



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 192 OF 2014

IN THE MATTER OF ARTICLES 22, 23 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ETHICS AND ANTI-CORRUPTION ACT, 2011 SECTION 12 (C)

AND

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA SECTIONS
8 AND 9**

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC.....APPLICANT

AND

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

KENYA INDUSTRIAL RESEARCH AND

DEVELOPMENT INSTITUTE.....3RD RESPONDENT

***EX PARTE:* ERASTUS GATEBE**

JUDGEMENT

Introduction

1. In his Motion brought on Notice dated 28th May, 2014 filed the same day the *ex parte* applicant herein, **Erastus Gatebe**, seeks the following orders:

1. **An order of Certiorari to remove into this Court for purposes of quashing and to**

quash the findings and decision of the 1st Respondent contained in the Respondent's letter of 11th March 2014 addressed to the 3rd Respondent

2. An order of Prohibition directed at the 3rd Respondent to prohibit the 3rd Respondent from proceeding with disciplinary action against the *Ex parte* Applicant on account of the findings and decision of the 1st Respondent communicated to the 3rd Respondent in the letter dated 11th March 2014.

3. Costs of this application be borne by the Respondents

Ex Parte Applicant's Case

2. The said Motion is supported by the verifying affidavit sworn by the applicant herein on 22nd May, 2014.
3. According to the deponent, he was on 14th April 2014 in a memo by the 3rd Respondent required to show cause why disciplinary action should not be taken against him on an allegation of having earned double salary in contravention of the ***Public Officer Ethics Act*** and the ***Leadership and Integrity Act*** which allegation was said to have emanated from communication received by the 3rd Respondent from the 1st Respondent. On receipt of the memo, the applicant on 14th April, 2014 wrote back to the 3rd Respondent asking to be furnished with the communication from the 1st Respondent.
4. To the said request, the 3rd Respondent in a letter dated 8th May 2014 further indicated that the disciplinary action contemplated against the applicant was dismissal for service for breach of Chapter six, Article 77(1) of the Constitution of Kenya, 2010; the ***Public Officer Ethics Act, 2003***, ***Leadership and Integrity Act of 2012***, Part II, Section 7, 8, 13(a) (c), (d) and 26 (1) as well as the Human Resources Policy Manual of the 3rd Respondent Section 9.3.1 clause (xi) and (xiii). According to the applicant, the sections of the law and human resources manual quoted in the letter of 8th May 2014 all relate to false declarations and gross misconduct that brings the 3rd Respondent into disrepute.
5. He deposed that under a separate cover, the 3rd Respondent on 12th May 2014 then furnished him with a letter dated 11th March 2014 from the 1st Respondent addressed to the 3rd Respondent which required the 3rd Respondent to take administrative action against the applicant for alleged failure to demonstrate honesty and contravention of provisions of the ***Public Officer Ethics Act*** and the ***Leadership and Integrity Act***. According to the applicant the 1st Respondent in the said letter on 11 March 2014 states that it had conducted investigations which had revealed that he had earned a double salary from Jomo Kenyatta University of Agriculture and Technology (JKUAT) and KIRDI for a period of four months which had led the 1st Respondent to conclude that he was guilty of failure to demonstrate honesty and contravention of provisions of the ***Public Officer Ethics Act*** and the ***Leadership and Integrity Act*** and hence the recommendation that administrative action be taken against him.
6. However, according to the applicant, he was not privy to any investigations against him by the 1st Respondent and he only learnt of the said investigations on 12th May 2014 when he was furnished with a copy of the 1st Respondent's letter of 11th March by the 3rd Respondent. To him, the investigations alluded to in the letter 1st Respondent's letter of 11th March 2014 were conducted without his involvement yet he was the subject of the investigation in breach of the rules of natural justice on the right to be heard and also in breach of Article 47 of the Constitution which guaranteed him the right to administrative action that is procedurally fair.
7. It was further averred that the investigations were also in breach of Section 12(c) of the ***Ethics and Anti-Corruption Commission Act, 2011*** which require the 1st Respondent to observe the rules of natural justice in discharging its mandate and in all its procedures. According to the applicant, the 3rd Respondent is a public body and hence the Public Service Commission is the authority mandated in the first instance to ensure compliance with the ***Public Officer Ethics Act***

