



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

MISC. APPLICATION JR NO.18 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE SECRETARY, PUBLIC SERVICE COMMISSION.....RESPONDENT

AND

THE PRINCIPAL SECRETARY MINISTRY OF SPORTS, CULTURE & ARTS...PARTY

EX PARTE – SAMMY NZIOKI

JUDGEMENT

1. By a Notice of Motion dated 9th August, 2016 the *ex parte* Applicant, Sammy Nzioki is seeking for orders that;

a. An order of mandamus, directed to the Respondent Public Service Commission to determine the grading of the appointment of the Applicant to Job Group Q according to law and in correct relation to the promotional/upgrading of the other members of the department of the Presidential Music Commission, including those who joined the Commission later than the applicant.

b. ...

2. The Applicant has filed several applications under Certificate of Urgency, attached statements and documents repeating his case but some of the documents relate to third parties, particularly the application and Certificate of Urgency filed on 14th September, 2016 which is based on a Notice of Motion for Paul Makokha Okoiti and the Kenya Revenue Authority.

3. In discerning the pleadings filed by the Applicant, his case is that he is a retired civil servant who was working with the Presidential Music Commission (PMC). The Applicant was appointed to act in Job Group Q in the Civil Service at the PMC for some time and then he was upgraded down with no explanation and when his juniors were being upgraded, he was left out. The complaint is also that the Applicant played a key role in the PSC and therefore it was unfair to be put into acting capacity in Job Group Q and then be demoted without an explanation. That it was incumbent upon the authorised officer to explain to the Applicant the reason for bypassing him for his juniors in promotions. That this was a case of discrimination against the Applicant without due regard to professionalism and since the Applicant has since retired he must be given the highest grade he acted on before the retirement is

effected. That the reason the Applicant was put to act in Job Group Q was because he was competent. Despite lodging a complaint with the Respondent, there is no response or a grant of the position sought for by the Applicant. That an order of mandamus is necessary to enable the Applicant get his rights and the Respondent to be made accountable for denying him the rights to be considered together with others who got equivalent positions, Job Group P, Q and R.

4. The Applicant in his Statement and affidavit to support the orders sought avers that he was discriminated against by the Respondent due to the unreasonable revocation of his appointment to Job group Q after he had been acting in the same grade. When there were subsequent promotions, the Applicant was omitted without any due cause for denying him a climb up the ladder. There were his juniors with less qualifications who bypassed him despite not have better academic or managerial abilities than the applicant. This was contrary to the rules of natural justice.

Respondent's case

5. The Respondent filed Grounds of Opposition to the orders sought by the applicant. That the Applicant has adversely mentioned persons who are not parties to the suit and has not provided evidence that their promotions were not on merit and competitive. The Respondent informed the Applicant of the decision not to promote him to the position requested by letter date 29th October, 2012. The authorised officer made a request to the Respondent to promote the Applicant on merit, but the position required was to be competitively filled. Prior to the request for promotion, the authorised officer had requested and allowed to re-designate officers in the applicant's department and such request did not include promotion and the Applicant retained his job group/scale.

6. The respondent's case is also that the Applicant served in one position for 20 years without raising the issues herein and only became concerned upon retire. He was appointed to act in job group Q so that by the tie he retired, he positions the Applicant is seeking to be retired had not been created by the respondent.

7. There is no cause of action disclosed by the Applicant to warrant the orders sought. The orders sought in their nature are discretionary in their scope and purpose and in the interests of justice should not issue. Application should be dismissed.

Submissions

8. The Applicant filed different sets of written submissions and list of cases and documents – **1st November, 2016; 24th November, 2015; 2nd December, 2016; 9th December; and 15th December, 2016, 2016** - I put these into account in my analysis.

9. The Applicant in submissions sets out that the Respondent have in reply filed Grounds of Opposition which is not a correct procedure to use as this should be done by way of affidavit to set out the facts of the defence as done in JR No.390 of 2015. The advocate who filed in reply for the Respondent is not a party to these proceedings and cannot give facts and to the issues set out by the applicant. The party privy to the question of promotions at the Respondent are competent to reply.

