



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

JUDICIAL REVIEW NO.3 OF 2017

IN THE MATTER OF AN APPLICATION BY KENNETH NTWIGA KANGA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTION 58(1) (C) AND SECTION 58(5) OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF ARTICLE 20, 21, 22(1), 27, 28,29, 41 AND 47 CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP. 26 LAWS OF KENYA

AND

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF THARAKA NITHI.....1STRESPONDENT

THE COUNTY GOVERNMENT OF THARAKA NITHI.....2NDRESPONDENT

EX PARTE KENNETH NTWIGA KANGA

JUDGMENT

1. The judicial review was filed seeking the following orders:-

1. THAT this Honourable court be pleased to issue the judicial review order of *certiorari* to remove into this court, for purposes of quashing the decision of the 1st and 2nd Respondent to send the *ex-parte* Applicant on compulsory leave as contained and communicated vide the 1st Respondent's letter dated 11/09/2017

2. THAT this Honourable court be pleased to issue the judicial review order of prohibition, directed at the Respondents, prohibiting the Respondents by themselves, their agents, servants and/or employee or officers or whoever else acting on the Respondent's instruction or behest, from interfering with the *ex-parte* Applicant's performance, execution and discharge of his duties as the Secretary of the 2nd Respondent's County Public Service Board

3. THAT this Honourable court be pleased to issue the judicial review order of *mandamus* compelling the 1st and 2nd Respondents, by themselves, their agents, servants, and/or employee, or their officers to pay to the *ex-parte* Applicant all unpaid salaries, allowances, gratuity and any other emoluments due to the *ex-parte* Applicant.

The grounds upon which these prayers were premised were set out on the face of the substantive application for judicial review the summary of which was to the effect that the decision by the Respondents to send the *ex-parte* Applicant on compulsory leave had been made in bad faith; in excess of the powers of the 1st Respondent and in effect an illegal attempt to remove the *ex-parte* Applicant from his office as secretary to the 2nd Respondent's County Public Service Board in circumvention of Section 58(5) of the County Governments Act; and that the Respondents had unlawfully and unreasonably refused and neglected to pay the *ex-parte* Applicant's salaries, allowances and other dues since the month of August, 2017. The statutory statement of facts filed alongside the motion set out the facts relied on by the *ex-parte* Applicant. The facts in summary were that on 11th September 2017, the *ex-parte* Applicant found 4 Police officers at the entrance when he reported for duty. The Police officers were waiting for him in the company of the County Public Service Board Chairman Mr. Stephen Nthiga Mitugo and the Supervisor of the Board Secretariat and Human Resource Manager Callen Gatune Francis. The *ex-parte* Applicant was informed that the officers had come to the office to enquire about the whereabouts and use of the County Public Service Board seal and that they had been given the seal by the Human Resource Manager who had retrieved it from her handbag. The *ex-parte* Applicant was then asked to accompany the said officers to his house and at the house conducted a search for any documents bearing the County Public Service Board's seal but they found none and the *ex-parte* Applicant obliged with a request to accompany the officers to Chuka Police station to record a statement. The *ex-parte* Applicant received on the same day and date a letter from the 1st Respondent sending him on compulsory leave on the basis that he was under Police investigations. He was subsequently charged with abuse of office charges and has challenged the criminal prosecution at Chuka High Court in a judicial review application. He also filed an affidavit verifying the statement of facts.

2. The Respondents filed a replying affidavit sworn by Dr. Fredrick Njeru Kamunde in opposition to the judicial review application. The affidavit was to the effect that he had been advised by counsel, which advice he verily believed was true that the honourable court lacked jurisdiction to entertain the notice of motion dated 5th December 2017 because it concerns the enforcement of rights arising from a contract of employment and by virtue of the rule in **R v East Berkshire Health Authority *ex parte* Walsh [1984] 3 ALL ER 425** this honourable court lacks jurisdiction on a judicial review application to enforce derived from a contract of employment. If, which is denied, the court has jurisdiction to entertain it, then it is for dismissal as the court had found in Nyeri ELRC Cause No. 337 of 2017 consolidated with Cause No. 342 of 2017 **Stephen Munene Njagi and Joseph Marangu Shem v Tharaka Nithi County Government & Another** that the *ex-parte* Applicant had written without authority of the County Public Service Board letters purporting to confirm the claimants to their offices thereby enabling them to be paid enhanced salaries by false pretences. It was deponed therefore that the motion was bad in law as the *ex-parte* Applicant had been found to have abused his office as held in the forgoing case. The deponent stated that the *ex-parte* Applicant was sent on compulsory leave for gross misconduct and the betrayal of public trust placed in him by the County Public Service Board and the people of Tharaka Nithi County. It was deponed that the *ex-parte* Applicant had deliberately failed to disclose in his application for leave to apply for judicial review that letters he wrote were the subject of an inquiry by the Employment & Labour Relations Court and that through investigations conducted by the 2nd Respondent it had been revealed that the *ex-parte* Applicant has issued purported letters to ghost workers thereby enabling them to obtain money from the 2nd Respondent by false pretenses. The deponent stated that the *ex-parte* Applicant is not allowed to benefit from his own wrongs and that through his application the *ex-parte* Applicant was basing his claim on wrongs he has committed. The deponent also stated that the *ex-parte* Applicant had failed to disclose that he had filed a judicial review application at Chuka High Court seeking to stop the criminal prosecution and that in the judicial review application before the High Court the court (Limo J.) had granted him leave to seek the orders of *certiorari* and prohibition declined to grant him a stay in that case.