- by employees of the 3rd Respondent hence the 3rd Respondent acted in disregard of Section 3 of the **Public Officer Ethics Act** in disregarding the role of the Public Service Commission.
8. To the applicant, the findings and decision of the 1st Respondent which are all tainted with procedural impropriety as there was denial of procedural justice in condemning him without giving me a chance to be heard and that had the 1st Respondent given him a chance to be heard, he would have successfully rebutted any allegation of dishonest or improper conduct against him since he had never received what could be factually termed as a double salary from JKUAT and KIRDI; had never acted dishonestly; had indicated to the 1st Respondent that he would report to work on 1st April 2013; on getting the job offer from KIRDI, he wrote to the university on 17th January 2013 notifying them of his desire to proceed on leave of absence without pay from 1st April 2013. I annex hereto and mark "EG 7" a true copy of my said letter of 17th January 2013 which request was however declined on 18th February 2013. He therefore appealed for the same and on realizing the appeal was taking long, and time to report to KIRDI was nearing, he proceeded on leave with effect from 15th April 2013. According to him, the period when he was said to have earned a double salary was the period covered by his accumulated leave days which he had successfully carried over from the previous years and which JKUAT was under an obligation to pay him for upon termination of his employment under Sections 10 and 28 of the **Employment Act** and also the JKUAT Terms of Service for Academic Staff, Grades AC 8-15 dated July 2008. The applicant added that upon realization that his leave days had ran out and his appeal for unpaid leave and or sabbatical leave had not received positive consideration from JKUAT, he opted to resign to enable him continue with the employment with the 3rd Respondent.
 9. It was therefore the applicant's case that the findings and decision of the 1st Respondent to the effect that he was a dishonest person of criminal conduct and who falls short of the requirements of the **Public Officer Ethics Act** and the **Leadership and Integrity Act** hence unfit to hold public office are very humiliating and damaging to his character and were in breach of his fundamental right to inherent dignity and the right to have that dignity respected and protected. To the contrary, throughout his career he had received positive commendations on his job performance and had always demonstrated honesty of a very high degree. While working for the 3rd Respondent, he had demonstrated a high degree of honesty and financial probity to an extent of even surrendering unutilized imprest such as on 24th January 2014 which conduct is incompatible with the alleged dishonesty on his part. To further his contention, he averred that on 13th November 2013 he was deployed as acting managing director of the 3rd Respondent when the managing director was interdicted and upon his interdiction being lifted, the managing director, who now saw him as a threat engaged in witch-hunting with a view to getting rid of him. In his view, the 1st Respondent is therefore unwittingly being used to wage war against him without observing due process and in disregard of his fundamental rights. Apart from that the 3rd Respondent was communicating to JKUAT seeking confidential information against him hoping to perhaps unearth some information that would assist get rid of him.
 10. The applicant contended that the foregoing clearly demonstrates that the purported investigations were carried out by the 2nd Respondent and the 1st Respondent were only being used to sanitize the illegitimate process that was intended to culminate in his dismissal from the 3rd Respondent.
 11. He further disclosed that on 27th February 2014, his office keys disappeared from the reception only to be returned a day later and on 31st March 2014 his secretary's cabinet was broken into, an action he believed was a fishing expedition in a bid to obtain would be damaging information about him for the furtherance of the scheme to rid the 3rd Respondent of him which incident he reported to the 3rd Respondent's managing director but no investigations were conducted nor action was taken.
 12. Based on the foregoing the applicant's case was that his rights had already been violated and are in danger of being further violated through a procedurally flawed process which warrants this court's intervention to ensure that his right to administrative action that is procedurally fair is upheld and that the natural rules of justice are observed.

