



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISC. APPLICATION JR 21 OF 2014

JONATHAN KIPKURUI KOSKEI

PETER ELANI EREGAE..... CLAIMANTS/APPLICANTS

VERSUS

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGEMENT

Introduction

1. The Applicants, Jonathan Kipkirui Koskei and Peter Elani Eregae instituted these proceedings against the National Police Service Commission and the Attorney General as the respondents. The National Police Service Commission Act, 2011 was passed by Parliament pursuant to the provisions of Article 246 of the Constitution, 2010 and under section 14 and the Second Schedule Rule 3 of the Act, all serving officers required to undergo vetting. The Rules and Regulations governing the vetting process were published on **16th December 2013**. These Rules were made available to the 1st Respondent on 9th January 2014. The Applicants underwent vetting on 3rd January 2014 and a determination was made on 8th January 2014 without application of the Rules and Regulations as these had not been published. The 1st Respondent made a decision to remove the Applicants from service.

2. The Applicants are seeking for the following orders;

a) That the applicant be granted leave to apply for an ORDER of Certiorari to bring into this Court and to quash the determination of the Respondent to remove the Applicants from the National Police Service

b) That the Applicants be granted leave to apply for an ORDER of prohibition to issue as against the Respondent to prohibit the effecting of the determination made against the ex-parte applicants.

c) That the Applicants be granted leave to apply to an ORDER of prohibition to issue as against the Respondent to prohibit the Respondents from making any retirement, promotions, dismissal, order of removal on the vetted officers on the basis of the vetting conducted in the month of December 2013.

d) An ORDER to issue to the Respondents to compel the reinstatement of the ex-parte Applicants to their duties as Police Officers

e) That the grant of leave herein do operate as stay of the decision of the First Respondent to remove the Applicants from the National Police Service.

f) That costs of this application to be provided for.

Applicants' case

3. The Applicants case is that pursuant to the provisions of the Police Service Commission Act, the 1st Respondent commenced vetting of all police officers including the Applicants on 25th November 2013 and at the commencement of the process there were no Rules and Regulations to regulate the same. Upon the launch of the vetting, the Respondent invited the public to submit their complaints in early December 2013 while there were no Rules and Regulations to regulate the process of vetting. The Respondent prepared a vetting programme and scheduled the vetting of the Applicants for 18th December 2013. The Applicants appeared for vetting without being briefed of the existence of any Rules and Regulations for vetting and only learnt that such Rules and Regulations were published on 16th December 2013, two (2) days prior to the vetting and in any event the 1st Respondent only received such Rules and Regulations on 9th January 2014. This was after the Applicants had been vetted and a decision made to remove them from the Police service. The Respondents made a decision on the vetting on 3rd January 2013 and indicated that the proceedings and ruling would be supplied to them by 6th January 2014 but this has not been done but a decision was made on 8th January 2014.

4. The vetting panel consisted of;

Johnstone Kavuludi

Mohamed Murshid

Ronald Musengi

Mary Owuor

David Kimaiyo – ex officio

Samuel Arashi – ex officio

Grace Kahindi – ex officio

5. The quorum required under section 14 and second schedule rule 3 of the National Police Service Commission Act to have 5 members who shall include 2 members appointed under Article 246 (2) (a) (i) and (iii) of the Constitution and the 5 members exclude the ex officio members appointed under Article 246(b) and (c) of the Constitution was not adhered to. There were no complaints during the vetting of the Applicants and the case was conducted contrary to the Rules of natural justice where the Respondents became the components, witnesses and judges in the case.

6. The mandate of the Respondent at the vetting is to determine the suitability and competence of the Police officers but the Respondent went beyond what is contemplated in law. The decision by the Respondent had no reasoning and the conclusions made were without any evidence as no witnesses were called.

7. It is the Applicants case that the Respondent applied selective justice and discrimination in the way they conducted their interview in that there were officers who were interviewed in private while others were subjected to public view yet all the officers were asked the same questions. The Respondents

determined who to interview in public or in private. The Applicants were interviewed in public at the KICC, some were interviewed in private while others got interviewed at the offices of the respondent. This was not transparent, fair and this was meant to be manipulate of the process for own selfish interests contrary to the public good.

