



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

J.R. APPLICATION NO. 4 OF 2018

JUDICIAL REVIEW APPLICATION FOR CERTIORARI AND MANDAMUS

BY ADMINISTRATION POLICE CONSTABLE JOHN NJOROGE KARANJA

AND

IN THE MATTER OF: THE DECISION BY ADMINISTRATION POLICE SERVICE AND

NATIONAL

POLICE SERVICE COMMISSION DATED 11/9/2018

IN THE MATTER OF: NATIONAL POLICE SERVICE COMMISSION ACT

AND

IN THE MATTER OF: FUNDAMENTAL RIGHTS AND FREEDOM

ENSHRINED IN THE CONSTITUTION OF KENYA 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ADMINISTRATION POLICE SERVICE.....1ST RESPONDENT

THE NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE APPLICANT APC JOHN NJOROGE KARANJA

RULING

1. The Respondents' raised a preliminary objection against the Judicial Review Application by the *ex parte* Applicant. The objection is that the *ex parte* Applicant failed to comply with the mandatory provisions of Order 53 and Rule 7(2) of the Employment and Labour Relations Court (Procedure) Rules

2016 on the filing of a judicial review application. The Respondents assert that non-compliance with the provisions of the law render the application fatally and incurably defective. The *ex parte* Applicant is of course opposed.

2. Parties filed submissions in support and opposition of the objection. In their submissions, the Respondents argue that the failure to comply with these mandatory provisions of the law render the judicial review application a non-starter, incurably defective and bad in law. The Respondent asserts that in line with the authority in **Republic v Mwangi S. Kimenyi ex parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR** the court cannot act in vain against a non-existent decision. Further in the case of **Republic v Ruiru District Land Disputes Tribunal & Another ex parte Lucia Waithira Muiruri & Another [2014] eKLR** where the court held that the failure to comply with Order 53 Rule 7(1) of the Civil Procedure Rules rendered the entire application incompetent since the court could not establish whether there existed a decision capable of being quashed.

3. The *ex parte* Applicant submits that the objection was not well taken as the Respondents were aware of the impugned decision and that it was the Respondents who gave the notice thus they cannot be heard to say they are not aware of the notice. The *ex parte* Applicant submitted that the Respondents would not be prejudiced if a further affidavit were to be filed to cure the defect. It was submitted that it was an inadvertent mistake and therefore the preliminary objection lacked merit and it ought to be dismissed. The *ex parte* Applicant submitted that he reserved a right/liberty to file a draft copy of the further affidavit together with the submissions.

4. The *ex parte* Applicant indeed did file the draft copy of the further affidavit alongside the submissions without leave of the court. To the Respondents' credit, the objection taken was spot on. In the case of **Republic v Ruiru District Land Disputes Tribunal & Another ex parte Lucia Waithira Muiruri & Another (supra)** Odunga J. held as follows:-

I am of the view that where the ex parte applicant for any reason is unable to exhibit the decision sought to be quashed, he ought to satisfy the Court on his failure to exhibit the decision which decision is required to be verified by affidavit with the registrar. Failure to comply with this mandatory provision similarly rendered the application incompetent since the Court cannot be in a position to find whether there is in fact an order capable of being quashed and if it exists whether the application was made within the stipulated time.

5. I am in agreement with my brother Odunga J. that in the absence of the impugned decision accompanying the application for judicial review, there is no decision capable of being quashed and therefore the judicial review application herein made by the *ex parte* Applicant is defective and devoid of any merit fit only for striking out. Each party will bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 31st day of January 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the original

DEPUTY REGISTRAR