



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW NO. 10 OF 2016
(FORMERLY HIGH COURT JUDICIAL REVIEW NO. 266 OF 2016)

(Before Hon. Lady Justice Hellen S. Wasilwa on 27th July 2017)

REPUBLIC.....APPLICANT

VERSUS

PARLIAMENTARY SERVICE COMMISSION (PSC)1ST RESPONDENT

JEREMIAH M. NYEGENYE.....2ND RESPONDENT

AND

1. SAMUEL OTIENO OBUDO
2. MARY GATHIGA KANYIHA
3. KEITH KISINGUH
4. ALLOYS TINEGA
5. DAVID MULINGE KITHUA
6. GEORGE OMONDIU ARUM
7. BENJAMIN NJAGI KAGUTUEX-PARTE APPLICANTS

JUDGMENT

1. The Applicant filed suit vide a Chamber Summons Application dated 20.6.2016 in the High Court Judicial Review Division, seeking leave to commence Judicial Review Proceedings which leave was granted on 21.6.2016. Thereafter the substantive Notice of Motion was filed on 5.7.2016 where the Applicants are seeking Orders that:

1. That the Applicants, be granted Orders of certiorari, removing into the High Court, all and/or any matters pertaining to the applicants disciplinary control, emoluments, and/or handling of other allowances or otherwise etc, currently before the Parliamentary Service Commission

(PSC), pending the conclusion of the hearing and determination of the substantive motion.

2. That the Applicants, be granted Order(s) of prohibition, barring/stopping the Respondents from conducting or handling the matters adverted to herein i.e. further deductions, or termination or cessation thereof, of the Applicants allowances, at the conclusion of the hearing and or determination of the substantive motion.

3. That there be a stay of decision(s) of the Respondents and any other consequential proceedings thereof, before the 1st Respondent, in respect of the matters pleaded herein, until the conclusion of the hearing and/or determination of the Substantive Motion.

4. That the Applicants be granted Orders of Mandamus, compelling the Respondents or, the 2nd Respondent thereof in his capacity as the deputed officer of the 1st Respondent, of reinstate the allowances of the Applicants in full and/or , to the payroll or, revoke its decision in that behalf, at the conclusion and determination of the substantive Motion.

5. That this Honourable Court be pleased to grant such other or further Orders that are ancillary and/or necessary or adjunct, to the relief being sought, as it may deem just and fit to grant in the circumstances.

6. That costs of the Application be provided for in any event.

2. The Application is premised on the grounds that:

(i) The Respondents have illegally, unlawfully, unconstitutionally, unprocedurally, arbitrary and unilaterally, moved to terminate and/or cease the applicants allowances, without any legal, statutory or other proper basis, on 12th November, 2015 and/or 16th February, 2016, when the decision to effect the deductions or termination or cessation of the applicants allowances, was reached.

(ii) The Respondents in purport of the decision arrived on 12th November, 2015, and/or 16th February, 2016, moved to effect the said deductions or termination or cessation of the Applicants' allowances acting as such, without any lawful excused or justifiable reasons, namely:

a) Respondents and/or the deputed officers thereof, acted in excess of its mandate or powers, in contravention of the Parliamentary Service Commission Regulations, 2002 and/or the Parliamentary Service Act, Anticorruption and Economic Crimes Act, the Penal Code and/or Employment Act 2007, hence the commission and/or the deputed officer, acted ultra vires the said laws.

b) In the alternative, the Respondents and/or the deputed officers acted in the absence of any such requisite mandate or powers or jurisdiction expressly conferred by law and/or statute or, imputed by necessary implication thereof, under the stated laws.

c) The reasons advanced by the Respondents and or the Deputed officer, touching the deductions and/or termination and/or cessation of the applicants allowances are vague, ambiguous, arbitrary, fictitious and non-existent under the parent law and stated legal regime, to wit, the constitution, the Parliamentary Service Commission Regulations, 2002, the Penal Code, Cap 75 Laws of Kenya and, the Anti-Corruption and Economic Crimes Act, and/or Employment Act, 2007 respectively.

d) The deductions, termination or cessation of the applicants' allowances, took root with effect from February, 2016, and still continue to date.

(iii) It is the Applicants' considered view that, the decision reached by the Respondents and/or the 2nd Respondent thereof as the "deputed officer", on 12th November, 2015, and /or 16th February, 2016, did not constitute a valid and proper decision of the 1st Respondent hence such decision is null and void ab initio in law.

