



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 1 OF 2016**

**MARGARET NYARUAI THEURI.....APPLICANT**

**VERSUS**

**THE NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday, 1<sup>st</sup> July, 2016)**

**JUDGMENT**

The applicant Margaret Nyaruai Theuri filed a notice of motion on 24.03.2016 through Mongeri and Company Advocates. The application was brought under Order LIII Rule 3(1) of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act. The applicant prayed for orders as follows:

- a. That an order of Certiorari be issued to move into this Honourable Court for the purposes of being quashed and to actually quash the decision made by the National Police Service Commission on a letter dated 25<sup>th</sup> January 2016 where and when the Commission denied to hear the application for review by the applicant.
- b. That an order of Mandamus be issued against the National Police Service Commission directing them to hear and make a finding on the review application by Margaret Nyaruai Theuri within ten days.
- c. That the costs of the matter be borne by the respondent.

The application was based on the verifying affidavit, the statutory statement of facts, and the leave granted on the chamber summons all dated 19<sup>th</sup> February, 2016.

The respondent filed on 29.04.2016 the replying affidavit of Johnston Kavuludi, the respondent's Chairman, to oppose the application. The learned Litigation Counsel, Paul Ojwang acted for the respondent throughout the proceedings.

Section 7 (2) of the National Police Service Act provides that all officers in the service shall undergo vetting by the respondent to assess their suitability and competence. Section 7(3) of the Act provides that the respondent shall discontinue the service of any police officer who fails in the vetting referred to under subsection (2). Section 7 (4) of the Act provides that the respondent in consultation with the responsible Cabinet Secretary, shall develop criteria and regulations to guide the exercise of vetting of the officers. Accordingly, the respondent has issued and published the National Police Service (Vetting) Regulations, 2013.

The applicant is at all material time a police officer in the Kenya Police Service at the rank of Superintendent of Police (SP) deployed at the Kenya Police College, Kiganjo. The applicant's service

number is 231723 and she was appointed on 26<sup>th</sup> July 1986 as a Police Constable and she rose through the ranks over the time of her service.

The applicant appeared before the respondent's vetting interview on 21.02.2015. The record of the proceedings filed in court shows that the vetting started at 5.55pm to 5.49pm. The parties have not advanced issues about the obvious error in the timing of the interview. The record shows that the applicant was subjected to a long and detailed interview running from pages 3 to 94 of the typed record of the vetting interview.

The outcome of the vetting interview was conveyed to the applicant by the respondent's letter dated 09.10.2015. The respondent's decision was that taking all the factors into account, the respondent found that the applicant had failed the vetting and was thereby, in accordance with the law, removed from the service. The decision letter concluded that the officer's attention was drawn to provisions of regulation 33 that provides the grounds for review. Regulation 33 on review of decision states as follows:

1. **An officer who has been found unsuitable or incompetent may, within seven days after being informed of the decision, request for a review of the decision by the Commission.**
2. **The Commission shall not grant a request for review unless the request is based –**
  - a. **on the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the officer at the time the determination or finding sought to be reviewed was made, provided that the lack of knowledge on the part of the officer was not due to lack of due diligence;**
  - b. **on some mistake or error apparent on the face of the record; or**
  - c. **on any reason the Commission considers just and proper.**
3. **A request for review shall act as a stay of the decision of the Commission, but the officer in question shall proceed on leave for the duration of the review.**
4. **The Commission may, upon review, confirm or reverse its earlier decision.**

Upon receiving the respondent's decision dated 09.10.2015, the applicant appointed Mongeri & Company Advocates for purposes of making an application for review under the said regulation 33. The advocates' application for review is by the letter dated 19.10.2015 and which indicates that the applicant received the respondent's decision on 15.10.2015. That fact is not in dispute and the court considers that the appeal was within the 7 days as provided for in the regulation.

In the letter seeking review by the applicant's advocates, the applicant set out 11 grounds to establish **"Mistake or Error Apparent on the Face of the Record"**.

The letter for review further set out four grounds to establish **"Just and Proper Cause"**.

The court has not reproduced the grounds as set out in the letter and has not reproduced the grounds upon which the respondent removed the applicant from the service in the decision subject of the review, because, the court considers that the merits of the case, in absence of any reason for the court to delve in the merits, is clearly the proper jurisdiction of the respondent to consider and make appropriate decision in its sole good judgment or as it were, discretion.

The letter requested that the applicant be granted audience through legal counsel at the review proceedings. In alternative, the letter stated that the review panel may consider permitting the advocates to submit written submissions highlighting the applicable statutory provisions, case law and in particular review decisions arising from the Judges and Magistrates Vetting Board and the respondent's own reviews which are strikingly similar to the regulations used by the respondent.

