



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 10 OF 2016

(FORMERLY HIGH COURT JUDICIAL REVIEW NO. 266 OF 2016)

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 16TH MARCH, 2018)

REPUBLICAPPLICANT

VERSUS

PARLIAMENTARY SERVICE COMMISSION (PSC.....1ST RESPONDENT

JEREMIAH M. NYEGENYE.....2ND RESPONDENT

CLERK OF THE SENATE/SECRETARY PARLIAMENTARY SERVICE

COMMISSION3RD RESPONDENT

AND

1. SAMUEL OTIENO OBUDO

2. MARY GATHIGA KANYIHA

3. KEITH KISINGUH

4. ALLOYS TINEGA

5. DAVID MULINGE KITHUA

6. GEORGE OMONDI ARUM

7. BENJAMIN NJAGI KAGUTUEX-PARTE APPLICANTS

RULING

1. The Application before the Court is dated 15.9.2017 brought under Articles 25 & 50 of the Constitution, Sections 3, 16 and 20 of the Employment and Labour Relations Court Act (Cap 234B), 2016, Sections 1A, 1B, 3A, 63 (e) and 80 of the Civil Procedure Act (Cap 21), Order 22 Rule 6 of the Civil Procedure Rules, 2010 and the inherent Powers of the Court seeking Orders that:-

1. This Application be and is hereby certified as urgent and be and is hereby heard exparte in the first instance.

2. This Honourable Court be pleased to stay execution of the Judgment and Decree of the Honorable Lady Justice Hellen S. Wasilwa made on 27.7.2017 pending the hearing and determination of this application (“The said Judgment”).

3. The Honourable Court be pleased to review and set aside the said Judgment in toto.

4. This Honourable Court be pleased to make such further orders as may be just and expedient the circumstances.

5. Costs of this Application be provided for.

2. The application is premised on the grounds:

1. That in a judgment delivered by this Honourable Court on 27th July, 2017, by the Honourable Lady Justice Wasilwa, the Respondents were ordered, *inter alia* to, reinstate the allowances of the Applicants in full.

2. That the main and compelling issue taken into consideration by the learned judge in making the said judgment was the fact *inter alia* that there is no legal basis of stopping the *ex parte* Applicants' allowances because the anti-corruption and Economic Crimes Act states otherwise and that the Parliamentary Service Regulations cannot override provisions of the Act.

3. That however, the *ex-parte* applicants are facing criminal charges of conspiracy to steal Kshs.70,600,00/= and abuse of office in Nairobi Chief Magistrate's Criminal Case Number 1860 of 2015 Republic v Samuel Otieno Obudo & 6 Others, which offences are primarily under the Penal Code (Cap 63.).

4. That the *ex parte* applicants by their own pleadings and affidavits in support thereof contend that they are currently facing offences under the Penal Code as opposed to offences under the Anti Corruption and Economic Crimes Act which was relied upon by the learned Judge in making her judgment.

5. That in the circumstances there is an obvious error on the face of the judgment delivered by the Honourable Lady Justice Wasilwa.

6. That in view of the foregoing, there is good and sufficient cause for review of the said judgment as prayed.

7. That this application has been made diligently and without unreasonable delay.

8. That unless the said judgment is reviewed as prayed, the Respondent would suffer grave prejudice as it will be forced to pay facilitative allowances to employees who are not on duty.

9. That accordingly, in the interests of justice and fairness, the said orders ought in this application ought to be granted as prayed.

3. The Application is supported by the Affidavit of Jeremiah M. Nyegenye the Secretary to the Public Service Commission, the 1st Respondent herein, where he reiterates the grounds on the face of the Application.

4. The *Ex parte* Applicants/Respondents have opposed the Application by filling a replying affidavit sworn by Samuel Otieno Obudo with the authority of the other *Ex parte* applicants. He states that there is no error apparent on the face of the Record to warrant the orders sought.

5. He contends that they were charged with offences under the Penal Code which does not contain any provisions regarding the payment of allowances. The Penal Code only outlines offences with which an accused can be charged with and it is therefore not expected that the said Penal Code will contain any provisions with regards to allowances payable to an accused person.

6. That similarly the Parliamentary Service Regulations 2002 do not contain any provisions with regard to allowances payable to an accused person who has been suspended.

