



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISC. APPL. NUMBER 30 OF 2014

DISMUS OMONDI OBONDO..... CLAIMANT

VERSUS

JUDICIAL SERVICE COMMISSION.....RESPONDENT

RULING

1. By ex-parte chamber summons filed on 29th December, 2014, the applicant sought leave to apply for judicial review orders of certiorari and prohibition to issue against the respondent to quash and or prohibit certain actions of the respondent which included the decision of the respondent dated 30th July, 2014 to proceed with the disciplinary hearing against the applicant without furnishing the applicant with all documents in support of the charges and further an order of certiorari to remove into the Court and quash the respondent's decision dated 17th December, 2014 terminating the applicant's contract of employment on the basis of the flawed disciplinary hearing.
2. When the matter came before me on 30th December, 2014 I certified the application urgent and further granted leave to apply for judicial review orders as I felt reasonably persuaded that the applicant raised arguable legal questions which merited the Court's determination. On the issue of leave granted operating as a stay of the decision prayed to be quashed or the action prayed to be prohibited, I directed that the application be served on the respondent for interpartes hearing on 20th January, 2015.
3. After a couple of adjournments to enable the parties complete filing their respective papers and responses, on 10th February, 2015, Dr. Khaminwa appearing for the petitioner submitted that leave should be allowed to operate as a stay. According to him a stay operates against a decision maker which in this case is the Judicial Service Commission. No prejudice would therefore be suffered if a stay was granted and a quick hearing is ordered. According to Dr. Khaminwa, the substantive motion raised serious points of law in that the disciplinary process by Judicial Service Commission, the respondent, showed the Chief Justice and Judges participated in the process and the petitioner's dismissal letter was signed by the Chief Justice. According to counsel, the Judicial Service Commission has a Secretary who is the Chief Registrar of Judiciary and ought to have been the one to sign the petitioner's dismissal letter. It was his contention that the Chief Justice and Judges in the Judicial Service Commission ought not to participate in disciplinary matters which could end up in Court. Their participation, according to Counsel, denied the petitioner fair hearing as required by rules of natural justice.
4. Dr. Khaminwa further submitted that the petitioner was not accorded fair hearing in that there was no equality of arms since the applicant who is a non-judge was facing judges in the Judicial

Service Commission. Counsel further submitted that there was unfair hearing in that the applicant was never provided with the documents, the basis of accusations against him. These documents, according to counsel were produced for the first time in Court and after the petitioner's dismissal.

5. Regarding dismissal, counsel submitted this was a grave matter and could lead to inability to obtain another appointment. Further that a replacement of the petitioner would amount to a confirmation that the applicant was properly dismissed. In conclusion counsel submitted that the petitioner had demonstrated serious questions of law and the stay ought to be granted.

6. Mr. Issa for the respondent on the other hand submitted in opposition that the proposition that Judges should have been excluded in the disciplinary process was not backed by any law. According to Counsel, Judicial Service Commission is a corporate body and sits as a commission set up under the Constitution and further that the disciplinary committee against the petitioner was not chaired by a Judge besides the petitioner did not challenge the composition of the committee hence could not raise the issue at the litigation stage. According to Mr. Issa, unless and until the Constitution is amended to exclude Judges, the composition of Judicial Service Commission would remain so. Further, Judges sit as Commissioners discharging Constitutional functions, they do not sit as Judges.

7. Concerning the complaint over provision of documents, counsel submitted that this was not a ground for stay since the procedural fairness of disciplinary process can be determined at the substantive stage. According to counsel, prima facie, either sides had positions regarding whether the petitioner was provided with documents or not.

8. Mr. Issa further submitted that employment contracts can be terminated on lawful grounds and termination is not a punishment. Concerning replacement of the petitioner, counsel submitted that public interest requires that the position is filled because the absence of a substantive holder of the office since the petitioner was removed, adversely affected the Human Resource function of the Judiciary. Counsel further submitted that the application as filed sought judicial review orders hence the Court would not be touching on the merits of the dismissal and that all that might be impugned is the process which if the Court finds was flawed, the Judicial Service Commission can commence afresh.

