



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW MISC. CIVIL APP. NO.10 OF 2019

IN THE MATTER OF AN APPLICATION TO COMMENCE JUDICIAL REVIEW ORDERS OF CERTIORARI

-AND-

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 19,20,22,23,31,47,48,49,50,
159 & 165 AND CONTRAVENTION OF RIGHTS UNDER ARTICLES 27,298,31,40,47 ,50 ,73 &75 OF THE CONSTITUTION OF
KENYA**

-AND-

IN THE MATTER OF PROVISIONS OF SECTION 11.16.5 OF THE HR POLICY MANUAL

-AND-

IN THE MATTER OF SECTION 62(1) OF THE ANTICORRUPTION & ECONOMIC CRIMES ACT NO.3 OF 2003

-BETWEEN-

REPUBLIC.....APPLICANT

-AND-

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....1ST RESPONDENT

DIRECTOR GENERAL NATIONAL TRANSPORT AND

SAFETY AUTHORITY.....2ND RESPONDENT

JUDGMENT

1. By application, **dated 17th May 2019**, the applicant sought an order of **certiorari** to move to the High Court for purposes of quashing the respondent's decision made on a letter dated **1st April 2019** interdicting the applicant from his place of work.
2. This application is supported by supporting affidavit and documents attached to chamber summons dated **24th April 2019** which sought leave to file this application.
3. The applicant averred that he was an employee of the 1st respondent having been enlisted as **Motor Vehicle Inspector III** at **Grade 5** in the **NTSA** grading structure on **4th July 2017**.
4. That after probation for 3 months, the applicant was confirmed on **17th October 2019** and issued staff **P/No.2017733**.
5. That on **29th March 2019**, the applicant was accused of having solicited and received bribes to release number plates for motor vehicle registration number **KCQ 331G** at motor vehicle inspection centre Nakuru.
6. That the applicant has not been charged with any criminal offence before any court of law as alleged and under **Section 62 of ACECA**, he cannot be interdicted before being charged. That on **20th March 2019**; the applicant was served with a letter dated **15th March 2019**

transferring him from Nakuru VIC to Kakamega VIC and was supposed to report to his new station on or before 1st June 2019.

7. He averred that on 29th March 2019, he was arrested and released on cash bail of kshs 50,000 to appear before Nakuru Chief Magistrate's Court on 9th April 2019; on 8th April 2019 he was summoned by EACC officers who extended his summons from 9th April 2019 to 9th May 2019.

8. He averred that on 11th April 2019, he was served with interdiction letter dated 1st April 2019. He averred that HR policy manual **Section 11.16.5** provide that one is placed on interdiction upon being charged before a court of law with a corruption or economic crime offence.

9. He further averred that **Section 62(1) of Anticorruption & Economic Crimes Act No.3 of 2003** provide that a public officer charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge.; that the applicant is to set to appear before chief magistrate' court on 9th May 2019 when he can finally be charged.

10. He averred that it is unlawful to interdict the applicant from his services yet he has not been charged in a court of law; that despite the applicant's appeal against interdiction by letter dated 12th April 2019, the respondents have not responded; that no criminal proceedings have been instituted against the applicant and decision to interdict him was not therefore proper.

11. Further that no complainant has recorded statement that he or she had given money to the applicant; that the applicant's right to administrative action, investigation and hearing have been violated as envisaged under **Article 23 of the Constitution**.

12. Applicant averred that he has not committed any offence of soliciting for benefit and the intended charges are vexatious and intended to embarrass the applicant.

13. The applicant attached letter of appointment dated **17th October 2017** from the 1st respondent and letter dated **15th March 2019** transferring him from Nakuru VIC to Kakamega VIC. He also attached cash bail receipt of kshs 50,000 issued on 9th April 2019. Interdiction letter dated 1st April 2019 and letter dated 25th April 2019 from **Mongeri & Co Advocates** to 1st respondent asking them to rescind the decision to interdict him as he had not been charged with any criminal offence.