10. The applicant's submissions are that there were two separate departments in the Ministry – department of Permanent Presidential Music Commission, where the Applicant was placed and department of Culture. The officers who bypassed the Applicant were given letter and notice by the Respondent, PSC over two years ago – Charles Wambua, Peter Wanjohi, Jacob Nyavanga, Rufus Thuku and Thomas Wasonga. They were in job group P, Q, and R at the time of transition and change from retirement at 55 years to 60 years. The Applicant would have been allowed to serve to 60 years of age. The Applicant was appointed to act in job group Q by letter of 27th May, 2005.

11. The promotion given to others should have been given to the Applicant to avoid confusions. Where Rufus Thuku was converted to Director of Music and promoted to job group S in the department of culture, the same should be done for the Applicant as a similar progression. The hurried removal of the

Applicant from service was meant to deny him the extension of time which would have been given to him because of his special qualifications and ability. The Applicant had 100 leave days accumulated and entitled to the same and is seeking time extension and to be fully paid followed by retirement. That in Republic versus **The Staff Disciplinary Committee of Maseno University & Others ex parte Prof. Ochong Okello, Misc. Civil Appl. No.227 of 2003 Kisumu**, and the Court allowed for time extension by granting an order of certiorari.

12. The Respondent submits that the Applicant was appointed as Music Programme Officer job group L on 1st septmber, 1976. He was then appointed acting in job group Q on 1st April 1990 the position held until retirement on February 2009. Before the Applicant retired the authorised officer had requested to re-designate officers in the applicant's department. This was not a promotion but a re-designation. The PSC had to create the position to which promotion would be done but this did not happen while the Applicant was in service.

13. The Applicant has not cited any law that allow the Respondent to promote him long after retirement. By letter dated 10th October 2012 the Permanent Secretary sought authority to create posts for music officers, which included the position of Senior Assistants Director of Music job group Q; Deputy Director of Music job group R; and Director of Music job group S. these positions were to be filled competitively as the powers of the PSC/Respondent are constitutional as under article 234 of the constitution. The positions in job group R and S did not exist when the Applicant was in service and retired where such positions exists, they can only be filled through a competitive process. The Applicant cannot seek for a promotion upon his retirement.

13. The Applicant has mentioned third parties in his application and seeking orders in comparison to such persons without giving evidence that there promotions were on merit and competitive or that the positions held were not competitive. There is no evidence that such third parties are still in the employment of the respondent.

14. By letter dated 29th October 2012 the Respondent informed the Applicant of the decision not to promote him to the requested position. The Respondent has since made a decision on the applicant's application for promotion and informed him of the reasons.

15. The Applicant is aware that before request for promotion, the authorised officer had made a request and the request approved was that of re-designation of job groups and this was not a promotion.

16. The Respondent also submits that the orders of *mandamus* are discretionary and their scope and purpose limited in circumstances and should not issue in this case. In the case of **High Court Misc. Civil Cause (JR) 390 of 2015** the Court has set out the circumstances where the orders of *mandamus* can issue – an order to compel a public officer to perform an obligation that arise from a public duty imposed in law.

17. The Applicant retired at 55 years, the age applicable then and not at 60 years as later changed. He cannot take the Respondent back by seeking the orders of *mandamus*. The cited cases by the Applicant are not applicable to his case.

18. The introduction of leave days due at 100 days is not pleaded and should not be allowed.

19. The Respondent has applied correct procedure in reply by filing Grounds of Opposition and not by affidavit and in accordance with Rule 14(5) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The objections made by the Applicant lack merits. The application before Court is not deserved and should be dismissed with costs.

Determination

20. The history to the case is given by the Respondent in submissions. Such I find crucial to restate however brief the facts set out in defence as this is crucial to the determination of the question whether

the orders of *mandamus* sought by the Applicant should issue.