(iv) In making or purporting to make reference to practice, convention, traditions and/or norms so established, by other public bodies or independent commissions envisioned by the constitution of Kenya 2010, the Respondents or, the 2nd Respondent breached or violated fundamental constitutional principle or practice as enshrined in terms of Articles 248 & 249 of the constitution of Kenya 2010.

(v) The applicants state that, they are currently facing criminal/proceedings embodied in Nairobi Chief Magistrate's Criminal Case No. 1860 of 2015 Republic Vs. Samuel Otieno Obudo & six others where they are charged inter alia, with offences of conspiracy to steal Ksh. 70,600,00/= and/or abuse office, which offences were primarily under the Penal Code.

(vi) The deductions, termination or cessation of the applicants' allowances took roof with effect from February, 2016, and still continues to date.

(vii) The applicants stand to suffer irreparable harm if these Orders are not granted.

(viii) No prejudice will be suffered by the Respondents if the Orders sought are not granted.

(ix) The actions of the Respondent are in Mala-fides, unreasonable, arbitrary, unjustified, unprocedural and effected in the wrong legal context.

(x) It is necessary for these Orders to be issued to protect the sanctity of the law, constitutional and other legal rights of the Applicants.

(xi) It is in the interest of justice that the application herein be granted.

(xii) The Respondents have not supplied a justifiable excuse or explanation as to how the decision effecting the deductions, termination or cessation of the Applicants allowances was reached.

(xiii) The Respondents ignored the guiding laws, rules of Natural Justice and Constitution of Kenya in reaching the said illegal and/or unlawful decision.

(xiv) The Orders sought are important because the Respondents have shown prima facie, that they are unwilling to follow the law. Although the 1st Respondent itself, is an independent commission set up by or under the constitution.

(xv) The Respondents have not taken into account the impact their decision is bound to have on the Applicants' welfare and career progression.

(xvi) The Respondent s actions run contrary to the letter, spirit, Constitutional fiat and principles under the constitution of Kenya, 2010, in a just and equitable society as enshrined in the law and, if nothing is done about it , the Applicants stand to suffer irreparable harm.

(xvii) The present case surrounding the Applicants allowances shall necessitate this Honourable Court adopting sui generis approach in hearing and determining the substance of he said dispute.

3. The Application is supported by an affidavit, and a verifying affidavit sworn by the 1st and 3rd ex parte applicants wherein they reiterate the grounds on the face of the application. The Applicants in addition to

the stated affidavits has also filed a statement of facts detailing the events leading to filing of the application and the prayers sought.

4. The Respondents have opposed the Application and have filed a Replying affidavit sworn by one Jeremiah M. Nyegenye, the Secretary to the Parliamentary Service Commission, 1st Respondent, wherein they admit the employment relationship. They further state that the Applicants were charged with various counts prescribed in the penal code, in the case Nairobi Chief Magistrate Court No. 1860 of 2015.

5. He states that on the 12.11.2015, the 1st Respondent's Commission held a meeting where it resolved among other issues that the Applicants be interdicted given the provisions of section 62(1) to (4) of the Anti-corruption and Economic Crimes Act and the Parliamentary Service Commission Regulations, 2002, pending the hearing and determination of the criminal cases against them.

6. That on 18.11.2015, the Applicants were informed of the Respondent's decision to interdict them on half pay with effect from 10.11.2015 pending hearing and determination of the Criminal case against them.

7. That following the interdiction of the Applicants, an audit query was raised on the allowances received by the Applicants which their auditor termed as irregular and inconsistent with the law.

8. He further states he was advised by their directorate of litigation and compliance that according to the Parliamentary Service Commission Regulations, 2002, employees who are interdicted should receive a salary not being less than half of the employee's basic salary. However the said regulation have to be read together with the Employment Act, Cap 226, the 1st Respondent is required to provide reasonable housing and access to proper medical attention to its employees. So the Respondent resorted to paying the Applicants half pay and provided the minimum basic allowances being housing allowance and medical benefits.

9. In lieu of the above advice, he states that he proceeded to advise the 1st Respondent's Director, Administrative Services to stop payment of all allowances to the interdicted officers except house allowance with effect from February, 2016.

10. Further that he was further advised by their Advocates on record that other allowances that the Applicants are entitled to are only applicable if the applicants were reporting to work which in this case they were not.

11. The Respondents aver that the Claim for allowances is not tenable in law and payment of such allowances to the applicants who are not on duty would be irregular and illegal and ought to be withheld until their reinstatement or otherwise. Further that the Applicants have not demonstrated that the 1st Respondent acted ultra vires or unreasonably and as such the Orders sought should not be granted.

