



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JR CASE NO. 375 OF 2012

REPUBLIC.....APPLICANT

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

KENYA WILDLIFE SERVICE.....2ND RESPONDENT

**THE PERMANENT SECRETARY OFICE OF THE PRESIDENT, HEAD OF CIVIL
SERVICE AND SECRETARY TO THE CABINET.....3RD RESPONDENT**

**THE PERMANENT SECRETARY MINISTRY OF
FORESTRY AND WILDLIFE.....4TH RESPONDENT**

WILLIAM KIPRONO KIBET.....INTERESTED PARTY

EX-PARTE

EVANS ARTHUR MUKOLWE

(AS CONSOLIDATED WITH)

REPUBLIC.....APPLICANT

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

KENYA WILDLIFE SERVICE.....2ND RESPONDENT

THE PERMANENT SECRETARY,

EX-PARTE

EVANS ARTHUR MUKOLWE

JUDGEMENT

This matter (Judicial Review Miscellaneous Civil Application No. 375 of 2012) was heard together with Miscellaneous Application No. 278 of 2011. As such, this judgement will apply to the two matters. In this cause the applicant is Evans Arthur Mukolwe whereas the Attorney General; Kenya Wildlife Service; the Permanent Secretary in the Office of the President who is also the Head of Civil Service and the Secretary to the Cabinet; and the Permanent Secretary Ministry of Forestry and Wildlife are the 1st to 4th respondents respectively. William Kiprono Kibet who is the Chief Executive Officer of Kenya Wildlife Service is an interested party. Through the notice of motion dated 26th October, 2012 the applicant seek orders as follows:-

(a)AN ORDER OF PROHIBITION do issue to forbid the respondents and or other agents and or servants from assigning and or allocating duties to and or gazetting the appointment of WILLIAM KIBET KIPRONO as the director of the 2nd Respondent and further forbid WILLIAM KIBET KIPRONO from assuming and or performing duties of Director of the 2nd Respondent.

(b)AN ORDER OF PROHIBITION do issue to forbid the respondents from terminating the Applicant's Contract Appointment as director and Chief Executive Officer of the 2nd respondent dated 2nd October, 2003 as contained in Kenya Gazette Notice Number 7091 of 3rd October, 2003 and or revoking the said Gazette Notice.

(c)AN ORDER OF PROHIBITION do issue to forbid the respondents and or their agents and or servants from presenting and or blocking and or restraining the Applicant from resuming his duties and responsibilities as Director and Chief Executive Officer of the 2nd Respondent as appointed on 2nd October,2003 as contained in Kenya Gazette Number 7091 of 3rd October, 2003.

(d)AN ORDER OF CERTIORARI do issue to remove into the Honourable Court and Quash the decision and or orders and or directions of the 3rd Respondent dated 5th October, 2012 to unilaterally and or arbitrarily appoint WILLIAM KIBET KIPRONO Director of the 2nd Respondent herein as contained in the letter of the 4th respondent dated 5th October 2012 addressed to and confirmed by the 2nd Respondent through the internal memo dated 5th October 2012.

(e)The costs of this application be borne by the Respondents.

The application is supported by the grounds on its face and the chamber summons application for leave dated 11th October, 2012 together with documents in support thereof. The applicant also filed a supplementary affidavit sworn on 16th November, 2012. The respondents and the interested party filed papers in opposition to the said application.

In case No. 278 of 2011 the applicant is the Republic. The Attorney General, Kenya Wildlife Service and the Permanent Secretary Ministry of Forestry and Wildlife are the 1st-3rd respondents. Evans Arthur Mukolwe is the ex-parte applicant. In the notice of motion dated 21st November, 2011 the ex-parte applicant prays for orders as follows:-

(a)AN ORDER OF MANDAMUS do issue to compel the Respondents to reinstate, return and or restore the Applicant to his office as director and the Chief Executive of the 2nd Respondent as Appointed on 2nd October, 2003 and as contained in Kenya Gazette notice number 7091 of 3rd October, 2013 and to pay the Applicant his salary and allowances as stipulated in the Terms and Conditions of Service dated 24th June, 2004 earned during suspension commencing 12th November, 2004 to date being a period of 83 months as at 31st October, 2011 amounting to kshs.135,543,500/= and further until the date of reinstatement.

(b)The costs of this application be provided for.

This particular application is also supported by the grounds on its face and the chamber summons application for leave dated 9th November, 2011 plus supporting documents. The respondents opposed the application.

