



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
JR MISC. APPLICATION NO. 5 OF 2014
(Formerly NRB H.C. JR NO. 351 of 2010)

NAIVASHA MUNICIPAL COUNCIL CLAIMANT

VERSUS

INDUSTRIAL COURT OF KENYA RESPONDENT

LOCAL GOVERNMENT WORKERS

UNION INTERESTED PARTY

M/S Kagucia for the Applicant

Mr. Ojwang for the Respondent

Mr. Mbuvi for the interested party

JUDGMENT

1. The judicial Review Application dated 20th December 2010 seeks the following orders:
 1. That leave be granted to the applicant to apply for an order of certiorari to remove into this Honourable Court and quash the award delivered by the Industrial Court on 31st August 2007 in Industrial Court Cause **No. 132 of 2006 – Kenya Local Government Workers Union Versus Naivasha Municipal Council**;
 2. that the proceedings in the Industrial Court be quashed forthwith by an order of certiorari on their removal into this Court;
 3. that costs of this application be provided for.

Facts

2. The facts constituting the alleged cause of action are that between 28th May 1993 and 30th June 1993, the Grievants who were 13 employees at the Naivasha Municipal Council were summarily dismissed allegedly on the ground that they had committed fraud. The matter was heard in the erstwhile Industrial Court. The Grievants prayers were that they be reinstated to their duties from the date of the Award.

3. By an order dated and delivered on 16th July 2010 by the **Honourable Judge Paul K. Koskei**, demand of reinstatement was allowed and the Town clerk was ordered to reinstate the Grievants to their former employment, without loss of their full salary and all other benefits within 20 days from the date of the Award.

4. The following grounds of opposition were raised by the Respondent to the Judicial Review Application:

1. that the Judicial Review is statute barred as order **53 Rule 2** requires that application for Judicial Review should be made within six months after the proceedings which is the subject matter of the review.
2. that the Judicial Review application is an abuse of the Court process since the Industrial Court has jurisdiction to hear and determine the dispute.
3. that the Industrial Court exercised its powers as set out at **Section 64** of the **Labour Institutions Act, 2007**, which gives the Industrial Court the mandate to hear and determine and give appropriate remedies in about matters.
4. that the Industrial Court Judge did not err in reinstating the Applicant's former employees as provided for in **Section 12(4)** of the **Labour Institution Act, 2007** where the circumstances so warrant. Thus the Industrial Court's ruling was well founded in law and practice.
5. that the Industrial Court's Award was not unreasonable as the dismissal was unfair and it did not conform to the Public Service Commission's Regulations and Disciplinary Procedures.

5. The Court will at the outset deal with the first issue raised above as it touches on the jurisdiction of the Court to entertain the Judicial Review application in the first place.

2 **Order 53 Rule 2 provides that:**

“leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by an Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined once the time for appealing has expired.”

6. The exparte Applicant first sought the review of the award of the Industrial Court delivered on 31st August 2007 by the Industrial Court itself and a ruling dismissing the application for review made on 16th July 2010 by the Industrial Court.

7. The exparte Applicant filed exparte Chamber Summons on 2nd December 2010 seeking leave to apply for an order of certiorari to quash **“the Award of the Respondent - The Industrial Court of Kenya made on 31st August, 2007 and the subsequent proceedings culminating in the Ruling and order of the Respondent Industrial Court of Kenya dated and delivered on 16th July, 2010 in Cause No. 132 of 2006.”**

8. Leave to file a substantive Notice of Motion was granted exparte and the motion was filed on 31st December 2010.

9. It is apparent that the decision that is sought to be quashed is the Award of 31st August 2007. The Applicant made an election to first seek the Industrial Court to review its decision which endeavor failed on 16th July 2010. For the purpose of limitation, time must run from the date of the initial Award on 31st August 2007 and not the subsequent ruling of 16th July, 2010.

10. Clearly, the exparte application for leave was filed more than three (3) years from the date

the decision the subject of review was made.

11. I have had occasion to deal with this matter in the Industrial Court of Kenya at Nairobi, **Cause No. 662 of 2013**. I relied on the decision of **Ojwang Ag. J.** (as he then was) in **Misc. Civil Appl. No. 229 of 2003**, in a matter, just like the present, leave to bring Judicial Review application seeking an order of *certiorari* was granted *ex parte* and therefore the issue of statutory bar was not raised at that stage.

12. In the matter, the Court was referred to two cases to wit; an application by **Gideon Waweru Gathunguri (1962) E.A. 520** and **Mahaja Khutwalo (1983 KLR 553)**.

The Gathunguri case came up before a two judge bench (**Rudd Ag. C.J. and Wicks J.**) and the question was whether leave to apply for *certiorari* can be made after the expiry of a period of six months following the making of the decision being impugned. The matter involved the interpretation of **Section 9** of the **Law Reform Act, Cap 26** of the **Laws of Kenya**.

Rudd, Ag. CJ. Stated;

“It follows that Rules of Court cannot defeat the clear provision of subsection (3) which imposes an absolute period of limitation in the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of being quashed so that leave shall not be granted unless the application for leave is made not later than six months after the date of such judgment, order, decree, conviction or other proceedings.”

13. In the case of Mahaja (*supra*), the Court of Appeal held that where an *ex parte* application for leave to apply for an order of *certiorari* is made coupled with an application to extend time, notice of at least the point dealing with extended time ought to be given, so that the matter can be heard *inter partes*.

14. In the present case, just like in the matter of **Isaac W. Wekesa** (*supra*) there was no application for extension of time at the *ex parte* stage.

15. Justice J. B. Ojwang in Misc. Appl. No. 229 of 2003, having reviewed these authorities held;

“that all actions in quest of the discretionary order of certiorari must be commenced either within the six months limit following the taking of the decision impugned, or outside this limit when the Court’s leave has been secured during that time limit.”

16. The present application is not in conformity with the aforesaid procedural requirements and therefore, the prayers sought cannot be granted.

17. The Court will not examine other issues raised in this matter as the Court lacks jurisdiction to entertain the substantive application for Judicial Review.

The application is therefore dismissed with costs to the Respondent and Interested Party.

Dated and Delivered at Nairobi this 13th day of June, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE