



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISC. APPLICATION NUMBER 21 OF 2015

JAGONGO DOMINIQUE OCHIENG..... CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. By an ex parte chamber summons filed on 3rd March, 2015 brought under certificate of urgency, the applicant sought orders that:-
 - (a) That leave do issue for the applicant to apply for an order of certiorari quashing the decision of the respondent from transferring the Applicant pending the hearing and determination of the substantive Application in the letter dated 3rd February 2015.
 - (b) The leave granted for certiorari do operate as stay pending the filing and determination of the Substantive Notice of Motion Application and determination of the main suit.
2. The application was supported by the affidavit of the ex-parte applicants Mr. Jagongo Dominique Ochieng; who deponed on the main claim that:-
 - (a) That he was an employee of the Teachers Service commission stationed at Kabete Technical Training Institute.
 - (b) That sometime in February 13th 2015, he received a letter from the respondent transferring him from Nairobi to Kisumu polytechnic.
 - (c) That he had never asked for a transfer from his current work station.
 - (d) That there was a shortage of lecturers at his station and the management had even gone ahead to fill the shortage by hiring temporary staff.
 - (e) That the said transfer was being done by malice since his appeal on the said transfer was yet to be determined.
 - (f) That he had been working in Nairobi for over twenty years and stayed with his family at the said place and nearing retirement.

- (g) That he had taken a loan facility which loan was granted based on his net income in Nairobi.
- (h) Should he be transferred to Kisumu, his net income would go down due to reduced house allowance and commuter allowance hence he would not be in a position to service his loan or afford simple basic needs.
- (i) The said transfer was done arbitrary without consulting him against article 41 of the Constitution of Kenya.
- (j) That the said decision to transfer him went against the principles of Natural Justice.

3. The respondent opposed the application on the grounds that:-

- (a) The Chambers Summons raised no reasonable cause of action against the respondent in that in transferring the applicant from Kabete Technical Training Institute to Kisumu Polytechnic, the Respondent acted within its constitutional and statutory mandate provided under Article 237(2) (c) & (d) Constitution of Kenya. Teachers Service Commission Act No. 20 of 2012 and Regulation 27 (3) Code of Regulations for Teachers.
- (b) The Judicial Review remedy of Certiorari was not available to Ex-parte Applicant as the relationship existing between the Ex-parte Applicant and the Respondent was contractual in nature and governed by private law.
- (c) The ex parte Applicant had filed the Application prematurely before exhausting the Dispute Resolution Mechanism pursuant to the provisions of Section 46 of the TSC Act and Regulation 28 (4) (b) of the Code of Regulations for Teachers.
- (d) The Application went against public interest and policy and should therefore be dismissed.

4. When the matter came before me on 3rd march 2015, I granted leave to apply for orders of certiorari as prayed by the ex-parte applicant. I however directed that such leave would not operate as a stay and that the question of leave operating as a stay be heard inter partes before a ruling can be made.

5. When the matter came up inter partes on 17th March, 2015 the parties offered to file written submission on the issue and leave it to the Court to make a ruling.

6. Mr. Oduor for the applicant submitted that once there is an arguable case, leave is to be granted and the Court at that stage is not called upon to go into the matter in depth. On this point Counsel cited the case of **Aga Khan Education Service Kenya v. R. and Others and Mbutia v Jimba Credit Corporation** where in the latter case the Court held that in applications for interlocutory injunctions the Court is not required to make final findings on contested facts and law and the Court should only weigh the relative strength of the parties cases.

7. Mr. Oduor further submitted that the proviso for the hearing inter partes of the issue of leave operating as a stay must start from the point that leave has already been granted and the determination of the question should rest on the further tests whether damages are adequate remedy and where the balance of convenience lies. Counsel on this score invited the Court to the case of **Republic v. City Council of Nairobi** ex parte **Inderpal Singh & 2 Others** where the Court held that in considering whether or not leave granted should operate as a stay pending determination of the applicant's main motion, it would not be appropriate to attempt to address the issues raised concerning the competence or otherwise of the applicant's suit since these may prejudice the hearing of the substantive motion.

8. Regarding existence of alternative remedy, Counsel sought reliance on ex-parte **Inderpal Singh** (supra) and submitted that as a general rule, the existence of an alternative remedy is no bar to the commencement or judicial review proceedings or to the granting of judicial review remedies in appropriate cases. Counsel therefore submitted that the order for leave operating as a stay be granted for

failure to do so would render the substantive motion purely an academic exercise.