3. The Respondents raise a collateral challenge on the jurisdiction of this court to handle judicial review applications on matters of employment as held in the UK case of **R v East Berkshire Health Authority *ex parte* Walsh (Supra)**. Suffice to say, **judicial review applications do not deal with the merits of the case. An application for review such as this one substantially deals only with the process by which the action challenged is reached. Put another way, judicial review concerns itself with issues such as whether the decision-maker had jurisdiction or whether the persons affected by the decision were heard before it was made in cases where this is required and most importantly as to whether in making the decision the decision-maker followed the correct procedure and took into account relevant matters. In this case the *ex-parte* Applicant challenges the decision to send him on compulsory leave.**

4. There is local case law on the matter of judicial review. In the case of **Kenya Universities Staff Union v University Council of Masinde Muliro University of Science And Technology & 2 others [2018] eKLR** Odunga J. held as follows:-

*I therefore agree that the Employment and Labour Relations Act, and Article 162(2) and 165(5) of the Constitution must all be interpreted in a manner as to allow the Employment and Labour Relations Court to have the powers to grant appropriate remedies when an employment or labour relations matter is before it. To buttress the holding that the said Court can grant judicial review orders in employment matters the Court of Appeal in **Civil Appeal 160 of 2008 - Republic vs. Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPRA) [2013] eKLR** stated that:*

“This is not to say that judicial review remedies cannot be available in contracts of employment. There are instances when such remedies are available. One such instance is when the contract of employment has statutory underpinning and where there is gross and clear violation of fundamental rights. In the case of CHIEF CONSTABLE OF NORTH WALES POLICE v EVANS (1982) 1 WLR 1155, Lord Hailsham pronounced himself thus:

“the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court” (See also Commissioner of Lands – vs- Kunste Hotel Limited 1995-1998 1E.A. 1 (CAK)). In the case of Eric Makokha & Others – vs- Lawrence Sagini & Others CA No. 20 of 1994 at NRB, this court defined statutory underpinning. It was stated: “the word statutory underpinning is not a term of art. It has no recognized meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean the employees removal was forbidden by statute unless

the record met certain formal laid down requirements. It means some employees in public positions may have their employment contract guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible that this is the true meaning of what has become the charmed words “statutory underpinning”. The statute makes it mandatory that a certain procedure must be observed in some contracts of employment before termination. Examples are constitutional office holders such as judges and the Attorney General.”

5. The words of Odunga J. need no repeating. This court has jurisdiction to deal with matters of judicial review as stated in the decision whose material parts have been reproduced above. The orders the *ex-parte* Applicant seeks are in sum to quash the decision of the Respondents to send him on compulsory leave. Under the County Government Act, the criterion for appointment of the position of secretary to the County Public Service Board provided for under Section 58(1)(c). The Act also makes provision for the removal of the said secretary as follows:-

58. (5) The members of the Board may only be removed from office—

(a) on grounds set out for the removal of members of a constitutional commission under Article 251(1) of the Constitution; and

(b) by a vote of not less than seventy five percent of all the members of the county assembly.

6. The removal of the secretary is as indicated above. The suspension that ensued was not sanctioned by the County Assembly as required. Currently, the office of County Secretary is held by Dr. Fredrick Njeru Kamunde. The removal of the previous County Secretary is not demonstrated to have been undertaken in accordance with the provisions of Section 58(b) of the County Government Act. I am satisfied that there is ground for me to issue an order of *certiorari* to bring the letter of the 2nd Respondent dated 11th September 2017 for purposes of being quashed and quashing the entire decision contained in the said letter as I hereby do.

7. As there is a substantive holder of the office of Secretary County Public Service Board Tharaka Nithi who holds the office pursuant to the provisions of Section 58 of the County Government Act, I suspend the effect of my order for 30 days to enable the 2nd Respondent comply with the resolutions necessary to effect the changes lawfully in the office of Secretary of the Tharaka Nithi County Public Service Board as the people of Tharaka Nithi County deem fit.

It is so ordered.

Dated and delivered at Meru this 11th day of May 2018

Nzioki wa Makau

JUDGE