



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**JUDICIAL REVIEW APPLICATION NO. E002 OF 2020**

**IN THE MATTER OF: ARTICLES 22, 23, 29, 41, 47, 50, 162 AND 236 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT ACT NO. 11 OF 2007**

**AND**

**IN THE MATTER OF: SECTIONS 7, 8 AND 9 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF: SECTIONS 30, 33, AND 34 OF THE TEACHERS SERVICE COMMISSION ACT NO. 20 OF 2012**

**AND**

**IN THE MATTER OF: SECTIONS 10(4) AND 11 OF THE TEACHERS SERVICE COMMISSION ACT, CAP 212 (REPEALED)**

**AND**

**IN THE MATTER OF: THE TEACHERS SERVICE COMMISSION (CODE OF CONDUCT AND ETHICS FOR TEACHERS) REGULATIONS, 2015**

**AND**

**IN THE MATTER OF: THE SUPERVISORY JURISDICTION OF THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

**BETWEEN**

**ERICK SAMUEL BWIBO.....APPLICANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....1<sup>st</sup> RESPONDENT**

**TEACHERS SERVICE REVIEW**

**COMMITTEE..... 2<sup>nd</sup> RESPONDENT**

**RULING**

1. Before the Court for determination is a Chamber Summons by Eric Samuel Bwibo (the applicant) seeking leave to commence judicial review proceedings against the Teachers Service Commission, the Teachers Service Review Committee and the Hon Attorney General (the Respondents).
2. The Court gave the parties directives on the filing and exchange of responses and submissions on 30 November 2020.
3. None of the parties complied with the directives.
4. Nevertheless, the Court will deliver a Ruling as it is open to it to determine an application for leave *ex-parte*.
5. A brief background is that the applicant was interdicted on or around 5 November 2009 pending investigations into allegations of immoral behaviour and a disciplinary hearing was held on 14 June 2010.
6. The Disciplinary Panel recommended that the applicant be dismissed, and his name be removed from the register of teachers.
7. On the same day, the applicant was notified of his dismissal from the teaching service and removal from the register of teachers.
8. The applicant was aggrieved, and he appealed on 7 July 2010 to the Teachers Appeal Tribunal. The applicant wrote a reminder to the Tribunal on 5 September 2013 and on 30 July 2014, he sent additional grounds of appeal to the Teachers Service Commission.
9. On 7 September 2017, the Review Committee met and found that the applicant had not presented enough grounds to warrant a review.
10. The applicant was formally notified through a letter dated 23 October 2017 that the decision to dismiss him and have his name removed from the register of teachers would be upheld.
11. The applicant then lodged these proceedings with the Court on 19 November 2020 seeking leave to commence judicial review proceedings for orders of certiorari, mandamus, a declaration and compensation.
12. The Court has considered the material before it and come to the conclusion that leave should not be granted because of the following reasons.
13. One, the cause of action sought to be redressed accrued with the dismissal of the applicant and his removal from the register of teachers on 14 June 2010 (see Judgment by Waki JA (as he was then) in *Attorney General & Ar v Andrew Maina Githinji & Ar* (2016) eKLR).
14. In the aforesaid decision, the Court of Appeal held that a cause of action in unfair termination of employment disputes accrue at the point of dismissal (when the letter of dismissal is received).
15. In other words, the legal injury or wrong sought to be remedied accrued on dismissal and not upon determination of the appeal.
16. Two, the cause of action sought to be advanced by the applicant falls within the realm of ordinary employment which is regulated by the Employment Act, 2007 and the statutory framework covering the operations of the Teachers Service Commission.
17. Although giving the proposed proceedings a constitutional and/or judicial review flavour, the remedies sought by the applicant are largely based on allegations of procedural fairness.
18. Three, the applicant was dismissed in 2010. His appeal was decided in 2017. However, he did not offer any sufficient explanation as to why it took him over ten years (or three years) to move the Court.
19. The delay, without such sufficient explanation, was inordinate, in the view of the Court.
20. Under Order 53 Rule 2 of the Civil Procedure Rules, the applicant should have moved the Court within 6-months for an order of *certiorari*. He has moved the Court after about ten years.
21. Lastly, although the Court appreciates that judicial review orders now have a constitutional anchor, judicial review orders are discretionary and may not even be granted where merited. More so where alternative remedies are available (see *Kenya Revenue Authority & 2 Ors v Darasa Investments Limited* (2018) eKLR).
22. In the case of unfair termination of employment underpinned by general employment law, there are clear statutory provisions on how to challenge the termination with clear remedies set out under section 49 of the Employment Act, 2007.
23. The applicant proposes to challenge his dismissal not through the manner outlined in the governing statutes of this Court but through the special vehicle of judicial review, long after the lapse of prescribed limitation under section 90 of the Employment Act, 2007.

**Conclusion and Orders**

24. Regrettably, the Court declines to exercise its discretion in favour of the applicant. The Summons is dismissed. No order on costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 10<sup>th</sup> day of February 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For applicant I.E. Omboko & Partners Advocates

For 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not file formal documentation

For 3<sup>rd</sup> Respondent Janet Langat, Deputy Chief Litigation Counsel, Office of the Attorney General

Court Assistant Chrispo Aura