The respondent's decision on the applicant's application for review was conveyed by the letter dated 25.01.2016. The respondent's letter addressed to the applicant through the Inspector General of Police stated as follows:

**“RE: APPLICATION FOR VETTING REVIEW**

**The National Police Service Commission received your application for review of the decision on your vetting dated 19<sup>th</sup> October 2015.**

**The Commission has considered your application and is of the view that your application is not merited under Regulation 33 of the National Police Service (Vetting) Regulation 2013, and has therefore not been admitted.**

**Therefore, please be advised that the Commission’s decision on your vetting still stands.**

**Signed**

**OJANGO OMUMU**

**CS/CHIEF EXECUTIVE OFFICER”**

The applicant’s case and submissions are as follows:

1. Under the said regulation 33 the respondent was bound and required to listen and adjudicate the applicant’s application but the respondent has denied the claimant that opportunity.
2. The rules of natural justice required that the claimant be given a chance to argue her review application without being hindered in any way.
3. The review was a legal requirement and therefore a right which the respondent could not take away in the manner it happened.
4. The respondent’s decision conveyed by the letter dated 25.01.2016 should therefore be quashed.

The respondent’s case is as follows:

1. That the court lacks jurisdiction to determine the application because the suit is about a vetting procedure which is a legal requirement and not an employment or labour issue. The respondent relied on the preliminary objection filed on 12.04.2016 and dated 11.04.2016.
2. The application was incurably defective because it was not brought in the name of the Republic.
3. The claimant was fairly removed from the service on account of financial probity after having failed to account for several deposits in her bank account deciphered from the claimant’s financial statements submitted to the Commission during the vetting proceedings. In particular her answers to the questions at the vetting proceedings led to the respondent’s decision removing the applicant from the service.

The **1<sup>st</sup> issue** for determination is whether the Court lacks jurisdiction to determine the suit. In **Seven Seas Technologies Limited –Versus- Eric Chege [2014] eKLR** the Court (Rika J) stated that the High Court is expressly excluded by the Constitution to deal with matters under Article 162 so that there is a constitutional imperative thrust upon this Court to deal with all aspects of disputes that relate to labour and employment matters in Kenya. The Court further stated that to hold otherwise would abridge the rights of parties to access justice and run counter the principles in Article 159(2) of the Constitution. Thus, the Court, and not the High Court, has the jurisdiction to hear and determine all issues as far as employment and labour matters go. The Court follows that opinion and further upholds **Abdikadir Suleiman –Versus-County Government of Isiolo and Another [2015]eKLR** where this Court stated thus, **“As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute**

are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant."

Thus the court returns that it enjoys the necessary jurisdiction to hear and determine the present application.

The 2<sup>nd</sup> issue for determination is whether the application was incurably defective because it was not brought in the name of the Republic. Relying on Republic –Versus- Secretary, Public Service Commissioun [2010]eKLR (Makhandia J.) the respondent urged that the applicant having brought the application in his name and not that of the Republic, the suit was defective because only the Republic and not the individual could seek orders of judicial review. The respondent further cited Farmers Bus Service & Others –Versus- The Transport Licensing Appeal Tribunal (1997) EA 779 where the court held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted. The respondent further relied on Kenhon Kijabe Hill Farmers Co-operative Society –Versus- The District Officer Naivasha, H.C.Misc. App. No. 280 of 1996 (UR) (Aganyanya J) where the court stated that prerogative orders were issued in the name of the crown, now the Republic, and they must be correctly instituted as such, failing, the suit would be incompetent because such proceedings are not ordinary suits and could not be brought in an individual's name.

The Court has carefully considered the claimant's submissions. First, the court observes that the applicant is seeking judicial review orders of certiorari and mandamus as opposed to the historically relevant and related prerogative orders. Second, in the present constitutional order, the grant of judicial review orders is founded upon Article 23 (3) (f) of the Constitution. Third, under the constitutional provisions and in particular Articles 22 and 23, every person is entitled to seek judicial review orders. Thus, the court returns that applicants or parties seeking judicial review orders need not move the court in the name of the Republic. Needless to state, the current constitutional order does not envisage a crown and the related concept of prerogative orders. Fourthly, the Court has considered the provisions of Article 159 (2) (d) that justice shall be administered without undue regard to procedural technicalities and the Court considers that for the applicant's case to collapse solely upon the manner she titled her pleadings would amount to unreasonable regard to a procedural technicality; a technicality which in the present case the Court has found to lack constitutional or even statutory or other relevant basis.

