REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

MISC. APPLICATION NO. 6 OF 2017

REPUBLIC.....APPLICANT

VERSUS

PUBLIC SERVICE COMMISSION.....RESPONDENT

EX PARTE JOSHUA WACHIRA NDERITU

JUDGMENT

1. The *ex parte* Applicant seeks an order of *certiorari* to remove to this court and quash the decision of the Public Service Commission conveyed by letter of 7th May 1999 dismissing the *ex parte* Applicant from the employ of the public service. He also sought an order of *mandamus* compelling the Respondent to reinstate the *ex parte* Applicant in the employ of the public service with effect from the date he was dismissed. These reliefs sought raise an issue that I will revert to later in the judgment on public law remedies. The suit commenced at the High Court on 2nd November 1999 some 19 years ago though the dispute arose a little while earlier. It is regrettable that the matter was not resolved before it found its way to this court some a year ago. The letter of 26th October 1994 retired the *ex parte* Applicant in the public interest. He engaged in correspondence after the letter of 26th October 1994 and specifically I refer to the letter of 22nd November 1994 and the letter of 12th January 1997. The *ex parte* Applicant was eventually dismissed from the public service on 4th April 1997 vide the letter from the Permanent Secretary prompting his suit. He was informed of his right to appeal against the decision within 42 days of the date of the letter. He was notified that the dismissal would lead to the loss of benefits. He was notified that he had forfeited all retirement benefits and privileges enjoyed had he left the service in circumstances other than dismissal. He appealed the decision to dismiss him and thereafter preferred a second appeal. The decision to uphold the dismissal was issued on a letter dated 7th May 1999. Perhaps that is why in his judicial review application he seeks the quashing of the letter. The *ex parte* Applicant's suit was dismissed before the High Court because of want of prosecution in June 2016 before reinstatement and transfer to this court. The chequered past is therefore partly on account of the parties and the failure by the arbiter to determine the matter in short shrift. The *ex parte* Applicant testified before the court and stated that his employment commenced on 1st October 1978 and that he served at various stations as an accountant under the Ministry of Education. He was an AIE (authority to incur expenditure) holder for secondary schools to the tune of Kshs. 120 million. He was suspended on allegations that he had sabotaged an audit exercise in some schools within what was Central Province leading to the retirement in the public interest. He stated that he had sought leave and was not therefore sabotaging the exercise as alleged in the accusations levelled against him. He appealed and the appeals were disallowed. He sought the reversal of the decision as the proceedings were irregular since he ought to have been given an opportunity to be heard before his dismissal. He sought the prayers of *certiorari* and *mandamus* as well as damages for the injury to his personality and for the depression he suffered.

2. The Respondent was of the contrary view that the *ex parte* Applicant did not have any right to these reliefs as what he sought had been overtaken by events as the *ex parte* Applicant was past the mandatory retirement age and therefore not capable of reinstatement. The Respondent called John Kimani Njorio who reiterated the Respondent's defence that the *ex parte* Applicant was issued a show cause and given a hearing before the dismissal. He stated that the *ex parte* Applicant had sabotaged the operations of the audit exercise in 500 hundred schools within Kirinyaga. He testified that the *ex parte* Applicant was dismissed and not retired in the public interest and that the authorised officer did not deem it necessary to refer the matter to the Police though the issue of sabotage was major. He stated that the *ex parte* Applicant had been indicted in other matters as well according to the records held by the Respondent.