1st Respondents' Case

13. In opposition to the application the 1st respondent filed a replying affidavit sworn on 10th June, 2014 by **Abraham Kemboi**, an Investigator working with the 1st Respondent.
14. According to him, the 1st Respondent is empowered by law to investigate the conduct of any person that in its opinion constitutes corruption or economic crime pursuant to the Provisions of the *Anti-Corruption & Economic Crimes Act, 2003* and *Ethics & Anti-corruption Commission Act, No. 22 of 2011*. Further the 1st Respondent is mandated under Article 252 of the Constitution of Kenya to conduct investigations on its own initiative or on a complaint made by a member of the public.
15. He deposed that the 1st Respondent received confidential information of irregular earnings by a public official who turned out to be the *Ex parte* Applicant and conducted investigations pursuant to its mandate to establish the veracity of the said allegations and the investigations revealed that between April 2013 and January 2014, the *Ex parte* Applicant was indeed in the pay roll of 2 different institutions i.e. the 3rd Respondent and the Jomo Kenyatta University of Agriculture and Technology. After establishing that indeed the *Ex parte* Applicant had earned a double salary, the 1st Respondent wrote to the 3rd Respondent recommending administrative action including recovery of the irregular salary from the *Ex parte* Applicant.
16. He deposed that the 3rd Respondent on receipt of the letter by the 1st Respondent carried out its own investigations to establish the truth of the allegations and to inform their course of action. According to him, the investigations carried out by the 1st Respondent were not in breach of the rules of natural justice on the right to be heard nor were they in breach of Article 47 of the Constitution but by their very nature were largely covert operations and the principles of natural justice do not necessarily apply.
17. In his view, the letter by the 1st Respondent was merely a recommendation for further action and/or processes which recommendation does not finally determine the *Ex parte* Applicant's rights since they are not a judicial or quasi-judicial proceeding and does not amount to an administrative action. In his view, the right to be heard and the right to fair administrative action arises at the stage of a disciplinary committee hearing which is carried out by the 3rd Respondent and not at the investigations stage carried out by the 1st Respondent.
18. It was further disclosed that the 3rd Respondent had commenced disciplinary proceedings against the *Ex parte* Applicant who was afforded an opportunity to be heard and was informed of the nature and extent of the case he faces to enable him prepare his defense. However as the said disciplinary proceedings had not yet been concluded and a decision arrived at as to whether to determine the employment of the *Ex parte* Applicant or not, the *Ex parte* Applicant therefore cannot be heard to say that he was not heard or subjected to administrative action that is procedurally fair. He reiterated that the recommendation by the 1st Respondent in their letter to the 2nd Respondent is not conclusive as the allegations have to go through an administrative process by the 3rd Respondent and therefore the *Ex parte* Applicant will have an opportunity to address his case after which due process the 3rd Respondent would determine what action, if any, it would take against the *Ex parte* Applicant.
19. Being discretionary, the deponent deposed that an order of certiorari may be refused even when the requisite grounds for its grant exist. To him, there is evidence that the *Ex parte* Applicant unjustly enriched himself by illegally earning two salaries and administrative action must ensue to finally determine the veracity of the claim and to take appropriate corrective action. In the circumstances of this case the grant of the orders sought would not advance public interest and promote accountability in public service. Based on advice by counsel for the 1st Respondent, **Diana Ogula**, he believed that the granting of the orders sought would be tantamount to fettering the 1st Respondent in the execution of its mandate.

3rd Respondent's Case

20. The 3rd Respondent's case was presented vide a replying affidavit sworn by **Jairus Ombui**, its

- Assistant Director, Human Resource Management & Administration on 5th June, 2014.
21. According to him, the 3rd Respondent (hereinafter referred to as the Institute) is an independent corporate body established by an Act of Parliament Cap 250 of Science and Technology 1979, (repealed and replaced by the Science and Technology and Innovation Act of 2013) hence it is not under Public Service Commission as alleged by the Applicant. According to him, the 3rd Respondent has a board of Directors who are wholly responsible for the transaction of business of the Institute including hiring and disciplining of staff and in undertaking this mandate, it is not answerable to any other organ (including Public Service Commission) save for ensuring compliance with the due process of law.
 22. He deposed that from the Institute's records the Applicant is an employee of the 3rd Respondent in the capacity of Chief Research Scientist and not Chief Research Assistant and the Applicant like all staff members of the Institute is subject to being given notice to show cause letters whenever there is contemplation of breach of the Institute's rules, policies and/or working terms and conditions applicable to them.
 23. According to him, on the 8th of May 2014 the 3rd Respondent disclosed to the Applicant the contemplated disciplinary action likely to be taken against him, upon receipt of the report the 1st Respondent in order to give him as opportunity to comment and/or respond on to the matters in the said report.
 24. He swore that upon receipt of the adverse report on the Applicant, the Ethics and Anti-Corruption Commission forwarded the same to the Institute, who is the Applicant's employer, for appropriate disciplinary action. Consequently, the employer commenced the necessary procedures and the Applicant was accorded time to respond to the matter.
 25. While it was true that the Institute furnished the applicant with the 1st Respondent's report, the deponent denied that the 1st Respondent directed the 3rd Respondent to punish the applicant but only to take appropriate disciplinary decision regarding the double payment of salary to the applicant.
 26. Since the Institute has commenced the said proceedings, the Court was urged to allow the Institute complete the said process.

