



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW NO. 5 OF 2015
(FORMERLY KISUMU HCC. MISC. APPL. NO. 6 OF 2012)

(Before Hon. Lady Justice Maureen Onyango)

GEORGE ANGOYA OCHIER..... CLAIMANT

-Versus-

TEACHERS SERVICE COMMISSION..... RESPONDENT

J U D G E M E N T

The Application herein has been made vide notice of motion dated 20th February 2012 in which the Applicant seeks the following orders:-

1. THAT Certiorari be granted to remove to this Honorable (sic) to quash the decision of the Teachers Service Commission made on the 6th June 2011 to dismiss and deregister the Applicant from the Teachers Service Commission.
2. THAT Mandamus do issue and the Respondent be ordered to re-investigate the issue and rule as per the evidence gathered.
3. THAT the Respondent be ordered to pay the cost of this Application.

The application is supported by the grounds on the face thereof and filed together with a Verifying Affidavit and Statement of the Applicant.

In the Statement the Applicant describes himself as an adult male of sound mind and resident of South East Alego Location, Karemo Diviision in Siaya Couny and former a Deputy Head Teacher (TSC No. 261183) at Bar-Kodhiambo Primary School in Siaya County

The grounds upon which the relief is sought as stated in the Statement of the Applicant are the following:-

- a) That on or about 4th January 2011 the Applicant then a Deputy Headteacher at [particulars withheld] Primary School in Siaya County was informed by his Headmaster Mr. O R that one A A O a former Pupil who dropped from standard 7(seven) a year before was pregnant and the father claimed that the applicant was the one who raped her in the staff room in March the year 2010.
- b) On 14th January, 2011, at around noon the Head teacher rung him and informed him to meet him at Siaya town where upon reaching he served him with a transfer letter to Bar-Kodhiambo Primary School and told him just to go straight away as he didn't want problems in his school. This was

after a series of meeting held in private between the head teacher Mr. R and A's father on 6th January, 2011 and on 10th January 2011 which A was present.

c) On 7th February 2011 while teaching at Bar-Kodhiambo, A's Father brought a letter from Children's Office in Siaya summoning our client to appear before them on 10th February, 2011.

d) On 21st February, 2011 our client was summoned on phone through his new Head teacher to report to [particulars withheld] Primary School as the District Education Officer would like to meet with him there. The District Education Officer sent his representatives who investigated the child and ordered the Applicant to report to the District Education Officer's Office the next day on the 22nd February, 2011. On reporting on the said date, A and his father were urgently summoned through Head teacher Mr. R. After thorough interrogations, A told the District Education Officer that it was not true that the Applicant had sexual relationship with her but she had lied to escape the furry of her father.

e) The Applicant received an interdiction letter dated 1st March 2011 responded on 16th March, 2011. Then received another second interdiction letter with fresh allegations dated 28th March, 2011. This was followed by invitation letter dated 12th May, 2011 for hearing from the Teachers Service Commission to be heard on 6th June 2011 after which he was dismissed and de-registered from Teachers Service Commission on the same day of hearing of his case at the District Education Officer's Office in Siaya through a letter he received on 2nd August 2011. This was done without the commission explaining to the Applicant any procedure or evidence relied on to reach such a decision.

In response to the Application the Respondent filed a replying Affidavit of SIMON MUSYIMI KAVISI, its Director in Charge of Administration. In the Replying Affidavit sworn on 20th April 2012 Mr Kavisi states that the Respondent is a Commission established under Article 237 of the Constitution of Kenya, 2010, its primary function being the management of teachers employed for service in public schools. Mr. Kavisi further states that the Respondent operates under the **Teachers Service Commission Act**, the **Code of Regulations for Teachers**, the **Teachers Service Code of Conduct** and the **Public Officers Ethics Act**. He states that under its constitutional and statutory mandate the Respondent has broad powers that encompass the registration, recruitment, transfer and discipline of teachers.

Mr. Kavisi states that on or about 16th February 2011 the Respondent received information through its agents that on diverse dates within the months of March and May 2011 while the Applicant was teaching at [particulars withheld] Primary School in Siaya County, he had carnal knowledge of his student (name withheld to protect the student's identity), a pupil in standard 7 pupil (hereinafter referred to as the "**Student**"). That the allegations if proved would constitute gross contravention of the Code of Regulations(hereinafter referred to as the "**COR**").