12. The Respondent in submissions states that the powers of the 1st Respondent are operationalized through regulations which set out the recruitment, appointment and discipline of the 1st Respondent's employees. All employees of the 1st Respondent are required to subscribe and adhere to all its laws, regulations and policies.

Submissions

13. The ex –parte Applicants submit that the legal implication of the decision by the Respondent to stop payment of their allowances was ultra vires in nature and should be quashed. The legal implications they submit are:

a) Legitimate expectation: they state that they had legitimate expectation that the body tasked with the responsibility will be the body to perform the function. That in this case the decision was made by a different body which was against their expectation and such decision is null and void ab initio.

14. They cite the case of **Macfay vs. United Africa Co. Ltd (1963) 3All E.R. 1169** where it was held:

“If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for the Court to set it aside. It is automatically null and void without more ado, though it sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

b) Balance and Proportionality: The Applicants state that the level of breach is so grievous that regarding the proportionality that is to be considered, it is impossible to remedy the situation without quashing the decision of the 2nd Respondent. That they attempted to remedy the situation by writing to the 1st Respondent informing them of the irregularity and the olive branch was declined as they never responded to their letter.

15. They state that the person tasked with the responsibility and authority of interdicting the Applicants in this case is the commission. However, the Commission can from time to time delegate such powers to the Deputed Officer who in this case is the Clerk of the National Assembly. That the assertion by the Clerk of the Senate in paragraph 18 of the Affidavit sworn on 20.9.2016 is incorrect and inconsistent with Legal Notice 63 of 2002. That the interdiction letter sent to the Applicants was done by J. M. Nyegenye who was the Clerk of the Senate/Secretary and not the deputed officer. They cite the case of **Ali Dhole Bocha vs. Attorney General & 3 Others (2013)eKLR**; where facts are similar to the instant case and the Court held that the interdiction of the exparte applicant was illegal.

16. Similarly in **Republic vs. Kenya School of Law Ex parte Thomas Otieno Oriwa (2015)eKLR** where it was held:

“That being in that position, the decision made by the Respondent’s disciplinary committee cannot be allowed to stand. Once that decision fails by the wayside all subsequent decisions which were made pursuant to it must similarly give way. Accordingly it is not necessary to grant the Order of prohibition in the manner sought.”

17. The ex-parte Applicants pray for their Application to be allowed and the Letter by the Respondent’s declared invalid, illegal and incapable of enforcement. They ask the Court to reinstate the status quo.

18. The Respondent on the other hand states that the question in this case thus is whether the 1st Respondent has power to stop payment of the 1st Applicant’s allowances. They cite Regulation 21 of the Parliamentary Service Commission which provides:

“21(2) an employee who is interdicted shall receive such salary, not being less than half his or her salary, as the deputed officer shall think fit.”

19. Further that Regulation 21(5) provides:

“For purposes of this regulation and regulation 24, salary means basic salary.”

20. They also cite the case of **Edward Muthuri Vs Airfreight Forwarders Limited Civil Appeal No. 134 of 2009**, the Court of Appeal stated that salary and allowances are two distinct and different concepts... salary means basic salary and does not include allowances and declined to grant allowances to the Appellant.

21. Further, they submit that the Parliamentary Service Commission Regulations are not to be read in isolation. Section 31 and 34 of the Employment Act, Cap 226 Laws of Kenya requires employers to provide reasonable housing accommodation and access to proper medical attention to their employees. In that regard they state that the Applicants were only entitled to half their basic pay and minimum basic allowances being, housing and medical benefits.

22. It is submitted on behalf of the 1st Respondent that the PSC Regulations are silent on payment of allowances and as such they are of the view that the common law maxim *Nulla poena sine lege* meaning “everything which is not forbidden is allowed and the converse that everything which is not allowed is forbidden” applies. This is what informed their decision to pay allowances that were considered critical.

23. For the other allowances, facilitative in nature which were not paid they cite the case of **Kenya Ports Authority vs. Silas Obengele (Civil Appeal No. 38 of 2005)**, where the Court of Appeal found that benefits such as telephone facilities, travelling allowance and other benefits are paid to serving employees not as payment to services rendered or to be tendered but to enable the officer concerned to perform his work more conveniently and therefore more efficiently.

24. The Court further stated that the payment is facilitation payment. That being the case there is or there would be no basis for making payment of those allowances if an employee has ceased to work unless the contract of employment treats any of those payments as remunerative payments.

