



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 38 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF PUBLIC SERVICE COMMISSION ACT. NO. 10 OF 2017 LAWS OF KENYA; RULES AND REGULATIONS THEREUNDER**

**AND**

**IN THE MATTER OF UNILATERAL AND UNPROCEDURAL CHANGE OF TERMS OF EMPLOYMENT FROM PERMANENT AND PENSIONABLE TO CONTRACT**

**AND**

**IN THE MATTER OF INTERPRETATIONS AND GENERAL PROVISIONS ACT CAP 2, LAWS OF KENYA**

**AND**

**IN THE MATTER OF GUIDELINES ON TERMS AND CONDITIONS OFS SERVICE FOR PUBLIC OFFICERS**

**AND**

**IN THE MATTER OF THE BILL OF RIGHTS; RIGHT TO FAIR AND EQUAL TREATMENT, FAIR LABOUR RELATIONS, FAIR ADMINISTRATIVE ACTION PURSUANT TO ARTICLES 20, 21, 22, 23, 24, 27, 41, 47, 232, 236 FO THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

**BETWEEN**

**SAMSON OGECHI NYAANGA.....EX PARTE APPLICANT**

**VERSUS**

**THE CABINET SECRETARY,**

**MINISTRY OF LABOUR AND SOCIAL PROTECTION.....1<sup>ST</sup> RESPONDENT**

**THE SECRETARY, PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE,**

**YOUTH AND GENDER AFFAIRS.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

The Application before the court is dated 7<sup>th</sup> December, 2018, brought under Order 53 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Ex Parte Applicant seeks orders:

1. That this Court be pleased to certify this application as urgent and fit to be heard ex parte in the first instant.
2. That this Court be pleased to grant leave to the ex-parte applicant apply for judicial review orders to wit:
  - i. An order of certiorari directed to the respondent removing into the High Court for purposes of being quashed the decision of the 1st, 2nd & 3rd respondents letter dated 2nd November 2016 communicated to the applicant on 20th November 2017, letter dated 29th November 2018, letter dated 7th December, 2018 and 14th December 2018 purporting to alter / change / convert / substitute the Ex-parte Applicant's terms of employment from permanent and pensionable to contract.
  - ii. An order of prohibition directed at the respondent prohibiting it from effecting/implementing the resolution of the 1<sup>st</sup> respondent implemented on 2<sup>nd</sup> November 2016 and communicated on 20<sup>th</sup> November 2017 (27<sup>th</sup> November 2017) and further communications thereto; dated 29<sup>th</sup> November 2018, 7<sup>th</sup> December 2018 and 14<sup>th</sup> December 2018
  - iii. An order of mandamus directed at the respondent compelling reinstatement and or restoration of the Ex-parte applicant to the position he served /serves on or before the date of the said impugned alteration of terms from permanent and pensionable to contract
3. That the grant of leave to apply for orders of Certiorari, Prohibition and Mandamus do operate as stay of the respondent's aforesaid decision.
4. That costs of and incidental to this application be provided for.

The Application is premised on the grounds that:

1. The Ex-parte Applicant was vide an advertisement in 2015 invited to apply for a job as Director of Employment on permanent and pensionable terms.
2. The user Ministry requested the public service commission to recruit for its purpose an officer designated as Director of Employment whereof the Ex-parte applicant applied and was recruited competitively.
3. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents have since initiated and acted in excess of Jurisdiction/ultra vires their mandate in purporting to change /alter the Ex- parte applicant's terms of employment from permanent & pensionable to contract and have communicated the said decision which decision is set to take effect in December 2018.
4. The variation , change and or alteration of the Ex-parte applicant's terms of service from permanent and pensionable position is illegal, un-procedural, arbitrary and unreasonable; as the same overlooks/and hampers career progression/employment benefits and legitimate expectations of the Ex-parte applicant, besides serving to violate his constitutional and employment rights.
5. The letters of offer, acceptance thereof and appointment never contemplated nor envisaged employment on contract basis but rather employment on permanent and pensionable terms.
6. That on joining employment as Director of Employment the Ex-parte Applicant's payslip was explicit that the terms of employment were permanent and pensionable.
7. The Ex-parte applicant did not sign any local agreement forms which are requisites of a three (3) year contract unilaterally or purportedly introduced and imposed on the Ex-parte applicant by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents.
8. That in or about August 2017, the 1<sup>st</sup> & 2<sup>nd</sup> respondents unilaterally, whimsically, unjustifiably, illegally, unlawfully and unconstitutionally commenced issuing payslips indicative that the Ex-parte applicant was serving on contract terms.
9. That from December 2015 up to July 2017 the payslips are clear and documented that the Ex-parte applicant was serving on permanent and pensionable terms ending in the year 2026.