14. In response, the respondents filed replying affidavit sworn by **Francis Meja** on 5th August 2019.

15. He averred that invocation of judicial review orders by the exparte applicant is entirely misconceived and the same do not lie for the following reasons:

1. That the dispute between exparte applicant and the 1st respondent is of contractual nature and fall within the purview of private law and not public law.

2. That the disciplinary proceedings undertaken by the 1st respondent in relation to exparte applicant do not have any bearing on public status of the 1st respondent and are being pursued pursuant to contractual relationship between exparte applicant and the 1st respondent.

3. That no remedy can lie in judicial review when a public body is not discharging its public duties; that the exparte applicant has not brought himself within the recognizable grounds for the grant of judicial review remedies in so far as he has not demonstrated breach of rules of natural justice or statutory procedure or that the 1st respondent has acted in an irrational manner.

4. That the exparte applicant has not demonstrated that he has exhausted remedies available to him before invoking the remedies available in judicial review, particularly for failure to appeal against the impugned interdiction by respondent to public service commission as provided by clause **11.21.7 of NTSA Human Resource Policies and Procedures Manual of 2018** (referred to as **NTSA HR Manual**).

5. That pursuant to disciplinary procedures and process provisions of **Section 12(3) of Employment Act 2007**, HR Policies and procedures Manual for public service 2016, the 1st respondent has formulated NTSA HR Policy to guide in defining appropriate individual and group conduct and ensure laws are followed and understood.

6. That under **clause 10.8.1 of NTSA HR policy employees** of 1st respondent shall be guided by national values and principles of good governance in **Article 10** and **chapter 6** of the **constitution** on leadership and integrity, part II of **leadership and integrity Act 2012** and **public officer's ethics Act 2003** revised in 2016.

7. That the **NTSA HR policy** is self-contained manual and provide framework for handling disciplinary measures against its employees; and in handling disciplinary measures the 1st respondent is guided by:

i. Rules of natural justice

ii. Procedural fairness

iii. Fair administrative action

iv. Decision making process based on logical proof or evidential material

16. Respondent averred that the 1st respondent can institute disciplinary proceedings against employees who commit criminal offence or there are sufficient grounds is suspected to have committed criminal offence; that the exparte applicant has not demonstrated that the 1st respondent has breached any of the principles set out above.

17. He further averred that **clause 11.6.5** does not provide that it be preceded by a charge before a court of law and the allegation that he unlawfully interdicted is unguided; that **clause 11.6.1 of NTSA HR Policy** granted the 1st respondent power to interdict the applicant or suspend any of its officers at any time to allow investigations.; that interdiction was lawful under **clause 11.8.3 of NTSA HR Policy** as it was deliberated by disciplinary committee who advertised 1st respondent to interdict him pending investigation on his conduct; that upon arrest by EACC there were reasonable grounds to believe that exparte applicant had solicited bribes to release number plates for motor vehicles to the detriment of the 1st respondent.

18. He averred that the terms interdiction and suspension have been given distinct meaning in **clause 11.16 and 11.17 of NTSA HR Policy**; and in this case, the exparte applicant was interdicted and not suspended.

19. Respondent averred that **Section 62 of Anticorruption and Economic Crimes Act** is not applicable to the exparte applicant as it is limited to suspension and not interdiction; that the section does not provide that interdiction or suspension is contingent on such officer being charged in court.

20. That it was repugnant to public policy for the exparte applicant to remain in the office when his integrity was being challenged in court of law for having solicited bribes; that by charging exparte applicant EACC was discharging its duty and nothing stopped the 1st respondent from instituting parallel disciplinary proceedings against exparte applicant.

21. That the exparte applicant has failed to demonstrate that disciplinary action against him was unfair, unprocedural or irrational and has not therefore made up a case for grant of judicial review remedies; that he has failed to demonstrate that investigations by EACC on offence of bribery are vexatious, malicious or made to embarrass him.