9. Ms. Kaluai for the respondent on the other hand submitted that judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. Its purpose is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large.

10. Concerning the respondent, Counsel submitted that under Code of Regulations number 27(3) the respondent had the discretion to transfer a teacher at any time even when such a teacher has not applied for transfer. Further that the applicant in his letter was informed that he had 14 days to appeal against the decision to transfer him. According to Counsel therefore failure by the claimant to exercise this right bars the applicant from alleging breach of principles of natural justice with regard to him.

11. Concerning entitlement to judicial review remedies, counsel submitted that the claimants terms and conditions of service are provided for in his letter of appointment and it is clear that his engagement with the respondent was contractual being employer-employee relationship and fell within the purview of private law. Counsel contended that judicial review orders are used by the Court in its supervisory jurisdiction to review lawfulness of an act or decision in relation to an exercise of public duty or act.

12. The relationship that exists between the applicant and the respondent is contractual and governed by private law hence outside the province of judicial review. To support this contention counsel relied on the case of **Staff Disciplinary Committee of Maseno university & 2 others v. Prof. Ocheing Okello.**

13. An applicant for interlocutory stay pending substantive hearing of judicial review application is akin to an applicant for interlocutory injunction pending the hearing of the main suit. The principles and considerations are therefore essentially the same. The applicant for leave must demonstrate that he has a prima facie case with probability of success. Or to put it the other way, the applicant has to show that he has an arguable case to present during the substantive hearing.

14. As Nyamu J (as he then was) stated in the case of **Re Birac International SA** an arguable case is not ascertained by the Court tossing a coin or waiving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise. One has to consider, without making any findings, the scope of judicial review remedy sought, the grounds and possible principles of administrative law involved.

15. The applicant in this matter complains that:

(a) The Applicant had been working in Nairobi for over twenty years and stayed with his family at the said place and near to retirement.

(b) The Applicant had taken a loan facility which loan was granted based on his net income in Nairobi.

(c) Should the applicant be transferred to Kisumu, his net income would go down due to reduced house allowance and commuter allowance hence he would not be in a position to service his loan.

(d) The said transfer was done arbitrary without consulting him against article 41 of the Constitution of Kenya.

(e) The Applicants; station (i.e. Kabete Technical Training Institute) as it was then was understaffed and the management had to hire temporary staff to fill the void of less teachers.

(f) The said transfer was done irregularly and with malice to the detriment of the Applicant.

(g) That the said decision went against the principles of natural justice.

16. The complaints as it were revolve around the claimant's contract of employment with the respondent.

17. In analysis, the possible issue for trial when the substantive motion is filed, the Court will be seeking to inquire into the role of the respondent in transfer of teachers and staff employed by them. This would entail interrogation of the respondents code of regulations and transfer policies. These are essentially contractual issues and are underpinned by the contract of employment between the claimant and the respondent and its code of regulations. These are as it were, private law matters and do not fall within the purview of public law to which judicial review is applicable.

18. Whereas there is public interest on the way the respondent managers and conducts its affairs in relation to teachers generally, there is no public interest on the considerations the respondent takes into account in the transfer or reassignment of teachers generally if such transfer or reassignment is carried out in good faith and in non-discriminatory manner.

19. The complaints raised by the applicant seems to be purely what he deems to be personal inconvenience if he was to proceed on transfer to Kisumu. He has not shown in what way the transfer has gone against the principles of natural justice or breached article 41 of the constitution.

20. In conclusion, whereas the applicant may be within his right to seek judicial review orders, the grounds and principles of administrative law which might ultimately be involved in the substantive motion do not warrant the grant of leave to pursue them to operate as a stay. The applicant has not sufficiently demonstrated any issue around his transfer which extends beyond his contractual relationship with the respondent that would warrant stay pending the hearing and determination of the substantive motion if eventually filed.

21. The Court therefore grants the applicant leave to file the substantive motion within 21 days of this ruling but declines to order that such leave do operate as a stay.

22. It is so ordered.

Dated at Nairobi this 29th day of May 2015

Abuodha J. N.

Judge

Delivered this 29th day of May 2015

In the presence of:-

.....for the Claimant and
.....for the Respondent.

Abuodha J. N.

Judge