7. The Applicants aver that in the affidavit of Jeremiah Nyegenye he admits that they were interdicted under the provisions of Sections 62(1) to (4) of the Anti-Corruption and Economic Crimes Act. In lieu of this that the applicable law on the issue of allowances since they were interdicted under the said Act and the Court correctly so held. They pray for the application to be dismissed with costs.

Submissions

8. Counsel for the Applicant submits that this Court has jurisdiction to determine the instant application as set out in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. They also cite the case of **JKM vs MWM and another (2015) eKLR and Muriel Ogoudjobi vs Mara Ison Technologies Kenya Limited (2016) eKLR** in support thereof.

9. He further submits that the judgment of the Court had errors at paragraphs 37, 38, 40, 44 and 48. He states that the main and compelling issue taken into consideration by the learned Judge in making the said Judgment was the fact *inter alia* that there is no legal basis of stopping the *Ex-parte* Applicant's' allowances because the Anti-Corruption and Economic Crimes Acts states otherwise and that the Parliamentary Service Regulations cannot override the provisions of the Act. In his view, this was an error as the applicable law in the circumstances is the Penal Code as the Applicants had been charged in Court therein.

10. Counsel urges that there is sufficient reason to warrant the Orders sought as the allowances granted by the Court attach upon employment. They cite the case of **Kenya Ports Authority Vs Silas Obengele (Civil Appeal No. 38 of 2005)** where the Court of Appeal held:

“Benefits such as telephone facilities, travelling allowance and other benefits are paid to serving employees not as payment to services rendered or to be rendered but to enable the officer concerned to perform his work more conveniently and therefore more efficiently. The Court further stated that the payment is a facilitation payment. That being the case there is or there would be no basis for making payment of those allowances if an employee has ceased to work unless the contract of employment treats any of those payments as remunerative. For instance for what reason will we say a payment for transport to and from work be made if the officer is not going to work? Or why would an officer demand telephone facilities if he is not being paid the same for the benefit of the employer. The Court declined to grant the allowances.”

11. The Applicant prays for the Application to be allowed as drawn.

12. On behalf of the ex parte Applicants, it is submitted that there is no error on the face of the record and the Orders sought should be disallowed. They cite the case of Nyamgo & Nyamogo Vs Kogo (2001)EA174 where it was held:

“An error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on the substantial point of law stares one in the face, and there could be reasonably be no two options, a clear case of error apparent on the face of the record could be made out. An error which has to be established by long drawn process of reasoning or the points where there may be conceivably be two opinions, can hardly be said to be an error on the face of the record. Again if a view adopted by the Court in the original record is a possible one, it cannot be error or wrong view is certainly no ground for a review although it may be for an appeal”.

13. In his view that the learned Judge wrongly applied the Anti-Corruption and Economic Crimes Act in reaching her decision is not sufficient reason to review the judgment.

14. It is also submitted that the Applicant has not established sufficient reason to warrant the orders sought. Counsel cites the case of Civil Appeal No. 142 of 2012 Stephen Gathua Kimani Vs Nancy Wanjira Waruingi (2016)eKLR where the Court stated that “any other sufficient reason must be analogous to the other grounds for review it cannot stand in isolation.

15. Counsel prays for the Application to be disallowed for failing to meet the threshold for review.

16. I have examined submissions of the parties. I note that the Applicants herein were interdicted under Section 62(1) to (4) of the Anti-Corruption and Economic Crimes Act and not under the Penal Code. It follows therefore that the applicable law that should follow the interdiction is the Anti-Corruption and Economic Crime Act and this was stated in my Judgement under Paragraph 37 as follows:-

“The Anti-corruption and Economic Crimes Act states as follows:- Suspension, if charged with corruption or economic crimes:-

1. A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until conclusion of the case.

Provided that the case shall be determined within twenty four months.

2. A suspended public officer who is on half pay shall continue to receive the full amount of any allowances. (emphasis are mine)

3.

4. This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.....”.

17. In my view, this Court correctly applied its mind to the law. In this case, I do not find any valid reasons to warrant review of my Judgement. I decline to grant orders sought and I dismiss this application accordingly.

18. Costs to the Respondent/Claimants.

Dated and delivered in open Court this 16th day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wena for Respondent – Absent