Mr. Kavisi states that the Respondent commenced investigations in exercise of its disciplinary mandate during which it recorded statements from witnesses who included the Applicant, the **Student** and her father. Copies of the statements have been annexed to the affidavit as Annexure "SMK-2". Mr. Kavisi states that the investigations revealed that the Applicant could have committed an offence punishable under the **COR** hence the Respondent reached a decision to interdict the Applicant. Subsequently the Applicant and other witnesses were summoned to a hearing on 6th June 2011 at the District Education Office, Siaya by letters dated 12th May 2011. At the hearing the Applicant was given an opportunity to cross examine witnesses and to adduce evidence in his defence. Upon evaluating the evidence the Respondent arrived at the decision to dismiss the Applicant from service and further to remove his name from the register of teachers.

Mr. Kavisi states that the punishment meted out to the Applicant was commensurate with the offence and in strict compliance with Regulation 66(5) of the **COR**, and lawful. That-

a) At the earliest opportunity the Applicant was informed of allegations against him and was invited to write his defence.

- b) The Applicant made his representations by way of a written defence statement which was presented and duly considered by the commission.
- c) Further, the Applicant appeared before the Commission, heard the evidence against him and had the opportunity to cross examine witnesses.
- d) The Applicant was accorded the opportunity to present his evidence both oral and written and to rebut the adverse evidence.
- e) The Applicants' evidence was duly considered by the Commission decision.
- f) Without unjustified delay the Commission communicated its decision to the Applicant.
- g) The Commission was not influenced or actuated by bad faith as alleged by the Applicant.

Mr. Kavisi states that the Applicant is therefore not entitled to the reliefs sought and prays that the application be dismissed with costs.

The Respondent thereafter filed written submissions. The Applicant's submissions were however never filed even after the Applicant's Counsel sought and was granted leave severally to file the submissions out of time.

In the written submissions filed on 19th July 2012 the Respondent submits that under section 9 of the **Teachers Service Commission Act** the Respondent is mandated to act on complaints against teachers as follows-

9. Disciplinary proceedings against registered teachers.

(1) The Commission shall investigate, consider and determine any case where it is alleged that a registered teacher should have his name removed from the register on the ground that, if he were not registered, the Commission would refuse to register him.

(2) In any proceedings under this section the Commission

(a) shall inform the person concerned of the nature of the allegations made against him, shall afford that person adequate time for the preparation and presentation of his defence, and shall afford him the opportunity of being heard in person;

(b) may act on general evidence or statements relating to the character or conduct of the person concerned, and shall not be bound to receive and consider only evidence admissible in a court of law;

(c) may administer oaths and may, for the purpose of dealing with any matter before it, summon any person to attend and give evidence and to produce any relevant documents.

The Respondent further submits that besides the statutory provisions herein above, the detailed provisions for disciplinary process is enacted under the Regulation 66 of the COR and that the Respondent complied with both the Act and the COR with respect to the Applicant. It is submitted that the Respondent did not take into account any irrelevant factors as alleged by the Applicant, that the Applicant's allegation is wild, unsubstantiated and unwarranted.

On legitimate expectation the Respondent submits that the Applicant knew or ought to have known the consequences of his acts. That he knew or ought to have known that any behaviour contrary to the provisions of the COR would lead to immediate disciplinary action and his expectations were subject thereto.

The Respondent relied on the decision of the High Court in the Petition of NANCY MAKOKHA BARAZA V JUDICIAL SERVICE COMMISSION [2012] eKLR in which the Court stated that legitimate expectation requires that those who act in good faith on the basis of the law as it is or seems to be should not be frustrated in their expectations. It was submitted that good faith is only applicable where one acts in good faith and on the basis of the law and therefore there can be no legitimate expectation where one acts contrary to the law as in the Applicant's case.

On whether the Applicant is entitled to an order of Certiorari the Respondent submitted that the circumstances under which the order of certiorari can be granted were set out in the case of RE FUNZI ISLAND DEV. LTD & 2 OTHERS [2004]eKLR as quoted in the case of KENYA NATIONAL EXAMINATIONS COUNCIL V REPUBLIC EX PARTE GATHENJI AND OTHERS IN CIVIL APPEAL NO. 266 OF 1996 to the effect that "*An order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons*"

It is submitted that the Applicant failed to prove the ingredients of natural justice and procedure were breached by the Respondent.

