



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

JUDICIAL REVIEW MISCELLANEOUS NO. 2 OF 2020

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 47, 50, 234, 249, 252 AND 253 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT AND THE LAW REFORM ACT

AND

IN THE MATTER OF: SECTIONS 4 AND 85 OF THE PUBLIC SERVICE COMMISSION ACT NO. 10 OF 2017

AND

IN THE MATTER OF: REGULATIONS 78(2) & 79(1) OF THE PUBLIC SERVICE COMMISSIONS REGULATIONS 2020

AND

IN THE MATTER OF: THE UNFAIR AND BIASED PROCEEDINGS BEFORE THE PUBLIC SERVICE COMMISSION IN THE MATTER OF THE APPEAL BY THE KENYA MEDICAL PHARMACISTS & DENTISTS PRACTITIONERS UNION AGAINST THE COUNTY GOVERNMENT OF LAIKIPIA AND THE LAIKIPIA COUNTY PUBLIC SERVICE BOARD

BETWEEN

THE COUNTY GOVERNMENT OF LAIKIPIA.....APPLICANT

VERSUS

PUBLIC SERVICE COMMISSION.....RESPONDENT

AND

LAIKIPIA COUNTY PUBLIC SERVICE BOARD.....1ST INTERESTED PARTY

KENYA MEDICAL, PHARMACISTS & DENTISTS PRACTITIONERS UNION.....2ND INTERESTED PARTY

RULING

1. The application dated 18th August 2020 by the *Ex parte* Applicant is what is before me. It seeks that leave be granted to apply for an order of Certiorari to remove to the High Court and quash the decision of the Respondent made on 12th August 2020 in its entirety setting aside the decision of the Applicant together with the 1st Interested Party to dismiss the members of the 2nd Interested Party from duty and further ordering the reinstatement and payment of remuneration. The *Ex parte* Applicant sought apply for an order of prohibition to prohibit the Respondent from enforcing and/or applying for enforcement of the decision of the Respondent dated 12th August 2020. The *Ex parte* Applicant sought that leave granted do operate as a stay of the decision of the Respondent made on the 12th August 2020 in its entirety.

2. The argument advanced by the *Ex parte* Applicant was to the effect that the leave sought to institute Judicial Review against the decision of the Public Service Commission of 12th August 2020 in regard to the Appeal by the 2nd Interested Party was merited. The *Ex parte* Applicant sought that the leave granted to operate as stay of the PSC decision of 12th August 2020. The motion was supported by the affidavit sworn by Karanja Njora the County Secretary of the County of Laikipia and the *Ex parte* Applicant submitted that arising from the consent of parties, there was an appeal filed by the Union challenging the dismissal of its members for taking part in an illegal and unprotected strike. The *Ex parte* Applicant submitted that the PSC heard the matter but that from the outset the PSC was manifestly biased against County Government of Laikipia. The *Ex parte* Applicant submitted that in a nutshell PSC made a pre-determination even before the matter was referred to mediation and that the initial sittings of the PSC was done without involvement of County Government of Laikipia. The *Ex parte* Applicant submitted that after County Government of Laikipia established hearings before PSC were proceeding in its absence raised concerns through its Counsel and the County Attorney and that these concerns and the preliminary objection were swept aside and the issues that should have been ventilated were not. The *Ex parte* Applicant submitted that it has reason to believe the Court should intervene and save the *Ex parte* Applicant submitted from the draconian incident that led to an unfair determination. The *Ex parte* Applicant submitted it should be heard since if the decision is enforced, the very object of the judicial review will be defeated. The *Ex parte* Applicant submitted that the 2nd Interested Party has already brought an application before Court for enforcement of the PSC decision. The *Ex parte* Applicant thus sought that leave granted to operate as stay even before Ruling on the motion for leave.

3. Counsel for the Respondent submitted that the Respondent was opposed to the grant of the motion. He stated that in response to the application filed, there is a replying affidavit of 5th October 2020 entirely opposed the application. The Interested Party also filed a replying affidavit dated 5th October 2020 and filed on 8th October 2020. The Interested Party submitted that the application was opposed in entirety and that the opposition is premised on the grounds that the Laikipia County Public Service Board and the Laikipia County Government presented themselves as a single entity. The Interested Party argued that the Laikipia County Public Service Board received communication and the County Government later retracted the representation asserting they should have been served separately. It was argued that the Laikipia County Public Service Board and the Laikipia County Government filed a joint reply and participated as such. It was further submitted that the PSC on notification by Laikipia County Government that it was not being heard asked the County Government to respond to the issues and that response was not forthcoming. The Interested party submitted that the PSC determined the issue through its decision which is being attacked in the application. The Interested Party submitted that the opportunity given by the PSC to the *Ex parte* Applicant was not taken up and it was submitted the decision was reached after full consideration as it took into account on the response to appeal, the preliminary objection raised and after the matters were heard. The 2nd Interested Party submitted that on the issue of leave to operate as stay, where there is compliance in that its members are at work, no stay can be given as issue has been overtaken by events. The 2nd Interested Party submitted that an order of stay would mean its members who are at work would have the effect of them leaving work and this would cause a health crisis in the light of the pending Covid-19 pandemic. The 2nd Interested Party submitted that if leave is granted as sought then there should not be any stay.