8. The Respondent incorporated persons of questionable integrity in the vetting panel. Joseph Kaguthi was adversely mentioned in the TJRC report and has not been cleared; Simiyu Werunga is implicated in the JSC scam; and Ronald Musengi has a fraud case pending in court. The vetting panel included persons who had not been gazetted to serve especially the members from the Task Force on Community Policing who have no mandate to vet police officers. The determinations of the vetting panel and the thus the Respondent are an illegality as they lack the force of law. If left unchecked, this would perpetuate injustice.

9. The Respondent exceeded their jurisdiction by determining the integrity issues instead of suitability and competence of the applicants. Integrity issues are a preserve of an independent authority set up by statute and such authority had no problems with the applicants. The decisions made by the vetting panel and by extension the Respondent Aare illegal, null and void *ab initio*. Police officers have been subjected to inhuman and degrading treatment. The vetting board is vested with quasi-judicial powers and therefore is subject to observe the Rules of natural justice in the manner they are conducting the vetting process. Police officers should be handled with decorum and fairness.

10. The reliefs sought are on the grounds that the Respondents have decided to remove the Applicants from service in disregard of a Court order and without following due process. The Applicants were subjected to vetting without the requisite quorum stipulate in statute, without the Rules and Regulations thus ending in a flawed process, the Respondents acted in excess of their jurisdictions in examining the integrity of the Applicants instead of considering the suitability and competence which was their mandate. The Respondent introduced stagers into the vetting process without any legal mandate leading to a flawed process; there was discrimination when the Respondent interviewed some officers in public, private or in their personal offices while similar questions were asked. The Respondent considered irrelevant issues while examining the Applicants and the subsequent finding hence irrelevant as they do not relate to the suitability of competence of the Applicants to serve in the police service. The Respondent acted without having any complaints against the applicants, they failed to observe the Constitution of statute and thus violated the fundamental rights and freedoms of the applicants. There are serious violations contrary to the rule of law and justice hence the orders sought herein should be granted.

Respondents' Case

11. In response to the applicants' case the Respondents filed the following grounds and also swore affidavit in reply. The respondents' case is that the vetting process is a legal requirement under Article 246(3) (b) and (c) of the Constitution and section 7 of the National Police Service Act, 2011 and the 1st Respondent has the mandate to comply with the same. The Rules and Regulations for the process were gazetted on 16th December 2013 and prior to such publication, the Respondents invited the senior police officers and the Applicants to the launch of the process and sensitisation over the same. Such vetting was to address officer's satisfaction, professional conduct and discipline, integrity and financial probity and respect for human rights to ensure those in the police service were competent to remain in the service. The process of vetting was undertaken in an open and transparent manner with the officers being granted access to all relevant information in accordance with Article 35 of the constitution.

12. It is the respondents' case that the Respondents invited members of the public to submit any relevant information prior to the vetting process on all the officers subject of the same and on 17th December 2013 the first set of officers underwent vetting which was done in public at the KICC. All complaints against any officer were brought to their attention and each was given a chance to Respondent in writing and at the interview. Results of the vetting were released on 3rd January 2014 and successful officers were allowed to continue in service, some applied for a review while others were found unsuitable among whom were the applicants. The Applicants filed for judicial review on before the High Court on similar

grounds as herein which was heard and the Court made a determination on 20th May 2014 and ordered that the Respondents had conducted the vetting process unfairly; the Court quashed the vetting proceedings; the Respondents were prohibited from effecting the determination made against the applicants; and the Respondents were directed to commence the vetting process *de novo*.

13. It is the respondent's case that following the Court orders and directions, on 26th May 2014 the Respondent wrote to the Applicants on commencing fresh vetting process. The Applicants sought an extension of 30 days but on 3rd July 2014 they wrote alleging the Respondents had not complied with Court orders and directions and having failed to submit themselves for fresh vetting, on 3rd September 2014 the Respondent discontinued their services effective 8th and 9th September 2014. That the averments that the Applicants were not accorded justice at the hearing, that the proceedings were discriminatory and that there were persons in the vetting process that were not so authorised to conduct the same were dealt with in the judgment to the Court delivered on 20th May 2014. Such matters were adequately addressed by the Court in arriving at the final orders made and the directions that the vetting process should commence *de novo*. There is no appeal or application for review against the orders of the court.

