



**Too v Judicial Service Commission (Judicial Review 27 of 2017)
[2018] KEELRC 854 (KLR) (19 October 2018) (Ruling)**

Gilbert Kimutai Too v Judicial Service Commission [2018]eKLR

Neutral citation: [2018] KEELRC 854 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

JUDICIAL REVIEW 27 OF 2017

HS WASILWA, J

OCTOBER 19, 2018

BETWEEN

GILBERT KIMUTAI TOO APPLICANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. The Applicant filed a Chamber Summons application, a Statutory Statement and a Verifying Affidavit sworn by Gilbert Kimutai Too on 25th September 2017 seeking the following orders:-
 - a) Leave be granted to the Applicant to apply for an order of *certiorari* directed to the Judicial Service Commission to remove into this Honourable Court and be quashed its decision contained in the letter dated 13th July 2017, Ref no JSC 8 (28391) purporting to summarily reject the *ex parte* Applicant's Appeal lodged on 30th March 2017;
 - b) Leave be granted to the Applicant to apply for an Order of *Mandamus* compelling the Judicial Service Commission to hear the Appeal lodged by the *ex parte* Applicant before it in strict compliance with the provisions of the law and the constitution;
 - c) That the grant of leave to apply for the above order do operate as a stay of the decision of the Respondent contained in the letter dated 13th July 2017;
 - d) Any other orders as the court may deem fit to grant;
 - e) The costs of this Application be provided for.
2. In seeking these orders the applicant relied upon his affidavit and statement of facts wherein he has deponed that the Respondent condemned him unheard by refusing or ignoring to give him a chance



to hear him during his appeal. He has submitted that the failure by the Respondent was against the principles of natural justice.

3. He has set out the facts of his case as follows; - That he joined judicial service as a District Magistrate II on 3rd July 2000 and was posted to Voi Law Courts. He rose through the ranks to the position of Senior Resident Magistrate and was serving at Eldoret Law Courts at the time the Respondent resolved to retire him in public interest.
4. Between 16th June 2009 and 31st March 2016, the Respondent served him with several notice to show cause letters as to why disciplinary action should not be meted against him based on allegations of gross misconduct.
5. By a letter dated 4th May 2016, the then Chief Justice Hon. Willy Mutunga informed the Applicant that he had been interdicted from performance of his duties due to absenteeism from duty without permission from 7th March 2016 to 24th March 2016. The Applicant was informed that his response to the notice to show cause letter dated 24th April 2016 issued by the Chief Magistrate Bungoma had been received. The Chief Justice further informed the Applicant that he had noted that it was the third time he was being addressed on absenteeism from duty.
6. By a letter dated 5th May 2016, the then Chief Justice Hon. Willy Mutunga informed the Applicant of the charge levelled against him and was granted twenty one (21) days to respond to the charge.
7. By a letter dated 19th May 2016, the Applicant responded to the notice to show cause letter and letter of interdiction dated 4th May 2016 and 5th May 2016.
8. By a letter dated 4th August 2016 the Chief Registrar of the Judiciary informed the Applicant that his request to report to the Chief Magistrate Eldoret Law Courts instead of the Chief Registrar Judiciary had been accepted.
9. By an email dated 3rd October 2016, Wanjiku Cherere an official at the Eldoret Law Courts informed the Chief Registrar of the Judiciary that the Applicant had not reported to the Eldoret Law Courts since 9th September 2016.
10. By a letter dated 19th January 2017, the Respondent informed the Applicant that the Judicial Service Commission Human Resource Management Committee deliberated on the response to the notice to show cause letter dated 19th May 2016 and directed him to appear before the committee for an oral hearing of his disciplinary case on 25th January 2017.
11. The Applicant appeared before the Judicial Service Commission Human Resource Management Committee on 25th January 2017 for the oral hearing of his disciplinary case.
12. After the oral hearing, the Judicial Service Commission Human Resource Management Committee submitted its report of the Applicant's disciplinary proceedings to the Judicial Service Commission.
13. The committee recommended that the commission takes appropriate disciplinary action against the Applicant for misconduct.
14. By a letter dated 9th February 2017, the Judicial Service Commission informed the Applicant that it had deliberated on his disciplinary case in its meeting held on 9th February 2017. The Respondent informed the Applicant that after considering his representations and evidence availed before the Judicial Service Commission Human Resource Management Committee during the hearing of his disciplinary case, it was satisfied that the grounds of gross misconduct had been proved in the charge levelled against him. The Judicial Service Commission found that the Applicant's habitual absenteeism from duty affected



his performance at work as a judicial officer and resolved to retire him from judicial service in the public interest with effect from 9th February 2017.

15. By a Memorandum of Appeal dated 29th March 2017, the Applicant being dissatisfied with the Judicial Service Commission to retire him in public interest lodged his appeal against the decision.
16. By a letter dated 13th July 2017, the Judicial Service Commission informed the Applicant that it had considered his appeal in its meeting held on 3rd July 2017 and disallowed it as it did not raise any new facts to warrant a review of the decision to retire him in public interest.
17. The Applicant depones that the decision by the Respondent herein to hear his appeal without giving him an opportunity to present his side of the story is against the Respondents own Human Resource Policies and in particular Section D.7.2.2 of the Human Resource Manual.
18. The Respondent opposed the Chamber Summons application by way of a Replying Affidavit sworn by Winfrida Mokaya on 18th April 2018 where she depones on the powers and duties of the Judicial Service Commission and sets out the procedure and process to be followed in disciplinary procedures.
19. It is her contention that the correct procedure was followed and therefore the application has no merit and should therefore be dismissed.
20. In considering whether or not to grant the orders sought, I note that Order 53 Rule 1 of the [Civil Procedure Rules](#) provides that:-

“No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefore has been granted in accordance with this rule”.

21. At the *ex-parte* stage, the Applicant has a duty to demonstrate that he has an arguable case to warrant grant of leave.
22. In the case of *Njuguna v Minister for Agriculture* [2002] 1 EA 184 (CAK) the Court of Appeal held as follows regarding the test applied for leave to institute judicial review proceedings to be granted:-

“The test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing if the substantive application”.

23. In the case of *R v Communications Commission of Kenya & 2 others Ex Parte East Africa Televisions Network Ltd* [2001] 1 EA 199, the Court of Appeal further held that leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.
24. In the case of *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43, the Court held as follows:-

“Application for leave to apply for orders of judicial review are normally *ex-parte* and such an application does restrict the Court to threshold issues namely whether the Applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a Court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the Court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an



intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in Court”.

25. I note that the Applicant has contended that the Respondent did not follow correct disciplinary procedure before retiring him in the public interest. Whether this is true or not is an arguable issue, which should be demonstrated by the Applicant in a full hearing of this application. From his affidavit, the Applicant has set out what happened before his retirement.
26. In my view without going into further details of what happened, I find that he has demonstrated that he has an arguable case. It is my finding that the application sought is merited and is therefore granted. The Applicant’s application for this leave to operate as stay is however rejected and I order this application to proceed for full hearing.
27. Costs of this application to be in the cause.

DATED AND DELIVERED IN OPEN COURT THIS 19TH DAY OF OCTOBER, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odoyo for Applicant – Present

Ms. Omondi holding brief for Miss Mugo for Respondent – Present