4. In a briefly rejoinder to issues raised by counsel for the Union, the counsel for the *Ex parte* Applicant submitted that the conduct of the appeal before PSC was handled by a firm of Advocates who had indicated an address for service but the Respondent issued summons to County Public Service Board but did not communicate to the Advocates and did not do so through the County Government's office of the County Attorney. The *Ex parte* Applicant argued that the submissions filed and the directions were neither served on the County Attorney or through the Advocate and they only learnt of it from service of submissions. The *Ex parte* Applicant argued preliminary objection raised was not heard. The *Ex parte* Applicant submitted that the preliminary objection as rightly pointed out was only addressed at the decision level and the preliminary objection was not ventilated and that therefore the summary dismissal of the preliminary objection was improper. The *Ex parte* Applicant urged the Court to consider the issue as per the affidavit. *Ex parte* Applicant prayed that leave be granted and it operates as stay as to hold otherwise would defeat the Judicial Review. The *Ex parte* Applicant argued that without being heard it would allow the flawed decision of Respondent to continue.

5. The main discourse in the matter before me is judicial review and its remit is one which is morphing due to the jurisprudential and legislative developments in this realm. Given that there are increasingly cases where the dichotomy in judicial review procedure, it would be important to ascertain the basics under the law. The Fair Administrative Actions Act was enacted to give meaning to the rights espoused under Article 22(2) of the Constitution. The grounds for judicial review in the Fair Administrative Actions Act are delineated in Section 7(2) of the Act. The circumstances where a court or tribunal may review an administrative action or decision include where the administrator did not have jurisdiction or exceeded their jurisdiction or acted pursuant to delegated power in violation of a law prohibiting such delegation. Judicial review is also permitted where there is non-compliance with mandatory procedures and conditions precedent, procedural unfairness and errors of law, bias or reasonable suspicion of bias as well as in situations where the affected person was denied a reasonable opportunity to state their case. Judicial review is permissible where an administrator acts on ulterior motives calculated to prejudice the rights of the applicant, or fails to take all relevant considerations into account, acts on the basis of illegal delegation and also for acting in bad faith. Additionally, judicial review can be granted where there is abuse of discretion and unreasonable delay or failure to act in discharge of a duty imposed under any written law or action that results in administrative actions which are unreasonable, disproportional, in violation of legitimate expectation, unfair or which result from or in abuse of power. For an allegation of unreasonable delay to gain traction one must prove that the administrator had a duty to act in the particular matter and that the action taken within a prescribed period in law and the administrator failed to so act. On the other hand, the provisions of Order 53 of the Civil Procedure Rules, 2010 makes provision as follows:-

Order 53, rule 1. Applications for mandamus, prohibition and certiorari to be made only with leave.

1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

Order 53, rule 2. Time for applying for certiorari certain cases.

2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

6. The application for leave to commence judicial review proceedings before me thus fits in the prism of both the provisions of Order 53 of the Civil Procedure Rules 2010 and the provisions of the Fair Administrative Actions Act. I say so because it fuses the application for leave and the requirements prior to filing for judicial review under the Fair Administrative Actions Act. In the matter before the Court, the Public Service Commission is accused of among others failing to give the County Government of Laikipia a hearing. It is countered that the County Public Service Board represented the interests of the County Government at the proceedings before the Public Service Commission. In my view, that is a reasonable ground for the attack mounted in the judicial review. In other words, there exists grounds for the leave sought by the Applicant to be granted. As to whether the leave granted ought to act as a stay, there was argument to the effect that if the stay is not granted, the current proceedings shall be rendered nugatory as the decision of the Public Service Commission will be implemented and the Applicant will be thereby prejudiced. It is not in doubt that the decision whether or not to grant a stay pursuant to leave so granted is an exercise of judicial discretion. Such discretion must be exercised judiciously on clear reasoning.

7. It is critical that in judicial review a court should consider the factors at play so that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application. If this would be the result, then a court should not hesitate to grant stay. We should not lose sight of the fact that the scope and purpose of the stay in such situations is limited as the purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process where the decision has not been made or to suspend the validity and implementation of the decision that has been made. Under the stay sought, it is however inappropriate to compel a public body to act in a way that would result in the dismissal of an employee before fully hearing the Respondent in the matter. It is clear there is a decision that was made by the Respondent and the *Ex parte* Applicant is aggrieved by it. It has moved the Court within the window for judicial review and raises some reasonable grounds in its efforts to stay the decision. Considering the fact that the decision of the Public Service Commission was made on 12th August 2020 and some of the staff affected had been re-absorbed and others were in the process, a suitable order in the circumstances of this case are that the leave to commence judicial review is hereby granted and the leave granted to operate as an order of *status quo*. The result is that the leave granted will result in a freezing of the action not taken while not negating the action already taken by the County Government of Laikipia in respect of the decision of the Public Service Commission. The application proper must be filed within 14 days and replies to be filed within 14 days so as to permit the ventilation of the judicial review motion within 40 days of today and if the delay is in any way attributable to the Applicant, the leave so granted shall automatically lapse. Costs shall abide the outcome of the main judicial review application.

It is so ordered.

Dated and delivered at Nyeri this 19th day of October 2020

Nzioki wa Makau

JUDGE