3. The parties filed submissions on 18th October 2018 for the *ex parte* Applicant and on 20th November 2018 for the Respondent. The *ex parte* Applicant submitted that he was entitled to the grant of the orders he had sought in the matter before the court. He relied on the Ugandan case of **Pastoli *v* Kabale District Local Government Council and Others [2008] 2 EA 300** where the court stated that:

> *In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety… illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or* ultra vires*, or contrary to the provisions of the law or its principles are instances of illegality.*

> ***…****Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards…Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.*

The *ex parte* Applicant submits that the decision by the Respondent was unreasonable, actuated by malice and founded on a pre-planned determination meant to ensure that the *ex parte* Applicant was dismissed from public service. It is submitted that no reasonable authority addressing itself to the facts of the matter would have arrived at the decision to dismiss the *ex parte* Applicant. The *ex parte* Applicant submits that the Respondent and the Permanent Secretary did not act fairly in dismissing him from public service and that the suspension and ensuing dismissal did not adhere to the laid down procedures prescribed by the code of regulations for civil servants. The *ex parte* Applicant submitted that the Respondent did not observe the rules of natural justice in dismissing the *ex parte* Applicant from the public service. The *ex parte* Applicant cited the case of **Gladys Nyawira & Others t/a Nyeruruma Self Help Group *v* County Government of Nyeri [2016] eKLR** and submitted that the Respondent in disallowing his appeals acted irrationally.

4. The Respondent on its part submits that the *ex parte* Applicant is undeserving of the grant of relief sought. It was submitted that the orders sought are incapable of grant having been overtaken by events notably the retirement age of the *ex parte* Applicant having passed and the ability to quash the letter of dismissal. The Respondent submits that the *ex parte* Applicant has not offered any explanation why this matter had remained unprosecuted for 19 years. The Respondent asserts that the law and due procedure were followed to the letter and the dismissal of the *ex parte* Applicant accorded with the law.

5. Let me advert to the issue I had indicated above on public law remedies. The issue of judicial review is not new in this jurisdiction. It however is often increasingly abused in employment matters. The oft sought remedy of judicial review is only available where an issue of public law is involved. It is not available where private law remedies are sought. In this case, the remedy of *certiorari* may well be available to the *ex parte* Applicant if the Respondent was in breach of its public law obligation, but that remedy cannot be available if what is in dispute is only the breach of a private law obligation. In other words, the public law remedy will not lie in matters of private law such as the dismissal of a regular public service employee whose core service is that of an employee exhibiting all characteristics of an ordinary contract of employment. It would be available in certain instances where the employment involves a public servant but that is in clear cut cases.

6. In the case cited by the *ex parte* Applicant being that of **Twinomuhangi Pastoli *v* Kabale District Local Government Council and Others** (*supra*) the learned judge (Kasule J.) held as follows:-

> *In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.*
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> …
>
> *Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or* ultra vires*, or contrary to the provisions of the law or its principles are instances of illegality.*
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> …
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> *Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards…Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.*

The learned Judge from Uganda was spot on. In this matter, the *ex parte* Applicant seeks relief for infarctions that are a mix of the two – impropriety and illegality. He asserts that the Respondent and the Permanent Secretary did not act within the law and did not accord him the safeguards of natural justice. I have carefully perused the correspondence produced herein. A clear line of consistency is shown on both sides. The *ex parte* Applicant was notified of the accusations levelled against him on the alleged sabotage of the audit exercise. The *ex parte* Applicant was notified of his misdeed which was to write his own circular that prompted some heads not to permit the audit in 1993. He boycotted the pool audit exercise. The *ex parte* Applicant was asked to apologise and was warned severely. In the letter of 9th September 1993, the *ex parte* Applicant wrote to the Provincial Education Officer Central Province indicating that he had issues with the proposed audit. He gave his recommendations which were radical and the subject of the sabotage allegations. The Respondent handled the complaint against the *ex parte* Applicant. The *ex parte* Applicant was sent packing by the Permanent Secretary and the *ex parte* Applicant offered a hearing. He gave explanations in writing and upon this hearing the *ex parte* Applicant received the verdict of the Respondent. This was in tandem with the rules of natural justice. It was proper for the discharge of the function of the office to hear the *ex parte* Applicant and make a determination. No new grounds arose on the appeal and no new facts emerge to cause the court to grant the order of *certiorari* or that of *mandamus*. The dismissal was for just cause and in keeping with the law. The reliefs sought herein by the *ex parte* Applicant are devoid of merit and the same are accordingly dismissed. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 6th day of December 2018

Nzioki wa Makau

JUDGE