9. In response to Mr. Issa's submissions, Dr. Khaminwa stated that the Court was concerned with individual rights of workers and that there was a process to be followed in removing judicial staff. The Court had power to inquire into the removal process to see if it was done properly.

10. An applicant for interlocutory stay pending the substantive hearing of a judicial review application is to me not different from an applicant for an interlocutory injunction pending the hearing of the main suit. The principles and considerations in both situation are therefore more less the same. For instance, just like his counterpart in interlocutory injunction application, an applicant for interlocutory stay 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 substantive hearing.

11. Concerning whether damages would be an adequate remedy in the event that an applicant for judicial review orders succeeds, this is where it may be said that there is deviation from interlocutory injunction application since damages is not one of the remedies available to an applicant for judicial review. Traditional and well settled judicial review remedies are orders for certiorari, mandamus and prohibition. They all concern the questioning of the decision making process and the action a Court may take in impugning such decision without going to the merits or demerits of the decision itself.

12. As was held by Nyamu J (as he then was) in the case of **Re Birac International SA (Bureau Veritas) (2005) E.A 42**, 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.

12. In the present application, the applicant complains in the main as follows:

(a) That he was invited on 11th July 2014 to attend a Disciplinary Hearing before a Panel of the Respondent's Commissioners, namely, Commissioners Rev. Samuel Kobia, Ms. Florence Mwangangi, Tom Ojinda, Emily Ominde and Ann Amadi, the Chief Registrar of the Judiciary.

(b) That at the said hearing, he was not accompanied by Counsel but the disciplinary hearing was adjourned to 30th July 2014.

(c) That on 25th July 2014, after getting advice from his advocates, he requested the Respondent to furnish him with documents that formed the basis of accusations in the Respondent's letter of interdiction dated 31st March 2014 to enable him to adequately prepare for his defense.

(d) That the Respondent declined to avail all the documents that formed the basis of the charges to him.

(e) That the Chairman of the Respondent's disciplinary Hearing Panel promised him that they would not pursue charges against him for which the documents had not been availed.

(f) That the Respondent nevertheless went ahead to hear the charges they had leveled against him without modifying the charges as framed on 31st March 2014.

(g) That the Respondent's decision to refuse to avail the full complement of documents that formed the basis of his interdiction and charges and then proceeding to hear the charges on the basis of initial accusation was unfair, unreasonable and irregular.

(h) That on the basis of the unfair, unreasonable and irregular hearing the full membership of the Respondent met on 17th December 2014 and made a decision to summarily dismiss him from employment.

(i) That he was advised by his advocate on record M/s Musyoka Murambi and Associates Advocates which advise he verily believed to be true that his legitimate expectation to have accurate charges with particulars and supporting documents was breached by the Respondent.

(j) That he was also a victim of bias as two members of the Respondent's Commission who made the final decision to summarily dismiss him, on 17th December 2014 had openly expressed bias against him.

(k) On 11th April 2014 Commissioner Justice Mohammed Warsame, in the presence of Commissioner Emily Ominde told Mr. Benedict Omollo, the then Director of Finance at the Judiciary, and himself to their faces that there were too many Luos at the Judiciary in Charge of Directorates and that he was going to see to it that they were sent home.

(l) That the comments by the Hon. Mohammed Warsame were made at the waiting room of the Salaries and Remuneration Commission Offices situated on the 6th floor, Williamson House, off Ngong Road in Nairobi.

(m) That he immediately asked him what he meant by that remark and he confirmed to him that he meant what he said.

(n) That the Hon. Chief Justice was not happy with him for his refusal to approve payment to his aides of allowances not recognized under any regulation and without the requisite approvals.