Submissions

14. In submissions, the Applicants stated that they have been employees of the 1st Respondent who were subjected to a flawed vetting process in December 2013 which was held by the Court in Petition number 6 of 2014 and JR Misc. No. 11 and 12 of 2014 as having failed to meet the requisite constitutional threshold. The Court quashed the process and directed the Respondents to commence the process *de novo*. By a letter dated 3rd July 2014 the Applicants wrote to the 1st Respondent voicing concerns that there was no compliance with Court orders of 20th May 2014 to commence the vetting process *de novo* where the Respondent failed to notify the public of the vetting process; failed to cure the bad draftsmanship in the National Police Service Act; failing to establish the presence of quorum while executing its functions; and failing to serve the Applicants with written statements, complaints or affidavit in order to be able to respond. The 1st Respondent ignored the concerns of the Applicants and proceeded to discontinue them from service.

15. The Applicants also submitted that the application is not contested as the reply filed by the 1st Respondent officer for the 2nd Respondent is not admissible. Such an officer can only depone to matters within his knowledge for the 1st Respondent and not on behalf of the Attorney General as the 2nd respondent. The application should therefore be granted as submitted. The Applicants rely on decisions of the Court of Appeal, **Mirugi Kariuki versus Attorney General [[1992] eKLR; Republic versus Attorney General & Another [2006] eKLR;** and High Court **Re Bivac International SA (Bureau Veritas [2005] 2 EA 43 (HCK).**

16. On their part, the Respondents submitted that on 10th September 2014 the Applicants moved the Court and obtained interim orders and the Respondents filed preliminary objections where the Court made a ruling on 1st December 2014 and gave orders that the Applicants were to remain in the employment of the Respondents but comply with orders made on 20th May 2014 under Petition 6 of 2014.

17. The Respondents also submitted that applications for judicial review are governed in law under Order 53 of the Civil Procedure Rules to which the Applicants have not complied with thus rendering their application incompetent and cannot be granted as currently framed.

18. That the Respondents have complied with the orders made on 20th May 2014 when they invited the Applicants to submit themselves for re-vetting. There are no contempt proceedings for non-compliance. The Respondent relied on the published Rules and Regulations for the vetting process but in utter disregard the Applicants have refused to comply hence their discontinuation from service. The Applicants have also failed to disclose material facts to the Court in making a decision as to whether to

grant leave for the *ex parte* Applicants to make an application for judicial review. The Applicants have also refused to undergo re-vetting as directed by the Court and where they felt aggrieved by the orders of the court, they have not filed an appeal or applied as appropriate in compliance thereto.

19. The Respondents have relied on the cases of **Mary wangari mwangi versus peter Ngugi Mwangi t/a Mangu Builders Ltd & 3 Others [2013] eKLR**; **Eusabia Karuti Laibuta versus National Police Service Commission [2014] eKLR**; and **Uhuru Highway Development Ltd versus CBK, HCCC No. 29 of 1995**.

Determination

Whether the Applicants should be reinstated back into the Police Service;

Whether the officer of the 1st Respondent has capacity to make an affidavit for the 2nd respondent; and

Whether the orders sought ought to issue.

20. From the onset, it is important to state that upon the Applicants moving the Court herein on 10th September 2014 and the subsequent preliminary objections filed by the Respondent and the ruling made on 1st December 2014, the Court recognised the orders made by the High Court with regard to a similar matter filed before the Court in Petition 6 of 2014 as consolidated with JR 11 and 12 of 2014. The Court herein reiterated the orders made by the High Court where the Applicants were to undergo vetting *de novo* and for that purpose the Court also retained the Applicants in the employment of the respondents. Applicants have since enjoyed interim orders to date.

21. After the Court ruling on 1st December 2014, parties appeared and moved the Court for directions with regard to hearing and on 2nd June 2015, there was agreement to proceed by way of written submissions with regard to the applications filed by the applicants/claimants herein.

22. From the various affidavits, submissions and averments made, there is no appraisal by the Applicants as to the processes that have taken place with regard to the orders made on 1st December 2014. Such orders were to ensure that they remained in employment and to submit themselves for vetting. The Applicants fail to appraise the Court either through affidavit or in submissions as to their current status.