21. The Applicant was Music Programme officer job group 'L' on 1st September 1976.

22. The Applicant was acting in job group 'Q' from 1st April 1990.

23. The Applicant retired from service in February 2009.

24. From the pleadings, it is apparent that the Applicant retired at 55 years. Upon such retirement, there was a change in the public service where officers are now allowed to retire at 60 years of age.

25. I take it that the Applicant retired at the applicable age at his time in February 2009. Before such retire, the Applicant had been acting job group 'Q' and the authorised officer, by letter dated 29th august 2008 wrote to the Respondent seeking the following;

RE-DESIGNATION AND PROMOTION ON MERIT

PERMANENT PRESIDENTIAL MUSIC COMMISSION

Your letter on the above Ref. No.226/93 of 7th august 2008 refers.

i. Attached please find the Authorised Establishment for the Department and the vacant posts against which the nine (9) officers are recommended for appointment and re-designation.

ii. ...

[Emphasis added].

26. Though the heading to this letter is misleading, the request to the Respondent was a recommendation for appointment and re-designation of officer. What was sought for approval was re-designation and not promotion.

27. The Applicant was dissatisfied and lodged a complaint. Such complaint was considered by the Commission on the Administration of Justice. However, the positions that included job group 'Q' in the department where the Applicant had served before his retire were addressed by the Permanent Secretary to the Respondent by letter dated 10th October 2012. The request was that;

AUTHORITY TO CREATE POSTS FOR MUSIC OFFICER AND APPROVAL OF UNPDATED ESTABLISHMENT

The scheme of service for Music Officers has been revised in conjunction with all stakeholders, Public Service Commission, Ministry of State for Public Service and the Ministry of State for National Heritage and Culture.

The Permanent Presidential Music Commission, which is a department in this Ministry,

...

b) Conversion to the new Grading Structure

Serving officer will adopt and convert to the new grading structure and designation as follows:-

...

The purpose of this letter is to request you to provide authority for creation of the posts of Senior

Assistant Director of Music Job Group ‘Q’, Deputy Director of Music Job Group ‘R’ and that of the Director of Music Job Group ‘S’. We also seek approval of the attached copy of updated establishment. This will facilitate filling of the posts through a competitive process.

28. The above letter and communication between line ministries particularly the ministry and department under which the Applicant had been serving, the Permanent Presidential Music Commission to the Respondent is explicit. The positions under job group ‘Q’, ‘R’ and ‘S’ had not been approved. The authorised officer was therefore moving the process forward and following the Respondent and other stakeholders revision of the scheme of service, it was then possible to appoint officers for the posts of *Senior Assistant Director of Music Job Group ‘Q’, Deputy Director of Music Job Group ‘R’ and that of the Director of Music Job Group ‘S’* once approved by the respondent. The Applicant has not challenged this process. In any event by the time the scheme of service was approved and the request for appoint officers in the positions of *Senior Assistant Director of Music Job Group ‘Q’, Deputy Director of Music Job Group ‘R’ and that of the Director of Music Job Group ‘S’* in October, 2012 he had retired in February, 2009.

29. Should then the order issue compelling the Respondent to grade/upgrade the Applicant by appointment to job group ‘Q’?

30. The Respondent has therefore already made a decision with regard to the Applicant’s employment and communicated such decision to him. To therefore seek the orders of *mandamus* to have the Respondent determine the grading/degrading of the applicant’s appointment of job group ‘Q’ according to law and in correct relation to the promotion upgrade of the other members in the department is spent. This would be seeking retrospective application of the order of *mandamus* in a matter that the Respondent has already communicated its decision as to why the Applicant was not promoted.

31. An order of *mandamus* is only issued for a specific purpose. This is not to be construed for an order of *certiorari*. Where the Applicant is avoiding seeking an order for *certiorari* due to time restrictions as required under Order 53 Rule 2 of the Civil Procedure Rules, the cure is not to apply for orders of *mandamus* where the respondent has made its decision and applied its discretion in a matter of appointments, promotions or re-designation of its employees.