13. The respondent through its Registrar Ms. Winfrida Mokaya stated as follows:-

(a) That by a letter of appointment dated 30th April 2012, the Judicial Service Commission appointed the Applicant as the Director of Human Resources and Administration.

(b) That as the Director of Human Resource and Administration, the Applicant was the head of the Human Resource and Administration Directorate in the Judiciary. The Applicant was expected to provide professional and administrative advice and strategic leadership on all matters relating to human resource and administration in the judiciary. The applicant was expected to discharge his duties with integrity and adherence to the judiciary scheme of service.

(c) That by a letter dated 31st March 2014, the Respondent informed the applicant that he had failed to discharge his duties diligently and transparently and set out in detail, the allegations of gross misconduct that had been levelled against him and gave him an opportunity to show cause why severe punishment should not be administered.

(d) That the allegations of gross misconduct were set out as follows;

(i) Neglect of duties – severally and without authority countermanded decisions, directions, recommendations and policy guidelines resulting in huge disparities between salaries of new and old employees;

(ii) Unprocedurally allowed the irregular recruitment and employment of staff without following laid down procedures and without seeking approval of the Commission.

(iii) Under his watch allowed staff to be seconded to the Judiciary without due regard to the rules and regulations on secondment.

(iv) Failed to ensure adherence to the Judiciary Schemes of Service that resulted in irregular and underserved promotion of some members of staff;

(v) Irregularly approved leave for officers deployed in the office of the former Chief Registrar of the Judiciary.

(vi) Incompetence – During the period of employment with the judiciary, directly and indirectly showed that he was unable and unwilling to perform his duties, responsibilities, obligations and tasks entrusted to him.

(e) That by a letter of the same date, 31st March 2014, the Applicant was interdicted pursuant to the provisions of Section 16, Part IV, Third Schedule of the Judicial Service Act, so as to pave way for investigations to be done.

(f) That the Applicant submitted a response dated 14th April 2014 in answer to the issues raised in the letter dated 31st March 2014.

(g) That after consideration of the allegations of gross misconduct and the response by the Applicant, the Judicial Service Commission resolved that the disciplinary proceedings instituted against the Applicant would continue. The Applicant was notified that the disciplinary hearing would be conducted on 11th, 14th, and 15th July 2014.

(h) That at the initial day of hearing on 11th July 2014, the hearing did not proceed as the applicant requested for copies of documents in support of the allegations of gross misconduct to be availed to him. The adjournment was granted and the Applicant was directed to write to the Chief Registrar with a list of the documents required.

(i) That by a letter dated 14th July 2014, the Applicant requested for copies of the documents to enable him to respond to the allegations.

(j) That by a letter dated 15th July 2014, the JSC provided the Applicant with all the documents requested except for the documents that the Applicant had not given when handing over.

(k) That the applicant then filed a second response to the allegations of gross misconduct.

(l) That by a letter dated 24th July 2014, the JSC informed the Applicant that the disciplinary hearing would proceed on 30th July 2014.

(m) That the Applicant by a letter dated 25th July 2014, requested for more documents to enable him to prepare for the disciplinary hearing scheduled for 30th July 2014.

(n) That the disciplinary hearing took place on 30th July 2014 in accord with the procedure set out in the Judicial Service Act and the Applicant was accompanied by his Advocate, Mr. Albert Simiyu.

(p) That the Chairman of the Disciplinary Committee Rev. Samwel Kobia informed the Applicant that the disciplinary hearing would proceed by considering each charge as enumerated in the letter dated 31st March 2014 and that should there be any charge that the Applicant felt he could not defend due to the lack of documentation, he was at liberty to object so that a decision would be made on how to proceed with the hearing of that charge.

(q) That the Applicant then confirmed he was ready to proceed and did not raise any objection on either lack of sufficient documentation or bias on the part of any of the Commissioners.

(r) That a reading of the Hansard report confirms that the Applicant was accorded a fair hearing and that he had confirmed that he had been given all documents to enable him prepare for his defence.