23. This is crucial here as the orders sought, in their nature and the basis of Judicial Review Applications before the Court require that where adverse orders have been made against the Applicants so as to invite the Court to intervene, such matters must be articulated. These are matters such as was articulated in the case of **Land Registrar Kilifi Ex parte Vischi Feranando Misc. Application No. 27 of 2012** and the court finding that the duty is on the Applicants to state their case, the facts and materials relied upon for the Court to invoke its powers and review the adverse orders made by the respondents. In this regard therefore, matters that arose after the orders and directions after 1st December 2014 become crucial and material herein. For the Court to move without such material disclosure is to make serious assumptions that are not only prejudicial to the course of justice but would be to direct in darkness resulting in a serious miscarriage of justice in the circumstances.

24. Where there was no compliance with the Court orders made on 1st December 2014, the Applicants had a clear recourse in law and to move the Court without a recognition of any matters arising thereafter is to act in utter disregard of the context and purpose of the orders so made. Where the Respondents were in compliance, the Applicants were to subject themselves to re-vetting as required by the Respondents and where the process had flaws and in recognition of orders made on 20th May 2014 and reaffirmed by this Court on 1st December 2014, any new and emerging concerns should form a new set of issues that the Applicants can have addressed either in a separate suit or through making the necessary amendments herein or new affidavits. I find no such efforts herein. This thus addresses the first issue set out above.

The reinstatement of the Applicants back to their positions was to make them available to the Respondents for vetting. Without such compliance, the Applicants cannot find justification that the respondents have failed to set in motion modalities for their vetting, To remain outside their workplace would be to act contrary to the interim orders enjoyed herein

25. On the second issue as to whether the affidavit of the officer of the 1st Respondent should suffice with regard to making averments for and on behalf of the 2nd respondent, the Respondents submitted that there was a typographical error in the averments of Johnstone Kavuludi in his replying affidavit with regard to reference for and on behalf of the 2nd respondent. These submissions though recognised by the Respondents as an error form the basis of the opposition to the applicants' case and despite reliance on the provisions of Article 159 of the constitution, affidavits are made by a deponent on matters within their knowledge as at the time of making the same. I however note that the averments made largely are based on the issues addressed by the Respondents in their submissions to their filed preliminary objections which the Court has since addressed. This does not in any way admit to the applications before Court to which the Applicants have the duty to affirm as this is their case and whatever error or mistake the Respondents have done in their averments and affidavit in reply, the burden of supporting the Applicants application is vested upon them.

26. Based on the above issues as outlined, the remedies sought by the Applicants are of the nature that the orders of the Respondents to remove them from service should not be effected and that any such decision should be quashed. I find that such matters have since been addressed by the High Court in the referenced orders of 20th May 2014; the prayer that the Respondents should be prohibited from making any order to retire, promote, dismiss or remove the applications from service on the basis of their vetting in December 2013 have equally since been addressed by the Court with the order to commence the vetting process *de novo*; and by the orders made on 1st December 2014 herein, the Applicants were reinstated back to their positions effectively operating as a stay of their removal from service from the National Police Service.

27. Thus effectively there remains no outstanding issue in remedies for the Court to grant save for the issue of costs. Such costs as claimed and noting the Applicants were reinstated back to their positions by orders of 20th May 2014 and reaffirmed by the orders made herein on 1st December 2014, the Applicants have also enjoyed interim orders since, each party should bear their own costs. .

28. What is clear in these proceedings and the questions raised by the Applicants with regard to their vetting, the matters noted as concerning the questions of integrity, competence and suitability and the violation of their rights as serving officers under the 1st respondent, and save for the question seeking reinstatement in this application that the Court has now addressed, all the other issues were specifically addressed by the High Court in Petition 6 of 2014 as noted above and for the Applicants to go back on them herein is in essence to have a second trial into similar matters. This is not the purpose of this Court and should be discouraged. Where a party fails to get orders sought in the manner contemplated before one court, it does not serve the ends of justice to use similar facts, submissions and averments before another Court of similar status such as this Court to re-submit the same issues. This is an abuse of Court process.

In conclusion, where the Applicants are aggrieved by the second vetting process, the vetting process as directed on 20th May 2014 by the High Court vide Judgement in Petition No. 6 of 2014 and the JR No. 11 and 12 of 2014 as consolidated and reaffirmed by this Court on 1st December 2014, a fresh suit may be filed in that regard. In this case, I find no case to grant the orders sought. The same is dismissed. Each party shall bear their own costs.

DATED and DELIVERED at NAIROBI this 30th day of July, 2015.

M. Mbaru

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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