10. That the said variation change or alteration of terms was not preceded by any notice, memo or circular or letter to or any meeting involving the Ex-parte applicant.

11. That the internal mechanism and appeal made by the Ex-parte applicant seeking the reversal of the impugned decision of the 1<sup>st</sup> & 2<sup>nd</sup> respondents has not yielded a fair decision as the 1<sup>st</sup> 2<sup>nd</sup> & 3<sup>rd</sup> respondents have maintained the unfair and unjustified decision that the ex parte applicants contract ends in December 2018.

12. The applicant avers that the change and alteration of his employment terms is illegal, irregular, perilous, unconstitutional and calculated to hamper and or scuttle the applicant's career progression and occasion loss of employment benefits; pension rights and thus loss of years of service.

13. The applicant stands to suffer grave and irreparable career loss, pension loss and loss of years of service by the 1<sup>st</sup> & 2<sup>nd</sup> respondents' impugned decision.

14. The decision of the 1st & 2nd respondents is unjustified in the context of the constitution of Kenya 2010 Articles 20, 21, 22, 23, 24, 27, 41, and 47,232,236.

The Application is supported by the grounds set out in the Statutory Statement in support of the application for leave, the Verifying and Supporting Affidavit of Samson Ogechi Nyaanga wherein he reiterates the grounds on the face of the Application and adds that variation of his terms of engagement will render and consign him to early retirement and loss of service if the prayers sought are not granted.

The ex parte applicant avers that he entered into an employment agreement whose time limit was not specified and thus deriving a connotation of permanent and pensionable terms which the payslips thereof clearly elucidated. He avers that he had legitimate expectation of employment within the ambit of permanent and pensionable terms which in any event is legally available to the ex parte applicant.

He further contends that the letters of offer, acceptance and appointment never contemplated nor envisaged employment on contract basis but rather employment on permanent and pensionable terms.

That the instant change of terms and or alteration of terms of service is discriminative, illegal, arbitrary and unconstitutional. The ex parte applicant urges the Court to allow the application.

#### **Determination**

The issue for determination is whether the Claimant's case meets the threshold for the granting of leave to file Judicial Review Application.

The applicant's case is that the 1<sup>st</sup> & 2<sup>nd</sup> respondents unilaterally, whimsically, unjustifiably, illegally, unlawfully and unconstitutionally commenced issuing payslips indicative that the Ex-parte applicant was serving on contract terms. That the said action is likely to cause him irreparable harm as it has the effect of costing him years of service.

In the case of *James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR*. the court observed –

*“In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.”*

From the material available to the Court there is a decision made that needs further investigation and this can only be done on the presentation of all the facts by the concerned parties which can only be available to the court if the parties are heard.

The ex parte applicant has presented to Court information showing that the impugned decision of the Respondents led to the lapse of his employment on 15<sup>th</sup> December 2018. This being the case the leave application shall not operate as a stay as to do this would be to reinstate the Applicant at an ex-parte stage in contravention of the provisions of Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provide that –

**17(10) Notwithstanding anything contained in this Rule, the court shall not grant an ex parte Employment and Labour Relations Court order that reinstates into employment an employee whose services have been terminated.**

The foregoing is aptly captured in the decision of Maraga, J (as he then was) in *Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006* where he stated –

*“...as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial*

review jurisdiction...I also want to state that in judicial review applications like this one the Court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction? The purpose of a stay order in judicial review proceedings is to prevent the 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. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant's case is deserving of a stay order. The Ex-parte Applicant seeks:

*“That the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councillor in the Municipal Council of Mombasa.”*

*Can I grant this prayer in view of the scope and purpose of the stay order as stated above? I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councillor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined.”*

The upshot of the matter is that leave is granted but the same shall not operate as a stay of the Respondent's decision.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**