The Respondent further referred to the case of REPUBLIC V EGERTON UNIVERSITY EX PARTE ROBERT KIPKEMOI KOSKEI [2006] eKLR in which the Judge held that "*...Judicial Review is not an appeal from a decision, but a review of the manner in which the decision was made...*"

The Respondent submitted the dismissal of the Applicant is not an issue for consideration herein but rather the manner in which the decision to dismiss the applicant was arrived at. The Respondent submitted that the dismissal was procedural, regular and lawful and that the Applicant is therefore not entitled to the order of Certiorari.

The Respondent submitted that the general principles which should guide statutory or Administrative Tribunals sitting in a quasi judicial capacity were elaborated in the case of **HYPOLITTO CASSIANI DE SOUZA V CHAIRMAN, MEMBERS OF TANGA TOWN COUNCIL 9(1961) EA. 77** to include-:

- a) *If a statute or statutory Rules and Regulations binding on the domestic on the domestic tribunal prescribe the procedure to be followed, that procedure must be followed.*
- b) *In such a case, the tribunal which should be properly constituted must do its best to act justly and ends by just means. It must act in good faith and fairly listen to both sides. It is not bound however to treat the question as a trial. It need not examine witnesses and it can obtain any information in any way it thinks best.*
- c) *The person accused must know the nature of the accusations made;*
- d) *A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement they may decide to bring forward.*
- e) *The tribunal should see it to that the matter which has come into existence for the purpose of the quasi-lis is made available to both sides and once the quasi-lis has started, if a tribunal receives a communication from one party it should give the other party an opportunity for commenting on it.*

The Respondent submitted that it faithfully adhered to the disciplinary procedure set out under Regulation 66 of the COR and prayed that the Applicant's application be dismissed with costs to the Respondent.

Determination

I have considered the Application herein and the Replying Affidavit as well as submissions filed by the Respondent. Order 53 of the Civil Procedure Rules sets out the procedure for filing Judicial Review Applications. Rule 2 provides for the time within which an application should be filed as follows:-

2. Time for applying for certiorari in certain cases

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

The instant application was filed on 2nd February 2012 while the decision that is the subject matter of the application was made on 6th June 2011 as is evident on the face of the Application. This means that the Application was filed outside the limitation period provided for in Order 53 Rule 2 of the Civil Procedure Rules. The words of the rule are couched in mandatory terms that "**Leave shall not be granted to apply for an order of certiorari ... unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act;**" This means that this application was filed out of time. There is no provision for extension of the time for filing and no extension was sought in any event. The application is therefore technically incompetent to the extent that it was filed out of time.

The foregoing notwithstanding, the application does not substantiate the grounds upon which it is anchored. The grounds in support of the application as set out on the face thereof and in the Statement in Support of the Application are that:-

- a) **THAT** Respondent is procedurally ultra-vires as they do not comply with provisions of the Teachers Service Commission.
- b) **THAT** the decision contains errors of law and fact on the face of the records as the reasons for decision are not given in compliance with the Teachers Service Commission Act.
- c) The Respondent failed to take into consideration what was relevant and in fact took into account irrelevant considerations.
- d) The respondent failed to give reasons for decision in compliance with the Teachers Service Commission Act.
- e) The respondents contravened the concept of legitimate expectation as the dismissal and deregistration is false and baseless contrary to judicial principles.

The Applicant did not set out what was *ultra vires*, or point out the errors on the face of the record. Neither did the Applicant state what irrelevant facts were taken into account by the Respondent. The court directed parties herein to file written submissions and severally fixed dates for highlighting of the submissions. The Applicant failed to file written submissions to substantiate the allegations in the Application, even after being granted several opportunities to do so. The only conclusion the court comes to based on the lacklustre manner in which the Applicant has prosecuted this application is that he has no interest in the same.

Conclusion

I find that the application is incompetent having been made after the lapse of the statutory period of 6 months. I further find that the Applicant has not proved the allegations made in the Application. I find that the Application is an abuse of court process as the Applicant did not bother to prosecute the same. For these reasons I find no merit in the Application and dismiss it with costs to the Respondent.

Dated and signed and delivered this 8th day of June, 2017

MAUREEN ONYANGO

JUDGE