22. Respondents averred that disciplinary proceedings pursued by the 1st respondent against exparte applicant are not vindictive, discriminative or unconstitutional and do not amount to abuse of authority as no evidence has been placed before court by exparte applicant to prove otherwise.

23. Respondents prayed for dismissal of the application.

ANALYSIS AND DETERMINATION

24. Respondent averred that **NTSA HR policy** is self-contained manual and provide framework for handling disciplinary measures against its employees. I have perused the HR policy and note as hereunder:

1. Clause 11.6.5 of NTSA HR Policy provide as follows:-

“Where an employee has been charged with corruption or economic crime, such officer shall stand suspended from exercise of his duties pending determination of the case. Such officer shall be entitled to payments as stipulated in Anti-corruption and Economic Crimes Act.”

2. Clause 11.17.1 provide instance when an employee can be suspended as follows:-

a) When disciplinary proceedings have been instituted against an officer as a result of which the director –General through the advice of the Disciplinary committee considers the officer to be dismissed.

b) When he has been convicted of a serious criminal offence.

25. Further under **clause 11.17.2** where an officer is suspended from exercise of the functions of his public office, he shall be entitled to half basic salary; full house allowance, and medical cover but other benefits shall be withheld.

26. **Clause 11.7.5** where an employee has been charged with corruption or economic crime, such officer shall stand suspended from exercise of his duties pending determination of the case.

27. Under **clause 11.18.3** provide for employees charged with criminal offence which do not directly relate to the authority. It provide that the authority may interdict the employee pending internal investigations whether authority’s rules and procedures have been breached and appropriate action taken.

28. On investigation **clause 11.19.2** provide procedure to be undertaken by investigating committee and its report is to be submitted to HR Committee of the Board/Disciplinary Committee and shall not contain any recommendation on form of punishment to be imposed on employee but statement as to whether charges have been proved.

29. The board or director general may entertain an appeal or review if in their opinion circumstances warrant it. Decision of appeal shall be

communicated to employee and employee informed of right for review. Under clause 11.21.7 a 3rd appeal may be made to public service commission.

30. From averments herein, it is not disputed that the petitioner was interdicted immediately after the allegation of corruption were raised. This is contrary to clause **Clause 11.6.5 of NTSA HR Policy**, which provide that once an officer is charged with economic crime, he stand suspended. Instead, the respondent interdicted the petitioner before he was arraigned in court. If he had been charged he would have stood suspended and be on half pay as per HR policy.

31. As noted above an employee could be suspended under two circumstance as set out below:-

- a) When disciplinary proceedings have been instituted against an officer as a result of which the director –General through the advice of the Disciplinary committee considers the officer to be dismissed.**
- b) When he has been convicted of a serious criminal offence.**

32. What does the HR policy say about interdiction?

Clause 11.18.3 provide as follows:-

“In the event that criminal proceedings are preferred against an employee for offences which do not relate to the authority, the Director General or his authorized officer may interdict the employee pending internal investigations whether the Authority’s rules and procedures have been breached and appropriate action taken.”

33. The letter interdicting the petitioner is dated 1st April 201. It is not disputed that he had not been charged. He was summoned to appear before EACC official on 9th April 2019 which was deferred to 9th May 2019. There is no doubt that he was interdicted before charges were preferred against him; thus the 1st respondent failed to comply with NTSA HR Policy.

34. From the foregoing, I find that the disciplinary action against him was unfair, unprocedural and irrational.

35. FINAL ORDERS

1. Decision made on 1st April 2019 is quashed

2. Costs of this petition to the petitioner

Judgment dated, signed and delivered at Nakuru this 28th day of November, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

M/s. Kinuthia holding brief for Mongeri Counsel for Applicant

Mrs. Njoroge Counsel for Respondent