(s) That the Applicants allegations that the disciplinary hearing was unfair, unreasonable and irregular was therefore unfounded. The hearing was conducted in accord with the provisions of the Constitution, the Judicial Service Act, 2011, the code of conduct for Judiciary Staff and the rules of natural justice.

14. From the foregoing it would emerge that the applicant's complaint is not that he was not provided with the information he required to prepare for his defence but that the information so given was insufficient and he thus sought for more detailed information and documents.

15. The respondent on its part maintained that the documents provided were sufficient and further he was informed that he was not obliged to respond to any charge in respect of which he

felt there was no adequate information or documentation. According to the respondent, the applicant did not exercise this option and instead participated in the proceedings.

16. On the allegation of bias against the applicant by Commissioner Warsame and Honourable the Chief Justice, the respondent has stated that these were raised for the first time in Court and that at no time during the disciplinary hearing did the applicant raise the issue.

17. As stated earlier, in this ruling, the duty of the Court at this particular stage is to examine the application as brought and decide whether the applicant has demonstrated an arguable case with probability of success at the full hearing of the motion. Further the Court at this stage needs to consider the nature of the remedies sought and see if they are capable of being granted if the applicant ultimately proves successful.

18. Prima facie, the allegations of failure to furnish the applicant with sufficient information and documents to enable him adequately prepare for his defence as well as complaints of bias are serious and cannot be adequately decided at this stage without delving deeper into the application and without calling for additional evidence including oral testimony if necessary. On their face alone, the applicant has demonstrated that he has an arguable case to present to the full trial.

19. The next issue for consideration by the Court is whether the remedies sought are capable of being granted in the context of the nature of the relationship that existed between the applicant and the respondents.

20. The applicant was an employee of the respondent. His services have since been terminated. The effect of the orders sought in this application if ultimately granted would have the effect of reinstating the applicant to his employment but with no guarantee that the respondent will not recommence the disciplinary process devoid of the alleged procedural lapses and dismiss him again. In other words, the judicial review remedies sought in their nature do not go to the merit or otherwise of the accusations levelled against the applicants. They will still like proverbial sword of Democoles be hanging around his neck.

21. Judicial review remedies are public law remedies and ought to issue where the matter concerns public interest. That is to say whereas the issue may have its roots in personal or private interest, the applicant ought to demonstrate that the action or inaction of the public body or officer, attacks the fabric of the Constitution or public interest which if left unchecked would destroy the fundamental principles of natural justice and constitutionalism. The issue so to speak must traverse beyond just personal rights and liberties of the applicant.

22. The applicant complains that the documentation which formed the basis of the charges against him were inadequate and that some members of the Judicial Service Commission displayed open bias against him. These are matters which can be adequately addressed within the provisions of the Constitution and Employment Act without invoking public law remedies by way of judicial review. In this regard, I will associate with the words of Visram JA in the case of **The Staff Disciplinary Committee of Maseno University & 2 Others v. Prof. Ochong' Okello (2012) eKLR** where the learned Judge observed as follows:-

“...orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the respondent and Maseno University was contractual relationship governed by private law...While it is true that the public has general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties...”

23. In conclusion the Court finds that whereas there may be arguable issues at the trial of the substantive motion, the nature of the remedies sought are inappropriate in the context of the

dispute between the applicant and the respondent which is a purely contractual matter governed by private law. There is no public interest as it were in the termination or reinstatement of the applicant to employment. The applicant has not demonstrated any issue which extends beyond his contractual relationship with the respondent that would warrant the invocation of the public law remedy of judicial review.

23. The Court therefore grants the applicant leave to apply for judicial review orders but declines to declare that such leave do operate as a stay.

24. It is so ordered.

Dated at Nairobi this 7th day of May 2015

Abuodha J. N.

Judge

Delivered this 7th day of May 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge