



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**

**MISC. JUDICIAL REVIEW APPLICATION NO. 83 OF 2015**

**ZACHARY ONSONGO.....EXPARTE APPLICANT**

**VERSUS**

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant, Zachary Onsongo moved the Court under Certificate of Urgency on 3<sup>rd</sup> September 2015 seeking leave to apply for judicial review orders of certiorari and prohibition on orders of the President of Kenya from transferring or retiring the Deputy Inspector General of the National Police Service. Upon service on the respondents, the 1<sup>st</sup> Respondent raised preliminary objection subject of the ruling herein.

2. The 2<sup>nd</sup> Respondent raised the following preliminary objections;

*1. The Applicant seeks to quash the alleged decision of the president who is not a Respondent in the proceedings;*

*2. The Applicant has not attached a copy of the alleged decision by the president that he seeks to be quashed;*

*3. There is no privity of contract between the exparte Applicant and the Respondent to grant him locus to initiate proceedings in respect to an employment contract;*

*4. The Applicant is neither a representative of a trade union that has a CBA with the respondents nor has he exhibited any Power of Attorney to act for the said Ms Kaindi.*

3. Both parties were directed to file their written submissions on the preliminary objections but only the respondents made such submissions. The exparte Applicant was not in Court on the appointed date.

4. The 2<sup>nd</sup> Respondent submitted that the Law Reform Act provides for instances when the Court shall issue judicial review orders as this is a special jurisdiction matter that is neither criminal nor civil in nature. Such matters are governed by sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. In this case, the matter is founded on employment, a civil matter and therefore not apt for the remedy of judicial review.

5. The Respondent also submits that the Employment and Labour Relations Act is specific on who may act for parties in any dispute before the Court under section 22 of the Act. The current Applicant cannot therefore initiate and purport to represent an employee in an employer/employee contractual relationship before this Court as held in the case of **Transport Workers union (K) versus ideal Logistics limited [2012] eKLR**, that the employment relationship is between two parties and by virtue of privity of contract, it is only the parties to the contract who can claim rights under the contract between them. Since the Applicant herein is not a trade union with a recognition agreement, he cannot be a right representative of Ms Kaindi in this matter.

6. A party seeking judicial review orders must meet the principles and procedures of judicial review as held in **Amirji Singh versus The board of post Graduate Studies Kenyatta University, Civil Appl. No.1400 of 1995** and the Court held that a judicial review matter cannot be turned into an appeal as there are rules for the same. Parties must abide by the rules for judicial review as they have opted to take such a procedure.

7. The Applicant has not attached the decision capable of being quashed as required by law as held in **Republic versus Registrar of societies & 2 others, exparte Samuel maina & 2 Others, HCCC JR No.313 of 2013** where the Court refused to grant leave for judicial review as the Applicant had not attached the decision complained against.

8. The Respondent also submitted that the Applicant is not a serious person who has demonstrated his interest in the matter to warrant the orders sought being granted to him as held in **Koigi Wamwere versus The Attorney General [2004] 1 KLR and Republic versus The Commissioner for Co-operative Development ex parte Thika Coffee Mills**. The Applicant has made various allegations against the President who is not a party to the proceedings herein. Such an omission is fatal to the proceedings and the same should be dismissed.

9. The 2<sup>nd</sup> Respondent has relied on various authorities – **Commissioner of Lands versus Kunste Hotel Limited [1997] eKLR; Sanghani Investment Limited versus Officer in charge Nairobi Remand & Allocation prison [2007] eKLR; Republic versus Public Procurement and administrative review Board & 2 Others ex-parte Sanitam Services [EA] limited [2015] eKLR; Michalel Maina Nderitu versus Kenya Power and Lighting Co. Ltd & Another [2013] eKLR; Transport Workers union versus Ideal Logistics Limited [2012] eKLR**.

## **Determination**

### **Whether the Applicant has standing before the Court to institute current proceedings**

### **Whether the Applicant has met the requisite requirements to institute judicial review proceedings**

10. The question of standing is paramount in this matter. The respondents disputed the applicants' standing as a person whose legal capacity to initiate any legal proceedings as such is in question noting that there is no cause of action against the party outside the employer/employee relationship other than the employer or the employer, the Union or the employer organization. That section 22 of the Employment and Labour Relations Court Act outline persons and or parties that have standing before this court. the Applicant herein has based his application for judicial review on the basis that the President of the republic of Kenya did violate the Constitution of Kenya by transferring the Deputy inspector General of Police Service and that their transfer violated article 245 and 246 of the constitution.

11. The position of this Court has taken in a variety of cases filed under Judicial Review provisions as application or as constitutional petitions has been clear to the extent that As far as capacity to institute such Court proceedings before this Court alleging infringement of rights or fundamental freedoms in the Constitution and under the Bill of Rights is concerned there is no doubt that "every person" is entitled to that recourse. See **Petition No. 33 of 2014, Okiya Omtata Okoiti & Another versus KEMRI Board of Management and Others**, where the Court held that the Rules governing applications as under article 22 of the Constitution as read together with judicial review matters under the law Review Act and any

other written law for this Court being The Labour Relations Court Act [the industrial Court Act] While it is true that article 22 of the Constitution refer to “every person” has access to Court under this provision of the Constitution, the Applicant in this case did not approach the Court as “every person”. The Affidavit in support of the application has the annexed affidavit of the applicant, Zachary Onsongo who describes himself as;

*I am the ex parte Applicant herein hence competent to swear this affidavit.*

12. The Applicant does not give any other description of himself and his interest in the matter at all. He does not give the nexus with the decision made by the President of the Republic of Kenya with regard to the Deputy Inspector General of Police and himself. The letter annexed as “ZO1” to the affidavit issued to Grace Kaindi is signed by Joseph K Boinnet and another signed by Johnstone Kavuludi who are not a parties herein and the recipient thereof, Grace Kaindi is equally not a party herein. Such a letter issued to Ms. Grace Kaindi relate to *Retirement on age grounds*. such letter do not make any reference and the Applicant fails to make any reference to a decision by the President to Transfer and or retire the Deputy inspector General of Police as outlined in the application by the applicant.

13. So, what interest exists for the intervention of the applicant/ in employment and labour relations matters? The underlying dispute herein relate to the *retirement on age grounds* of Ms. Grace Kaindi. This thus talks to an issue relating to employment and labour relations that the Employment and Labour Relations Court Act [Industrial Court Act] spell out the parties who can approach the Court in such a relationship. Judicial review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced by the employee as to how the rights in her employment relationship with the employer and the respondents herein arose. For the Applicant to thus initiate the proceedings herein and frame the issues in the Chamber Summons as done without having the benefit or regard to the contract of employment for purposes of *retirement on age grounds* would be to defeat the very purpose of the proceedings required before this Court – that of production of documents that would be necessary to assess the terms and conditions of employment which would require the call of evidence and the alleged affected employee Ms. Grace Kaindi where oral evidence would be adduced. This I find was the essence in the decisions of **Republic versus Ex part Karia Misc. Appl. 534 of 2003**.

14. Equally, the Court in **Sanghani Investment Limited versus Officer in charge Nairobi Remand & Allocation Prison** held that Judicial Review being a discretionary remedy will only issue if it will serve some purpose. The Judge went ahead to quote;

*... Certiorari is a discretionary remedy which a Court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining.*

15. In this regard therefore, I find no interest, no requisite grounds or any useful purpose the Applicant will achieve in moving the Court as he has and in his capacity as a person concerned with the rights of another who is an employee and has not moved the Court as required under section 22 of the Industrial Court Act or as under article 22 of the constitution. The objections raised by the Respondent in this regard must therefore succeed.

16. As rightly submitted by the 2<sup>nd</sup> respondent, applicants coming for judicial review before any superior court, must follow certain basic requirements for the Court to base its decision on. Where a party has opted to take the route of judicial review, seeking for orders of certiorari and prohibition against a decision that has already been taken and is also cited as the basis of approaching the court, then such a decision must be attached to the application for judicial review for the Court to assess the same and be able to order or direct as appropriate. It is not sufficient for a party to only cite that they have knowledge of a decision having been made. Or that they are aware that a particular public officer has issued a declaration in a non-specified place and time and then seek to challenge such a declaration. For the Court to base such a fluid decision to issue directions to a Respondent would be equivalent to chasing a loose goose in a wild field. That is not the purpose of the court, as to do so would be making orders and

directions without certainty and not capable of enforcement. The challenged decision and the requirement to attach it in an application such as this one would serve this very important purpose – the Court would with certainty be able to appreciate the decision complained against. This is the essence of the diction in **Republic versus Prof. Mwangi kaimenyi ex-parte KIPPRA, Civil Appeal No. 160 of 2008** where the Court held;

*... The Court cannot act in vain against a non-existent decision. There was no decision or letter ... that Court be called and removed into the High Court to be quashed ... a Court of law cannot descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into Court a decision to be quashed.*

17. The Applicant has attached a decision made by the Inspector General National Police Service and that of Chairperson, National Police Service Commission and not the alleged decision made by the President of the Republic of Kenya. The attached letters of the two officers cannot form the basis of a grant of orders sought by the applicant. The decision complied of herein, is that of the President. Based on the cited authorities above, the orders sought and in their nature, the absence of such a decision renders a fatal omission herein and the objections raised by the 2<sup>nd</sup> Respondent must be upheld.

**Ultimately, the objections raised are upheld. The effect of the same renders the application by the Applicant fatally defective in terms of the substantive issues raised and the procedure adopted. Lack of standing of the Applicant also removes him from seeking the orders sought.**

Delivered, dated and signed in open Court at Nairobi this 21<sup>st</sup> Day of September, 2015.

**M. Mbaru**

**JUDGE**

In the presence of:

Court Assistant.....

.....

.....