



**Wachira v Ethics and Anti-corruption Commission; Attorney General
(Interested Party) (Judicial Review Application E078 of 2023)
[2023] KEHC 26860 (KLR) (Judicial Review) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E078 OF 2023
JM CHIGITI, J
DECEMBER 18, 2023**

BETWEEN

ANTHONY STEPHEN WACHIRA APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION RESPONDENT

AND

HON. ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The Application before this court is Chamber Summons dated 20th June, 2023 wherein the applicant seeks the following orders: -
 1. That this Application be certified as urgent and apt for hearing on a priority basis and leave be granted to the Applicant to apply for the following Judicial Review orders:
 - a. A declaration that the impugned letter from the Respondent dated 12th April 2023 violates the Applicant's rights to be heard and that of fair administrative action and therefore offends article 25(c), 47 & 50 of *the Constitution* as the same was issued against the Applicant without affording him an opportunity of being heard.
 - b. A declaration does issue that it is unfair, unjust and unreasonable for the Respondent to apportion blame on the Applicant for the institutes award of staff medical insurance tender no. KEMRI/HQ/014/2020-2021 for provision of in and outpatient medical insurance cover for the financial year 2020-2021 to Madison Insurance as the go ahead



and or decision to award Madison Insurance the tender was a decision of the then Director General and the Head of Procurement of the institute.

- c. A judicial review order of certiorari does hereby issue to bring into this court for the purpose of quashing the communication of the Respondent to the Applicant communicated vide a letter dated the 12th April 2023 citing him for alleged impropriety in the procurement of staff medical insurance tender no. KEMRI/HQ/014/2020-2021 for provision of in and outpatient medical insurance cover for the financial year 2020-2021 to Madison Insurance and cautioning him for the alleged breaches and notifying him of the entry of his name its database as part of his personal integrity profile.
2. The application is supported by the following grounds and the affidavit of Anthony Stephen Wachira.
3. The applicant is the Deputy Director of Finance and Accounts and is also the Acting Director of Corporate Services at the Kenya Medical Research Institute.
4. The Applicant is in receipt of the Respondent's letter dated 12th April 2023 informing him of adverse findings made against his integrity due to his involvement during the award of staff medical insurance tender no. KEMRI/HQ/014/2020-2021 to Madison Insurance at the tune of Kshs. 158,130,524 against the budgeted amount of Kshs.115 million.
5. Upon receipt of the impugned letter, the Applicant wrote to the Respondent vide a letter dated 12th May 2023 informing the Respondent that the impugned letter which has since been entered into the Commission's data base as part the Applicant's personal integrity profile has been written to him in error.
6. The applicant believes that decision to apportion blame to the Applicant is unreasonable and unjust as the decision to exceed the budgeted amount and to award Madison Insurance the tender despite the wide margin in the quotation was made by the then Chairman of the Board Dr. Naphtali Agata and the CEO Prof. Yeri Kombe in a meeting held on the 18th December 2020.
7. The decision by the Chairperson and the CEO to exceed the budgeted amount was made consciously and with the determination to seek the approval of the board for the extra millions that the Institute had not budgeted for through its budget committee.
8. The Respondent citing exercise of the authority vested on it by virtue of Section 30 of the Leadership and Integrity Regulations 2015 proceeded to issue a warning/caution letter to the Applicant. The letter further informed the Applicant of adverse measures taken against him to wit addition of adverse findings to his "Personal Integrity profile". This action would undoubtedly greatly hinder his chances at securing any position either elective or appointive.
9. In the wake of the impugned letter from the Respondent, the Institute made a vacancy announcement in the daily nation newspaper for the position of Director-Corporate Services with a deadline of 31st May 2023 and invited applicants to apply for the position.
10. The Applicant currently holds the aforementioned advertised office/position on an interim basis.
11. The Respondents letter dated 12th April 2023 placing reliance on the aforementioned provision of the Leadership and Integrity Regulations clearly in itself and on the face of it reveal that the Applicant was never availed an opportunity to be heard. The Respondent arbitrarily singled him out and proceeded to take unwarranted and evidently unfair adverse actions against him.



12. The letter further communicated an action which we strongly aver is extremely unreasonable as it is an indelible action that will forever linger upon our client's record.
13. The Respondents have essentially meted out punishment with an indefinite & permanent impact as these findings do not lapse/ expire. This in his opinion is akin to incarceration for life yet he vehemently avers is unjust, ultra vires & unreasonable.
14. The Respondent opposes the Application through the affidavit of Christine Ombaka.
15. It is the Respondent's case that, the Commission carried out investigations into allegations of irregular award of Kshs. 158 Million to Madison Insurance Company for staff medical insurance cover for Kenya Medical Research Institute (KEMRI) employees, in the financial year 2020/2021.
16. It was pursuant to the above investigations that the impugned letter dated 12th April 2023 was issued to the Applicant and it was so issued because of his role in the said irregular procurement process, where he had failed to advise and/or provide any proof that he advised the Accounting Officer to halt the part payment of Kshs. 115,000,000 of the tender sum for the procurement of KEMRI staff medical insurance due to the unavailability of adequate funds. This aforesaid lapse caused the staff of KEMRI not to receive the full value of the medical cover as procured.
17. Evidence obtained by the Commission indicates that the Applicant, being the Deputy Director Finance at KEMRI, approved the purchase requisition of the subject staff insurance at the budgeted amount of Kshs. 115,000,000/-
18. It argues that the Finance Department's approval was based on a budget that had not been approved. The Applicant single-handedly granted authorization for commencement of the tendering process for the subject KEMRI staff medical cover.
19. As a consequence of the Applicant's above-stated actions, KEMRI was committed to a financial obligation of Kshs. 43,130,524/- in excess of and/or over and above the amount provided for in the subject budget for the financial year 2020/2021.
20. I have considered the Chamber Summons, Verifying Affidavit and Statutory Statement. I have had due regard to the response on record and the learned submissions by counsel. The issue for determination is whether the Application for leave to commence judicial review proceedings is merited.
21. At the leave stage all the applicant has to show not that it is, but that it might turn out to be, an arguable case.
22. In exercise of its discretion, this court has the duty to determine whether or not the Applicant has made out a case that has the potential of fitting into a case that is within the *Fair Administrative Action Act* framework.
23. The Applicant has to satisfy the court that there is a need to delve deeper into its case so as to establish that the respondent has acted ultra vires, irregularly or through procedural impropriety.
24. An applicant who wants the court to grant them leave so as to advance into the substantive phase of their case must demonstrate that they have a case that falls within the remit of Article 47 of *The Constitution*.
25. The standards and the burden of proof at the leave stage is not the same as what presents at the substantive hearing phase. All the court has to do at the leave phase is to do an initial assessment of what the applicant presents before it. No doubt, an applicant who misleads the court and or fails to disclose to the court the truth simply exposes their case to the calamity of a dismissal when the truth



comes out. The applicant at this phase owes the court a duty of candid disclosure and presentation of the facts. The days of an applicant who steals a match during the leave stage through material none disclosure plants a rotten seed that will Poison their case.

26. The requirement to seek for leave to file for judicial review orders is provided for under Order 53 Rule 1 of the Civil Procedure Rules which stipulates under mandatory terms that no application for an order of mandamus shall be made unless leave therefore has been granted in accordance with the rule.
27. In IRC V National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93 Lord Diplock explained the need for leave as follows:

“Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”

28. It would therefore appear that the reasons for leave are therefore two-fold and that is number one to save the court’s time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed with their operations.
29. In the same case, Lord Scarman saw the need for leave as ‘an essential protection against abuse of legal process’. In his words, “it enables the court to prevent abuse by busybodies, cranks and other mischief makers”. (see pages 653 and 113).
30. On his part, Woolf LJ referred to the need for leave, in the same case, as ‘the unique statutory means by which the court can protect itself against abuse of judicial review’.
31. In order to avoid from delving into the merits of the case, Lord Diplock, in IRC V National Federation of Self-Employed and Small Businesses Ltd (supra) suggested the following approach.

“If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.”

32. The question of whether a case is arguable or not may occasionally require some questioning on the case's merits, but this type of questioning won't go far enough to determine whether the case will win or fail. The questioning will be severely constrained or limited, only going as far as is required to decide whether the matter can be argued, and nothing beyond. It is from this perspective that I have consider the applicant’s application.

Disposition:

33. On a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

Orders:

1. The Application dated 20th June, 2023 is allowed.
2. The Applicant shall file and serve the substantive Motion within 14 days of today’s date.



3. The Respondents and interested party shall file and serve their responses if any within 14 days of service.
4. The Applicant shall thereafter file and serve its submissions within 7 days.
5. The Respondents and interested party shall thereafter file and serve their submissions within 7 days of service.
6. The matter shall be mentioned on 4th March, 2024 with a view to securing a judgment date.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2023

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J. CHIGITI (SC)

JUDGE

