



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

JUDICIAL REVIEW MISC APPL NO. 2 OF 2019

IN THE MATTER OF AN APPLICATION BY NIXON OTIENO FOR LEAVE

TO APPLY FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE

OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF PUBLIC SERVICE COMMISSION, DISCIPLINE

MANUALPROCEDURE MANUAL FOR PUBLIC SERVICE, 2016

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

NIXON ONYANGO OTIENO.....APPLICANT

v

PAYROLL OFFICER MIGORI COUNTY GOVERNMENT.....1st RESPONDENT

HEAD OF MIGORI COUNTY PUBLIC SERVICE.....2nd RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD.....3rd RESPONDENT

RULING

1. On 5 March 2019, Nixon Onyango Otieno (the applicant) was granted leave to commence judicial review proceeding against the Respondents.

2. The leave was to operate as a stay of the decision of the Respondents made on 11 October 2018 to withhold the applicant's salaries during a period of suspension (the Respondents cited section 71(5) of the Public Service Commission Act, 2017 for the decision).
3. Despite the grant of leave operating as a stay, the Respondents did not pay the applicant his salaries and on 12 April 2019, he filed a contempt application.
4. The County Secretary filed a replying affidavit in opposition to the contempt application and in a Ruling delivered on 9 July 2019, the Court issued warrants of arrest against the Respondents.
5. The Court also ordered the Respondents to pay the applicant the withheld salaries within 7-days failure to which they would stand committed to civil jail for 6-months.
6. On 16 July 2019, the Respondents filed a Motion seeking the setting aside of the orders of 9 July 2019, and that they be granted leave to comply with the orders of 5 March 2019.
7. The application was heard and on 14 October 2019, the Court found it without merit and dismissed it.
8. Nevertheless, the Court directed the Respondents to comply within 10-days.
9. The Respondents did not comply within the 10-days and on 17 May 2021, the applicant filed another contempt application for non-compliance with the orders of 9 July 2019 (this Motion is the subject of this Ruling).
10. The County Secretary filed a replying affidavit in response to the Motion on 14 June 2021. He asserted in the affidavit that the orders of 9 July 2019 had never been served and so contempt did not arise, and that the application was *res judicata*.
11. It was also contended that there was no contempt because by virtue of section 71(5) of the Public Service Commission Act, 2017, the applicant was not entitled to salaries withheld during suspension because he had been found culpable during the disciplinary hearing.
12. Despite the legal provision, the County Secretary disclosed that it had been agreed to pay the applicant the withheld salaries but that due to budgetary requirements it had not been possible to pay the salaries.
13. Pursuant to Court directives, the applicant filed his submissions on 26 November 2021. The Respondents filed their submissions on 12 January 2022.
14. The Court has given due consideration to the record, the application, affidavits in support and opposition and the submissions and regrettably come to the view that the Motion is fatally defective and incompetent and should be dismissed.
15. It is not in dispute that when the Court granted the applicant leave on 5 March 2019, it ordered that the leave do operate as a stay of the Respondents decision made on 11 October 2018 to deny the applicant salaries which had been withheld during his interdiction.
16. Upon grant of the leave and by virtue of Order 53 Rules 1 and 3 of the Civil Procedure Rules, the applicant had 21-days within which to file the substantive judicial review proceedings through a Notice of Motion.
17. In the instant case, the applicant purported to file the Notice of Motion at the same time he filed the Summons seeking the grant of leave.
18. The applicant did not seek the admission of the Notice of Motion upon grant of leave. The Notice of Motion was more of an exhibit to the Summons. It is not clear that the requisite fee was paid upon the lodging of the Motion other than as an exhibit or attachment to the Summons.
19. Without a valid Motion for grant of judicial review orders, the present application cannot be sustained, it has no legal legs to stand on.
20. Further, the applicant had already moved the Court for contempt and that application was determined through the Ruling of 9 July 2019.
21. When the Court granted the Respondents 7-days to comply on the said date, it was only indulging the Respondents but not rescinding or reversing the finding of contempt.
22. Indeed, the Court directed that in default of the Respondents complying within 7-days, the Respondents would stand committed to civil jail for 6-months.
23. For the above reasons, the Motion is dismissed with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16TH DAY OF FEBRUARY 2022.

RADIDO STEPHEN,

MCIARB JUDGE

Appearances

For applicant S.M. Onyango & Associates Advocates

For Respondents Abisai & Co. Advocates

Court Assistant Chrispo Aura