



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**MISCELLANEOUS APPLICATION NO. 3 OF 2016**

**(Formerly Miscellaneous Application No. 80 of 2001 in the High Court of Kenya at Meru)**

**REPUBLIC**

**VERSUS**

**PUBLIC SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MERU.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

**JOEL KAITHIA MATHIU.....APPLICANT**

(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> May, 2017)

**JUDGMENT**

The applicant filed a notice of motion on 17.05.2001 through Nyaga Kamundi & Company Advocates. The application was brought under order LIII Rule 3 of the Civil Procedure Rules and was stated to be in the matter of disciplinary proceedings for a chief officer under the Public Service Commission (Local Authority Officers) Regulations, 1984 and the Local Government Act, Cap. 265 Laws of Kenya. The applicant prayed for an order of certiorari to quash the decision of the 1<sup>st</sup> respondent concerning disciplinary proceedings and the dismissal of the applicant Joel Kaithia Mathiu as a local authority officer employed by the 2<sup>nd</sup> respondent (then the County Council of Meru). The application was based on the statutory statement on record and the applicant's verifying affidavit filed on 25.04.2001. By the notice of change of advocates filed on 13.07.2006, the applicant appointed Mwenda Mwarania, Akwalu & Company Advocate to act for him in the case. Consequential to leave by the court, the applicant filed on 01.11.2016 the amended notice of motion and the amended statutory statement. The amendment introduced the 2<sup>nd</sup> respondent in view of the current devolved system of government under the Constitution of Kenya, 2010.

The 2<sup>nd</sup> respondent appointed Kiautha Arithi & Company Advocates to act in the matter as per the notice of appointment filed on 15.08.2001. The 2<sup>nd</sup> respondent filed a notice of preliminary objection on 15.08.2001 that the application should be struck out with costs upon the ground, amongst others, that the notice of motion was vague and uncertain.

The 2<sup>nd</sup> respondent filed the replying affidavit of F.M. Raibuni on 24.10.2001. At paragraphs 5 and 6, the affidavit stated that the notice of motion had failed to state the date of decision to be quashed and at

paragraph 6, it stated that the motion was time barred having been filed after lapsing of the 6 months prescribed for challenging a decision by way of a prayer for an order of certiorari.

For the 1<sup>st</sup> respondent the Attorney General, through D.O. Rabala, Litigation Counsel, filed the notice of appointment on 15.08.2001. The 1<sup>st</sup> respondent filed on 29.10.2001 the replying affidavit of Harrison Hunyu Githae, Deputy Secretary in the Commission.

The court has perused the material on record. It is clear that the prayer for certiorari does not set out the date of the proceedings or decision for quashing by an order of certiorari and as prayed for. However, exhibit "JKM 5" on the verifying affidavit is the letter dated 01.12.2000 conveying the 1<sup>st</sup> respondent's dismissal of the applicant. The letter was forwarded to the applicant on 14.12.2000 and it conveyed that the claimant was thereby dismissed from the public service with effect from 11.08.2000 on account of gross misconduct; and the 2<sup>nd</sup> respondent's stores valued at Kshs. 100, 000.00 be recovered from the claimant. The letter stated that upon dismissal the claimant forfeited all his retirement benefits and he had a right to appeal to the 1<sup>st</sup> respondent within 6 weeks from the date of the letter. The applicant did not appeal as per the dismissal letter. For the 1<sup>st</sup> respondent it was stated in the replying affidavit that the applicant had to exhaust the appeal process prior to invoking the court's jurisdiction by way of the present application. Accordingly, the court finds that the proceedings or decision subject of the order of certiorari as prayed for must be the letter conveying the decision dated 01.12.2000 and as exhibited on the verifying affidavit.