32. In a case where an employer had refused to renew an employment contract for the employee, the employee moved the Court by judicial review seeking for orders of *mandamus* to have the employer to be compelled to employ him. The Court in **Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng. Judah Abekah [2015] eKLR** held that;

[An] order of mandamus will issue to compel the performance of a statutory duty owed to an applicant. Therefore, the fulcrum of an order of mandamus is that a statutory duty must be owed to an Applicant and the public officer or public body, after being asked to perform the duty, has refused or failed to discharge that duty and there is no other adequate remedy. In matters involving exercise of judgement and discretion the public officer or public agency can only be directed to take action; it cannot [be] directed in the manner or the particular way the discretion is to be exercised.

33. The Court above, by reaching the findings set out relied on various cases on the subject of when an order of mandamus can issue and when the remedy can issue and relied on the case of Republic versus The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M’agere. Nairobi High Court Misc. Application No. 395 of 2012, and the finding that;

11. The first issue is when can a Court grant an order of mandamus and what is an order of mandamus? In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543, it was held that:

“Mandamus is essentially English in its origin and development and it is therefore logical that the Court should look for an English definition. Mandamus is a prerogative order issued in

certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature."

34. The findings of the Court confirms what was held way back in 1996 in the case of **Kenya National Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge & Others, Civil Appeal No.266 of 1996 (CAK) eKLR**; that;

[An order of] Mandamus compels the performance of a duty imposed by statute where the person or body to whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongly performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. ... Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction....

35. The orders sought for mandamus must therefore be directed at a public officer who is in authority either under a statutory or legal duty to do or not to do something. The authority to be exercised by such an officer in any given matter must be set out in law and not based on discretion.

36. The Applicant has relied on the general provisions of the Public Service Commission Act at section 13 and 14 and submitted that when he was appointed in an acting capacity to job group Q, the Respondent before making any changes, he should have been given reasons and the law was not respected. That from the time he was appointed to act in job group Q the law required the authorised officer to promote him before any contrary act was done.

37. my reading of the provisions of section 13 and 14 of the Public Service Commission Act, repealed by Act No.13 of 2012, does not give the respondent the legal mandate, authority or direction to promote its officers. The regulations to the Act as set out above address the functions of the Respondent as requiring a consideration of a set target principles in arriving at an appointment, promotion or in any manner dealing with the re-designation of officers in service.

38. As such the acts complained of have taken effect. The Applicant was re-designated by letter dated 29th august, 2008 and has since been retired from service as age 55. The orders to issue as prayed for that he be reinstated into service so as to enjoy the promotion and job group Q and the annual leave days due is therefore premised on a decision that has already taken effect. A mandamus cannot aid the applicant. It must be accompanied by another order to vacate the decision already made in the nature of the powers that the Respondent had at the time the Applicant was in employment. To issue an order of mandamus as the Applicant is seeking would not aid his case in the sense that the acts complained of cannot be reversed through a mandamus.

39. The Applicant retired in February 2009. The Public Service Commission was in 2009 regulated under the provisions of the Public Service Act, Cap 185 [now repealed]. Under the applicable law and the regulations therein, where the PSC had a vacant position(s) such had to be advertised where the PSC found this as necessary but where the PSC was reasonably satisfied that *a public officer in some Ministry or department other than in which the vacancy occurs, it may invite applications from serving public officers only.* [See Regulation 12(3) to the PSC Act].

40. Therefore, the PSC in making any appointments, internal and available officers had to be considered

but the having failed to get good applicants externally.

41. In the case of selection of candidates for appointment, promotion and transfer, PSC was to give regard to efficiency of the public service and take into account merit; experience and official qualifications and above all *proved merit and suitability for the vacancy in question will be given greater weight than seniority*. [See regulation 13(1)].

42. The above determinant factors put into perspective, the Respondent had to put into account various factors before making an appointment, promotion and transfer. Ultimately, the decision as at 2009 when the Applicant was in service, had to be made by the respondent. Such I find was at the discretion of the Respondent within the set yardsticks of merit and suitability where such a position existed within the scheme of service and had received approval.