25. On whether the remedies sought are available to the exparte applicants the Respondent submit that the purpose of judicial review is not to look at the merits of the decision but at the process through which the decision was made. The Respondent state that the Applicants have failed to establish that the 1st Respondent acted ultra vires of its powers or unreasonably and as such the conditions for granting the remedy have not been met. They cite the case of **Republic vs. Kenya Power and Lighting Company Limited & Another (2013)eKLR**, where the Court stated that:

“it is not enough for an Applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited before judicial review remedies are granted.”

26. As to prohibition, the Respondent submits that such order cannot quash a decision that has already been made. It can only prevent the making of a contemplated decision. That in the instant case the decision to stop payment of facilitative allowances to the applicants has already been made and as such the Order for prohibition is not efficacious against the decision made. They rely on the case of **Kenya National Examination Council vs. Republic (1977) eKLR**, to buttress this position.

27. On the order for Mandamus the Respondent submits that such Order does not issue as a matter of course. That the Applicants ought to demonstrate that the Respondents have failed to perform a constitutional or statutory duty which in this case they have not. In their view the Order cannot therefore issue. The Respondent urges the Court to find the application to be unmerited and dismiss it with costs.

28. I have considered the submissions of the parties herein. The Applicants have sought equitable reliefs of certiorari and mandamus against certain actions by the Respondents. The order of the Respondent which Applicant wish to quash are orders made by the Respondent/or its officers on 12th November 2015 and 16th February 2016 terminating payments of Applicants’ allowances.

29. The Applicants Exhibit KKL 1 – is a letter addressed to the 1st Applicant herein from the Clerk of Senate/Secretary to the 1st Respondent herein.

30. The letter advised that following preferring of the charges against the 1st Applicant at CMs Kibera Criminal Case No.1860/2015, he was now interdicted with effect from 10th November 2015 and would henceforth be paid half pay. Similar letters were written to the other Applicants. The Respondent indicated as follows in their letters:

“On 10th November 2015 you were charged before the CMs Court at Milimani with offences of conspiracy to commit a felony contrary to Section 393 of the Penal Code and abuse of office contrary to Section 101(1) as read with Section 103A of the Penal Code. These offences are defined as corruption and economic crimes under the provision of Section 2 of the Anti-Corruption and Economic Crimes Act.

Section 62 of the Anti-Corruption and Economic Crimes Act stipulates that “A Public Officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge”. Further Regulation 21 of the Parliamentary Service Commission Regulations, 2002 provides for the interdiction of an officer in the Parliamentary Service where that officer has criminal proceedings instituted against him or her.....”.

31. Exhibit 500 KK.2 is a letter from the Applicants’ Counsel indicating that though the Applicants were on interdiction they were entitled to payment of certain allowances which the Respondent had since stopped and they were demanding a reinstatement of the same as per the Constitution, Public Service Commission Act (as amended), PSC, Service Regulations, and SRC Circular of 10th December 2014.

32. The Respondent replied to this letter indicating that they were justified in stopping payments of the allowances in question in view of the law but only retained housing and medical allowances for employees in question. They indicated that the Applicants were not entitled to the other allowances which are facilitative in nature and can only be paid to an employee who is on active duty as they are meant to aid an officer in carrying out their day to day duties and responsibilities while at work.

33. From the pay advice exhibited the allowances payable included entertainment allowance joint service, extraneous allowance joint service, responsibility allowance joint service, telephone allowance joint service and transport allowance joint service. These allowances were stopped save for the house allowance.

34. The issue for me to determine is whether the cessation of the other allowances is contrary to the law.

35. By virtue of the law, though interdicted, the Applicants remains in the employment of the Respondent. Under Section 31 of the Employment Act, they are therefore entitled to house allowance. Section 31 of the Employment Act states as follows:

1) “An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2) This section shall not apply to an employee whose contract of service:-

a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

36. They are also entitled to retention of their medical or be retained in an existing medical scheme. This is also in line with Section 34 of Employment Act which provides as follows:-

1) ...“Subject to subsection (2), an employer shall ensure the sufficient provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness.

2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.

3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.

4) This section shall not apply where:-

a) the illness or injury to the employee was contracted during a period when the employee was absent from his employment without lawful cause or excuse;

b) the illness or injury is proved to have been self-inflicted;

c) medical treatment is provided free of charge by the Government or under any insurance scheme established under any written law which covers the employee”.

37. The Anti-corruption and Economic Crimes Act states as follows:-

“Suspension, if charged with corruption or economic crimes:-

1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until conclusion of the case.

Provided that the case shall be determined within twenty four months.