As a preliminary consideration by the court, the court considers that the judicial review proceedings were commenced pursuant to Order 53 Rule 3 (1) of the Civil Procedure Rules and section 8 and 9 of the Law Reform Act. Under Order 53 Rule 2 of the Civil Procedure Rules leave shall not be granted to apply for an order of certiorari to quash a decision unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act. The said Rule 2 reproduced section 9(3) of the Law Reform Act, Cap.26, Laws of Kenya. The leave application and the relevant supporting statutory statement of facts and prayers were filed on 25.04.2001 and the proceedings or decision leading to the application was conveyed by the letter dated 01.12.2000 (so that 6 months lapsed on or about 01.06.2001). The notice of motion was filed on 17.05.2001. Thus, the suit was filed within the prescribed 6 months and it was not time barred as urged for the 2<sup>nd</sup> respondent. As for the case for the 1<sup>st</sup> respondent that the appeal process had to be exhausted, the court returns that appeal was not mandatory but was discretionary and within the applicant's choice. Further, the court considers that on appeal a decision maker different from the maker of the decision appealed against reconsiders the decision on account of alleged error of fact or law in the decision appealed against. In so far as the 1<sup>st</sup> respondent had decided to dismiss the claimant, the court returns that the purported right of appeal was perfunctory as the appeal was to the same 1<sup>st</sup> respondent which had already declared its decision in the matter and the court holds that the purported right of appeal served no purpose as it would not operate as a valid internal or administrative procedure that the applicant could be found guilty of failing to exhaust prior to filing of the judicial review proceedings. Thus, the application was not premature or it was not barred or ousted by the applicant's failure to appeal.

Accordingly, to answer the **1<sup>st</sup> issue** for determination, the court returns that the preliminary issues as raised for the respondents will fail.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The applicant's case is that the dismissal decision should be quashed because of the following grounds:

- a) The Public Service Commission (Local Authority Officers) Regulations, 1984 applied to his disciplinary case.
- b) As Treasurer to the County Council of Meru he was a Chief Officer and provisions of the regulations as applicable to Chief Officers were to be invoked in the disciplinary proceedings.

c) The suspension letter by the Permanent Secretary dated 30.08.2000 was issued prior to issuance of a statement of charges as was required under regulation 34(1). Even if the suspension letter contained the allegations, the applicant's case was that the Permanent Secretary lacked authority to issue such a letter as the same was to be issued by the Clerk to Council as per regulation 34(1) and (2). The applicant's case was that the Permanent Secretary would only receive the clerk's report under regulation 34(3) if the reply to the show-cause letter was found not satisfactory.

d) The applicant lamented that the Minister had not appointed, in the applicant's disciplinary case, an inspector, as per regulation 34(4) and section 245 of the Local Government Act, 265 to investigate the allegations against the applicant.

e) The applicant's case is that he could be suspended only after appointment of the inspector as per regulation 34(6) but the Permanent Secretary had suspended him by the letter of 30.08.2000 and in clear contravention of the law.

f) The applicant's further case was that since an inspector was not appointed, he was not afforded due process per regulation 34 (6), (7), (8) and (9) on investigation of the allegations through appearance and defence, cross-examination of witnesses, calling witnesses, receiving copies of any documentary evidence in the case, and, representation through a fellow officer or an advocate.

g) The applicant's case is that he was dismissed by the 1<sup>st</sup> respondent in violation of regulation 34(13) as there was no statement of the charge and the applicant's reply thereto and there was no independent report by the inspector who was never appointed as provided in the regulations.

The court has considered the material on record. The respondents have failed to rebut the applicant's case that the prescribed disciplinary process involving the appointment of an inspector and due process of investigating the allegations was not followed. Accordingly the court returns that the applicant has established his case and the court further returns that the applicant is entitled to an order of certiorari to quash the offending dismissal decision and all proceedings leading to the dismissal because the proceedings and the decision were undertaken and arrived at in clear contravention of the statutory provisions as prescribed in the cited provisions of the regulations and the Act.

In conclusion, judgment is hereby entered for the applicant against the respondents for:

1) The judicial review order of certiorari which is hereby issued quashing the decision of the 1<sup>st</sup> respondent conveyed by the letter dated 01.12.2000 Ref. No. S/130384/1/32 and all proceedings leading to that letter as concerns disciplinary proceedings and the dismissal of the applicant Joel Kaithia Mathiu as a local authority chief officer employed as Treasurer for the County Council of Meru (the successor being the 2<sup>nd</sup> respondent).

2) The respondents to jointly or severally pay the applicant's costs of the judicial review proceedings.

**Signed, dated and delivered in court at Nyeri this Friday, 19<sup>th</sup> May, 2017.**

**BYRAM ONGAYA**

**JUDGE**