that a stay is only appropriate to restrain a public body from acting. It is however not appropriate to compel a public body to act. In the instant case the stay sought is to reinstate the *Ex parte* Applicant's salary in full which the Court finds would be improper.
14. Consequently, I hold that the leave granted on the 28<sup>th</sup> November 2023 shall not operate as stay. No order as to costs.
15. I proceed to issue the following directions in the proceedings:-
  - a. The *Ex parte* Applicant is ordered to file their Notice of Motion(JR suit ) as per the leave of Court granted on the 27<sup>th</sup> November 2023 within 14 days and serve.
  - b. The Respondent will have 14 days upon service to file response to the Notice of Motion(JR suit). The *Ex parte* Applicant is at liberty to reply.
  - c. Pretrial directions on the 24<sup>th</sup> January 2024.
  - d. Notice to issue.
16. It is so Ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11<sup>TH</sup> DECEMBER 2023.**

**JEMIMAH KELI,**

**JUDGE.**

**IN THE PRESENCE OF**

Court Assistant: Lucy Macheso

*Ex parte* Applicant :- Okinyo and Omenta

Respondents:- Absent