Determinations

27. I have considered the issues raised herein as well as the submissions filed and authorities relied upon.
28. It is clear from the parties' cases that the 1st Respondent never afforded the applicant a hearing before compiling its report which was obviously adverse to the applicant since it recommended that disciplinary action be taken against the applicant.
29. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
30. It follows that the applicant was constitutionally entitled to be informed of the reasons leading to the commencement of his disciplinary action. He was similarly entitled to a procedurally fair administrative action which in my view entails that he would be heard before an adverse report was compiled and transmitted to the 3rd Respondent.
31. It was however contended that since the report compiled by the 1st Respondent was merely a recommendation which was subject to the 3rd Respondent's decision, there was no necessity to hear the applicant before the 1st Respondent compiled the said report. In **Re Pergamon Press Ltd [1971] Ch. 388**, the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a court of Law. That issue was answered as follows:

“It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay’s submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice....That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind.”

32. The 1st Respondent is not just any investigatory body. It is a constitutional commission tasked with carrying out investigations on matters related to corruption. Its recommendations do invariably lead to criminal charges being preferred against persons who their investigations find culpable. Clearly, therefore they ought to take their task seriously and ensure that the principles relating to fair administrative processes are adhered to. They ought not to take their tasks casually and hide under the pretext that their decisions are subject to ratification by another body. The 1st Respondent in conducting investigations ought to comply with the basic requirements of the rules of natural justice.
33. It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidentiary material.
34. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair,

impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

35. The Court however emphasizes that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.
36. Where no attempt has been made at all to adhere to the principles of natural justice as in this case, it is not sufficient to present the evidence collected by the 1st Respondent with a view to showing that the evidence was overwhelming and that a hearing would not have altered the decision. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

“The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant’s legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice.....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at....In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone’s advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio*.”

37. Although it is contended that the 3rd Respondent carried out its own independent investigations, it is clear that the process of disciplinary action was provoked by the 1st Respondent and it is clear that the 3rd Respondent sought for the evidence from the 1st Respondent. Therefore if the process which itself provoked the disciplinary action was flawed, it cannot be said that it would be made right by further action. Considering the role of the 1st Respondent in matters of corruption in this country and the importance attached to its recommendation, I am not prepared to downplay its recommendations as it wishes this Court to do.
38. In the premises I find that the 1st Respondent’s decision to recommend that disciplinary action be commenced against the applicant was tainted with procedural impropriety for failure to afford the applicant fair administrative process hence its action was null and void *ab initio*. Being null and void the 3rd Respondent’s actions pursuant thereto cannot stand. See **Macfoy vs. United Africa Co. Ltd [1963] 3 All E.R. 1169**, it was submitted that:

“If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for the Court to set it aside. It is automatically null and void without more ado, though it is sometimes

convenient to have the Court declare it to be so and every proceeding which is founded on it also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Order

39. In the result I find merit in the Notice of Motion dated 28th May, 2014 and grant the following orders:

1. **An order of Certiorari removing into this Court for purposes of quashing the findings and decision of the 1st Respondent contained in the 1st Respondent's letter of 11th March 2014 addressed to the 3rd Respondent which findings are hereby quashed.**
2. **An order of Prohibition directed at the 3rd Respondent prohibiting the 3rd Respondent from proceeding with disciplinary action against the *Ex parte* Applicant on account of the findings and decision of the 1st Respondent communicated to the 3rd Respondent in the letter dated 11th March 2014.**
3. **Costs of this application are awarded to the applicant to be borne by the 1st Respondent.**

Dated at Nairobi this day of 28th November 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Chege for Mrs Guserwa for the 3rd Respondent

Cc Richard