2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances. (emphasis are mine)

3)

4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.....”.

38. It is therefore apparent that under the Anti-corruption and Economic Crimes Act – an officer facing charges is entitled to payment of full allowances. This law does not however derogate from any other law which provides otherwise.

39. Under the Parliamentary Service Commission Regulation 2002 Section 21, it is stated as follows:

1) ...”if any case the deputed officer is satisfied that the interest of the Service requires that an employee should cease forthwith to exercise the powers and functions of his or her office, he may interdict the employee from the exercise of those powers and functions, provided proceedings which may lead to his dismissal are being taken or are about to be taken on that criminal proceedings are being instituted against him or her.

2) An employee who is interdicted shall receive such salary, not being less than half his or her salary as the deputed officer shall think fit.

3) Where disciplinary or criminal proceedings have been taken or instituted against an employee under interdiction and such employee is neither dismissed nor otherwise punished under these Regulations, the whole of any salary withheld under paragraph (2) shall be restored to him or her upon the termination of such proceedings.

4)

5) For the purpose of this regulation and regulation 24 ‘salary’ means basic salary.”.

40. There is no other law or regulations which limit the provisions of the Anti-corruption and Economic Crimes Act cited above that an employee facing a criminal or economic crimes charge should have his or her allowances withheld.

41. The Respondent have submitted that the Applicants being on interdiction are not entitled to the other

allowances such as responsibility, transport, extraneous and telephone allowances which are facilitative allowances.

42. They aver that such allowances are payable to facilitate the employee perform their duties and they are therefore not entitled to these allowances since they don't perform any work. They cited **Paul Ngeno vs. Pyrethrum Board of Kenya Limited (2013) eKLR, Peter Opiyo Mc'Odero vs. Laikipia University (2015) eKLR, Kenya Ports Authority vs. Silas Obengele (Civil Appeal No. 38 of 2005), High Court Civil Case No. 195 of 2003, Alex Muriuki Bundi vs. Kakuzi Limited (2012) eKLR and Charles Muturi Mwangi vs. Invesco Assurance Company Limited (2016) eKLR;** where Courts have held that fuel, telephone and entertainment allowances are tools ancillary, necessary and tied to the performance of duties assigned to or being performed by an employee and which become inapplicable on termination.

43. Indeed such allowances are not payable upon termination but the question is whether they are payable on interdiction. The basis of this question is that an interdicted employee retains his position as an employee and if the law state that he should be paid his ½ salary and other allowances, then the employer cannot decide to pay only certain allowances to the exclusion of others.

44. Having stated as above, it is apparent that indeed the action of the Respondent in paying the Applicants certain allowances and ceasing to pay others had no legal basis because the Anti-corruption and Economic Crimes Act state otherwise. The Regulations made under the PSC Act cannot override the provisions of an Act of Parliament.

45. The remedies sought here are remedies for Judicial Review. **In London Court Form, 2nd Edition Vol 14 1991 issue at page 12-14 Butterworths** the author states as follows on application for Judicial Review:

“.....for a decision to be susceptible to Judicial Review, the decision maker must be empowered by Public Law (and not merely by agreement between private Parties) to make decision which if validly made, will lead to administrative action or abstention from action by an authority endorsed by law with executive powers, which alter the rights and obligations of a person which are enforceable in private law or which deprive that person of some benefit or advantage he has enjoyed and which would legitimately expect to be permitted to continue until rational grounds for withdrawal of it have been communicated to him or which he has been given the opportunity to comment or he has been assured that the benefit or advantage will not be withdrawn without an opportunity for him to make representations”.

46. The orders sought to be varied herein were made by the 2nd Respondent who had authority to do so on behalf of the 1st Respondent and so the prayers for Judicial Review are apt in the circumstances. Proper leave was sought and obtained before the Judicial Review application was instituted.

47. It is my finding therefore that the orders were made by an administrative body who had powers to do so but who nevertheless made the orders in excess of authority, the authority is clothed with.

48. I therefore find that Applicants have established their case and I make the following orders:

1. That Applicants are granted orders of Mandamus compelling the Respondents herein to reinstate the allowances of the Applicants in full.

2. That such allowances to continue to be paid till the final outcome of the Criminal proceedings pending before the CMs Criminal Case Kibera No. 1860/2015 against the Applicants for 2 years with effect from the date of interdiction or until the determination of the case whichever is shorter.

3. Costs be borne by the Respondents.

Read in open Court this 27th day of July, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwiguri for exparte Applicant – Present

Respondents – Absent