The 3<sup>rd</sup> issue for determination is whether the respondent, in the manner it determined the applicant's application for review thereby abdicated its obligation to determine the review application and denied the applicant the right to a review. The Court in determining this issue has carefully revisited the record against the provisions of the cited and earlier reproduced regulation 33. First the claimant presented the application for review within the stipulated time. Second, the claimant's application enumerated about 15 grounds to urge the case for review. Thus the Court concludes that there was a good application for review before the respondent in terms of the formalities prescribed under the regulation. Second, what did the respondent do with the application upon receiving it? Paragraph 2 in the letter dated 25.01.2016 states, "**The Commission has considered your application and is of the view that your application is not merited under Regulation 33 of the National Police Service (Vetting) Regulation 2013, and has therefore not been admitted.**" The operative phrase in the paragraph is "...not been admitted." The word admit as used here can only mean, "accept as valid" per Concise Oxford English Dictionary, 12<sup>th</sup> Edition. Indeed, the court considers that to be the meaning as usually used in formal administrative or legal proceedings where documents are, without looking at their merits, rejected as a matter of preliminary consideration for want of "this or that" prescribed formality. The question that emerges is, in what respect, as considered by the respondent, was the applicant's application rejected as invalid. That, in the court's findings, has not been established. Third and more crucial to the Court's inquiry on the issue is whether the respondent had the authority or jurisdiction not to admit any application for review. There were no formal prescriptions on the form of the application. Thus the court returns that not admitting an application for review was not envisaged in regulation 33. The only prescription was the

time within which the application was to be requested and even if the time had lapsed, but which was not the position in the applicant's case, it is the court's opinion that consideration of time would be a substantive issue to be taken into account by the respondent in granting or not granting the application and not a preliminary issue for admitting or not admitting the application and which was not envisaged in the regulation 33-as the regulation did not state that where in the opinion of the respondent, the application for review is outside the 7 days, the respondent would refuse to admit the application on that account.

The court has considered regulation 33. Sub-regulation 33(2) tells the Commission not to grant an application for review unless the application is based on any of the prescribed grounds. Sub-regulation 33(4) then tells the Commission the kind of decisions it could make in an application for review; that is, to confirm or reverse its earlier decision.

The court has revisited the record. There is no evidence that the respondent ever addressed its mind to the claimant's detailed application for review. All the material before the court show that the application was not admitted. There is no disclosed record **"...considering the applicant's application on merits."** as was purported in the respondent's letter of 25.01.2016. Regulation 34 is elaborate that the respondent shall cause to be made and kept an accurate record of its proceedings. In absence of such record of proceedings with respect to the applicant's application for review, the court returns that the application for review was not considered by the respondent, either on merits or any other account. The issues raised by the applicant in the application for review remain unreturned or unanswered one way or the other.

As was submitted for the applicant, the respondent walked beyond or before its jurisdiction in purporting not to admit the application for review or the respondent failed to exercise jurisdiction to grant or not to grant the application by confirming or reversing its earlier decision.

Thus, the Court returns that, the respondent, in the manner it determined the applicant's application for review, thereby abdicated its obligation to determine the review application and denied the applicant the right to a review as was envisaged in the applicable regulation 33.

The **4<sup>th</sup> issue** is whether the applicant was entitled to be heard by the respondent during the consideration of the applicant's application for review. Regulation 11 provides that the respondent shall determine the sequence of the vetting process. The Court considers that the review application was part of the vetting process and the respondent was entitled to determine how to proceed. However, regulation 4 provides that the respondent, in conducting vetting, shall be guided by the stated principles including that all officers of the service shall undergo vetting individually, vetting shall be implemented consistently and the same procedural principles shall be applied in all cases; vetting shall be done in accordance with the values and principles set out in Articles 10, 27, 47, 50 and 232 of the Constitution; and vetting process shall be done in a transparent manner allowing for the person undergoing vetting to know and assess the information that has been used by the Commission to reach its decision.

Taking the cited principles into account, the Court finds that the procedure adopted by the respondent must be such that the applicant participates individually and that the applicant is accorded all fairness to assess the information the respondent would have used to reach its decision. In the present case, without getting into the merits of the case, the Court finds that the applicant raised numerous grounds for review based on matters of fact whereby without a hearing, it would be difficult to resolve the issues one way or the other. While making the decision on the best approach to apply, it would be crucial for the respondent to consider whether at the initial vetting process the applicant had the information on all likely questions of fact that she would be confronted at the proceedings (and therefore well informed and prepared to answer them) or that such information was insufficient and therefore with due diligence she was not adequately armed at the initial hearing ( so that at the review a hearing would be fair and necessary for the applicant to put her case straight). The Court considers that where the matters in issue involve evidence to establish facts in issue, then the general rule is that a hearing will largely be appropriate than not. All such considerations are matters the respondent was and is entitled to determine in terms of determining the sequence of the vetting as per regulation 11. As the proceedings never got there, such are not matters for determination in deciding the present case.