43. The Applicant has not set out which legal duty the respondent failed or neglected to abide.

44. In matters involving exercise of judgement and discretion the public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised. **Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.** See *Mureithi & 2 Others (For Mbari Ya Murathimi Clan) versus Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443*.

45. As set out above, the Applicant retired from service in February 2009. It has been over 8 years since. The officers alleged to have been promoted to job groups 'P', 'Q' and 'R' though named in the application, the time and qualifications of these officers and whether the promotions arose out of a competitive process. Such has not been set out so as to make a case of discrimination against the applicant and that the Respondent had a duty in law to promote the Applicant over these other officers. Where the promotions of such officers happened after the Applicant had retired from service, the same became applicable as at the time such promotions were conferred. The Applicant cannot seek to be promoted to a position that did not exist in the scale/group and even where such position existed and there was no promotion based on the discretion of the Respondent, such a promotion upon the Applicant's retire cannot apply retrospectively. The discretion of the Respondent in addressing vacant positions that became available and based on merit and suitability come to bear.

46. The Employment and Labour Relations Court (Procedure) Rules, 2016 upon amendment have allowed a litigant to move the Court by way of judicial review, petition or by Memorandum of Claim and seek orders which may include orders for judicial review. See Rule 7 of the Court Rules.

47 However, to move the Court as the Applicant has after such a long time, 8 years, even where the Court is to give the orders sought, under section 10(6) and (7) read together with section 73 and 74 of the Employment Act give an employer a timeline within which to keep work records – 5 years and 3 years respectively – for purposes of producing such records to Court within any proceedings made against the employer and where inspection of such records are required. Before the Applicant moved this Court he had applied with the Respondent and the Commission on the Administration of Justice to have his case for promotion by the Respondent be addressed.

48. Before I conclude, mention must be given to the various cases cited by the applicant. Of all the attached cases, the lists in the written submissions being most similar, the cases do not relate to the applicants case save to emphasis the procedure applicable in seeking the orders of *mandamus*.

49. As set out above, the Respondent communicated their decision on the subject vide letter dated 7th august 2008. Soon thereafter, in February 2009 the Applicant retired from service at 55 years of age. To grant the orders of *mandamus* sought will not serve the intended purpose and even where the Applicant were to move the Court within the context of petition of Memorandum of Claim, he

has already been overtaken in time. Whichever way, the attempt to move the Court as herein for orders that the Respondent be directed to promote the Applicant to job group ‘Q’, the result of the Applicant having been made and notified to the Applicant, and the Respondent having exercised its discretion in the matter, I find no legal duty upon the Respondent to be compelled to comply as prayed.

50. On the question of the reply by the respondents, once a suit or application has been filed such as the one the Applicant has, the Respondent has the option to reply by affidavit or through Grounds of Opposition. The Applicant has the duty to set out their case clearly and concisely to enable the responding party give their reply in a similar manner. The Respondent can therefore not be forced to file an affidavit where Grounds of Opposition will well serve their response. On the set out facts and grounds in opposition, the Court must analyse and make a finding. In this case, I find the Respondent have sufficiently been able to reply to the issues and in their submissions and have complied with Rule 7 of the Employment and Labour Relations Court (Procedure) Rules 14.

51. The application must fail.

52. Although the applicant’s application has failed, I take note that in the application and Notice of Motion filed on 21st September 2016, annexed therein is the Notice of Motion in Misc. Civil Cause JR 13 of 2013, Republic versus Kenya Revenue Authority *Ex- Parte* Paul Makokha Okoiti. Upon perusal of the applicant’s application and the pleadings in JR 13 of 2016, this must have been the draft the Applicant used. However, each case has its own facts and merits. One cannot automatically be transplanted and applied on the other. The purpose for attaching the application in JR 13 of 2016 is therefore lost as there is no purpose of its application herein.

There is therefore no basis whatsoever for the issuance of an order of mandamus. In the circumstances the Applicant’s application fails in its entirety and the same is dismissed.

Each party shall bear own costs.

Dated and delivered in open court at Nairobi this 13th day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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