



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

JUDICIAL REVIEW NO. 44 OF 2020

DENNIS KIPKIRUI MARITIM.....PETITIONER

AND

THE PRINCIPALS SECRETARY

STATE DEPARTMENT FOR

CORRECTION SERVICES.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER GENERAL OF PRISONS.. 3RD RESPONDENT

THE COMMANDANT KENYA PRISONS STAFF

TRAINING COLLEGE.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. On 20.2. 2020, Justice Onyango granted leave to the Applicant to apply for orders of certiorari, prohibition and mandamus and directed that the application for the leave to operate as stay be heard inter-partes on 3.3. 2020. On the said date, the respondent sought leave to file a replying affidavit and the application was fixed for hearing on 5.3.2020.

2. The applicant's case was argued by his counsel Mr. Savwa who submitted that the applicants rights under Article 47,49 and 50 of the Constitution were violated when he was dismissed from the Prisons Training College. He contended that under the said provisions of the Constitution a person is entitled to a hearing before any action is taken against him to his detriment.

3. He further submitted that the applicant was charged with a criminal offence of malicious damage to property contrary to section 339(1) of the Penal Code at Bomet and pleaded not guilty. Thereafter the charges were terminated under section 202 of the Criminal Procedure Code. As evidence of the foregoing, he produced copies of court proceedings for criminal case no. 1386 of 2015 and a police signal dated 15.12.2019 to the Criminal DENTS Nairobi confirming that the applicant was taken to Bomet Law Courts on 25.11.2015 in CR. 803/72/2015 court file no. 1386 of 2015 and the case was withdrawn under section 202 of the Criminal Procedure Code on 1.11.2016. He further produced a copy of a Police Clearance Certificate dated 6.1.2020 from the Director of Criminal Investigations confirming that the applicant had no previous criminal record.

4. He reiterated that he had no criminal record when he applied and joined the respondent's college and on 2.1.2020 when he was dismissed without being accorded a hearing. He urged that he satisfied the requirements of Rule 9 of the Kenya Prisons Standing Orders. He therefore prayed for direction that the leave granted on 20.2.2020 do operate as stay of his dismissal pending hearing and determination of the motion herein.

5. M/s. Oyugi learned State Counsel appearing for the respondents opposed the application for stay and relied on the Replying Affidavit sworn by Mr. Joseph Matevesi, Deputy Commissioner of Prisons and the Director of Administration of the 2nd Respondent. She urged that the order of stay sought is discretionary and that discretion must be exercised judiciously. In her view, stay order should be a preventive measure to stop an action or decision from being done and not to undo what has been completed. For emphasis she relied on **Republic v National Hospital Insurance Fund Management Board Ex-parte Patanisho Maternity and Nursing Home [2019]eKLR**, and **Taib A.**

Taib vs Minister for Local Government and others [2006]eKLR.

6. She further submitted that public interest is a relevant factor in considering when to grant stay in Judicial Review applications. For emphasis she relied on **R vs Capital Markets Authority ex party Joseph Mumo Kivai & another [2012]eKLR** Majanja J agreed with **R(H) vs Asworth Special Hospital Authority (2033) 1 WLR 127** where the court held that the court must strike a balance between the rights of an individual and the public interest, and refuse to grant the stay unless it is satisfied that there is a strong case that the impugned decision was unlawful.

7. She further urged that stay should not be granted if it would violate the needs of good administration. For emphasis she relied on **Re Bival International SA (Bureau) Veritas (2005) EA 42** where the Court of Appeal reiterated that public interest was a relevant factor to consider before granting stay in judicial review case.

8. In a brief rejoinder, Mr. Savva contended that this court has jurisdiction to exercise supervisory powers over the respondent's administrative decisions. He maintained that the applicant has no criminal record and urged the court to determine what "**previous criminal record**" means. Finally, he prayed that the leave granted herein do operate as stay of the dismissal of the applicant from the training college pending the determination of the suit.

9. The issue for determination is whether the leave granted to apply from orders of certiorari, prohibition and mandamus on 20.2.202 should operate as stay pending the determination of the suit herein.

10. There is no dispute that the order sought is discretionary and that the powers to grant it should be exercised judiciously. In **Republic vs National Hospital Insurance Fund (Supra)**, Nyamweya J held that:

"The decision whether or not to grant stay pursuant to leave is thus an exercise of discretion and that discretion must be exercised judiciously."

11. It is trite that the direction that leave operates as stay must be intended to stop the impugned proceedings in order to preserve the substratum of the review proceedings. One of the factors to consider is whether the action or decision under review has been completed or it is continuing in nature. In **Taib A. Taib v The Minister for Local Government and others HC.MISC A No. 158 of 2006** cited in the **Republic v National Hospital Insurance Fund, (supra) Maraga J** (as he then was) held that:

"The purpose of a stay order in judicial review proceedings is to prevent a decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made . . . A stay order framed in such a way as to compel the respondent to reinstate the applicant before hearing of the respondent cannot be granted."

12. In addition to the issue of completeness, the court ought to consider public interest in granting or not granting the order. This calls for striking a balance between private rights of an individual and the public interest. The order should not for example violate good administration or create a leeway for violating principles of good governance and integrity as envisaged under chapter 6 of the constitution. The order should not be used to aid in perpetuating an illegality.

13. In **R v Capital Markets Authority ex parte Joseph Mumo Kivai and another, Supra, Majanja J** cited **R(H) vs Asworth Special Hospital Authority (2003)1 WLR 127**, where it was held that:

"I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented . . . But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay."

14. In the said case the court went on to hold that the court should usually refuse to grant stay unless satisfied that there is a strong case that a tribunal's decision was unlawful.

15. Applying the said judicial principles of completeness and public interest to this case, I am satisfied that though the decision to dismiss the applicant from the training school has already been made, the implementation can be stayed and the applicant re-admitted while the validity of the impugned dismissal is determined. It is not in dispute that the group that was enlisted with the applicant is still going on with the training. Considering the materials presented to the court including the proceedings of the criminal case, the police signal and the Clearance Certificate for the DCI, I am satisfied that the applicant has made out a strong case that the impugned decision was unlawful and as such stay order is merited.

16. In addition, it has also not been shown how the public interest would be violated by granting the stay order sought. So far the undisputed evidence on record is that the claimant was charged with criminal offence which was terminated under section 202 of the CPC which amounts to an unconditional acquittal. Consequently, I find that public interest is in favour of granting the stay order because the court is supposed to uphold rights of individuals as enshrined in the constitution and the statute law including the rights of an acquitted person.

17. In conclusion, I direct that the leave granted to the applicant on 20.2.2020 to apply for orders of Certiorari and Prohibition shall operate as stay of the decision of the 1st, 3rd and 4th respondents to dismiss the applicant from the training at the Kenya Prisons Training College pending the hearing and determination of this suit. For avoidance of any doubt, I direct the 1st, 3rd and 4th respondents to readmit the applicant to the said college and continue to offer the required training pending the hearing and determination of the suit which shall be heard on priority basis. Costs in the cause.

Dated and delivered at Nairobi this 9th day of March 2020.

ONESMUS N. MAKAU

JUDGE