Thus the court returns that the procedure the respondent adopts in determining the application for review and whether to hear or not to hear the applicant is within the respondent's authority to determine but whatever procedure is adopted, the same must meet ends of justice as per the test in the guiding principles listed in regulation 4. In the court's view, a determination that an application for review is wanting in any material respects would be a substantive issue, an issue of merits requiring consideration in a due process. That due process in Article 47(1) of the Constitution is expeditious, efficient, lawful, reasonable and procedurally fair. In Article 236(b) of the Constitution the procedure is described as “**...due process of law**”. In determining the procedure or sequence of the vetting including procedure at the consideration of the review application, the respondent must bear in mind the cited constitutional provisions and ensure that they are satisfied.

The 5<sup>th</sup> issue is whether the applicant was entitled to appear by advocate or his legal counsel at the proceedings before the respondent for the application for review. The court has already found that the procedures for the proceedings are determined by the respondent but must meet tenets of justice. The Court, on the issue of legal representation cites its opinion in the judgment in **Republic –Versus- Arnold Karani Njiru, Fund Account Manager, Laikipia East Constituency Fund and 10 Others Ex-parte Amin Mohammed Ali [2015]eKLR**, thus,

**“While making that finding, the court holds that in a democratic civilised society, the right to legal representation during administrative decision making is desirable and in absence of any identifiable bar it is a crucial component of fair hearing which cannot be defeated in absence of clear statutory qualification. In the present case, there was no such statutory qualification and the court holds that the applicant was entitled to appear at the hearing together with his advocate especially in view of the gravity and consequence of the allegations that had been levelled against the applicant by the respondents. In this case, the respondents did not advance any ground that would have made legal representation inimical and the court finds that the respondents having allowed and not objected to the applicant attending the hearing with his advocate, the respondents were thereby bound to allow the advocate to effectively participate in the proceedings. It was desirable that the respondents exercised their discretion in favour of allowing the advocate to attend but by resisting the advocate's participation in the proceedings, the court finds that the applicant's legitimate expectation to the legal representation was thereby thwarted and the proceedings, taking into account the other defects stated in this judgment, fell short of the fair hearing the applicant was entitled to.”**

To answer the 5<sup>th</sup> issue for determination the court returns that it would be desirable but not mandatory for the applicant to enjoy legal representation during the proceedings by the respondent on the application for review especially in view of the gravity and consequence of respondent's decision to the applicant's livelihood and employment. In the Court's opinion it is noteworthy and commendable that the respondent made the offensive decision subject of the present proceedings without questioning that the application for review had been made through the advocates and further suggesting that the respondent had entertained legal representation that far.

The 6<sup>th</sup> issue is whether the applicant is entitled to the remedies as prayed for. The Court returns that the claimant is entitled in terms of the findings made earlier in the judgment. The offending decision conveyed by the letter dated 25.01.2016 is liable to quashing by the judicial review order of Certiorari. By an order of mandamus, the respondent is liable to being compelled to decide the applicant's application for review in accordance with the regulations and the relevant constitutional principles.

While making the finding that the remedies should issue, the Court has considered that regulation 33(3) is clear that a request for review shall act as a stay of the decision of the Commission, but the officer in question shall proceed on leave for the duration of the review. For avoidance of doubt, consequential to the order of certiorari, that provision takes effect from the date of the application for review through after the quashed respondent's letter of 25.01.2016 so that the applicant remains on leave until the decision by the respondent on the application for review. Taking that into account, there would be no compelling reason to limit the time for the respondent's action on the application for review to within ten days as was prayed for. The respondent should be able to exercise good judgment to take action within reasonable

time and as expeditious as possible within its schedule of activities.

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

- a. The order of Certiorari removing into this Honourable Court for the purposes of being quashed and actually quashing the decision made by the National Police Service Commission conveyed by the letter dated 25<sup>th</sup> January 2016.
- b. The order of Mandamus is hereby issued against the National Police Service Commission directing them to grant or not to grant the application for review by the applicant dated 19.10.2015 by confirming or reversing its earlier decision as envisaged in regulation 33 of the National Police Service (Vetting) Regulations, 2013 and in accordance with the other provisions of the Regulations and the relevant constitutional values and principles.
- c. That the costs of the matter be borne by the respondent.

**Signed, dated and delivered in court at Nyeri this Friday, 1<sup>st</sup> July, 2016.**

**BYRAM ONGAYA**

**JUDGE**