These proceedings cannot be understood without a brief a history. Evans Arthur Mukolwe who will hereinafter be simply referred to as the applicant was through Gazette Notice No. 7091 of 3rd October, 2013 appointed the Chief Executive Officer of Kenya Wildlife Services (KWS). He had been headhunted by the Government of Kenya from the World Meteorological Organization headquarters at Geneva, Switzerland. On 12th November, 2004 the applicant's appointment was suspended by the Permanent Secretary, Ministry of Tourism and Wildlife. Subsequently, on 20th January, 2006 the applicant was arrested and charged in the Anti-Corruption Court, Nairobi with four counts relating to his stewardship at KWS. The applicant was convicted but the conviction was set aside on appeal vide Nairobi High Court Criminal Appeal No. 385 of 2009 which had been consolidated with High Court Criminal Appeal No. 386 of 2009. Judgment was delivered on 16th November, 2010 and on 14th January, 2011 the applicant forwarded a copy of the judgment to KWS and asked to be reinstated to his position as provided by Section 63(3) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. He was informed by the Chairman of the Board of Trustees of the KWS that there was need for a court order before he could be reinstated to his position. The applicant filed Nairobi High Court Misc. Application No. 113 of 2011 which was struck out on the ground that the applicant had not demanded for reinstatement from the respondents. The applicant subsequently filed Misc. Application No. 278 of 2011. In this particular matter the applicant's main complaint is that the letter which suspended him did not give any reasons for his suspension and the author of the letter being the Permanent Secretary in the Ministry of Tourism &

Wildlife had no powers to suspend him. He states that his treatment was unconstitutional, discriminatory and malicious in that his co-accused one Mr. Achoki was paid half salary and allowances during the pendency of the criminal case. The applicant also states that failure to reinstate him contravenes the express provisions of Section 62(3) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

KWS filed grounds of objection dated 23rd January, 2012 as follows:-

(1)The Application has been brought with undue delay and is hopelessly out of time.

(2)The ex-parte Applicant is guilty of non-disclosure of material facts namely that:-

(a)There exists a pending suit vide NAIROBI HCCC No. 295 of 2005 – EVANS MUKOLWE-VS-ATTORNEY GENERAL & KENYA WILDLIFE SERVICE relating to the same facts.

(b)The ex-parte Applicant applied for leave to commence Judicial Review proceedings vide HCMSC. APPL. No.113 of 2011 wherein leave was refused and the ex-parte Applicant filed a Notice of Appeal to the Court of Appeal.

(3)These proceedings are frivolous and vexatious and an abuse of the process of this court.

(4)The application is defective and incompetent.

(5)The ex-parte Applicant's gazetment as Director was revoked and another director appointed in his place.

(6)The ex-parte Applicant's remedy does not lie in Judicial Review.

KWS also opposed the application by way of a replying affidavit sworn on 21st February, 2012 by its acting Corporation Secretary, Mr. Thomas Ogola. The said affidavit reinforces the grounds of objection.

The Attorney General and the Permanent Secretary in the Ministry of Forestry and Wildlife did not file any responses in Case No. 278 of 2011. The applicant did file a supplementary affidavit sworn on 3rd May, 2012 in which he responded to the issues raised by KWS. Of importance to note in the

supplementary affidavit is the applicant's attack on the legality of the appointment of his replacement at KWS Mr. Julius Kangongo Kipnetich. For purposes of record, it must be observed that the said Julius Kangongo Kipnetich is not a party to the two matters which are the subject of this judgment. The applicant also restated that his appointment as the Chief Executive Officer of KWS had not been terminated nor had the Gazette Notice which contained his appointment been revoked.

KWS' case is that the applicant's appointment was revoked vide Gazette Notice No. 10336 of 24th December, 2004. The applicant's reply to this is that the said Gazette Notice revoked Gazette Notice No. 7092 of 3rd October, 2003 which contained the appointment of Mr. Ahmednasir Maalim Abdulahi and Ms Fatima Sichale as Chairman and Vice-Chairman respectively of the Kenya Anti-Corruption Advisory Board.

The applicant submitted that his claim in HCCC No. 259 of 2005 is for damages for unlawful suspension but the claim herein is for reinstatement and payment of salary and allowances illegally withheld from the time of his suspension to date. The applicant also submitted that he had informed the court about High Court Misc. Application No. 113 of 2011 in his verifying affidavit and he had not filed any appeal against the decision to strike out the matter.

The basis of the applicant's claim in Case No. 375 of 2012 is similar to that in Case No. 278 of 2011 save for the fact that in Case No. 375 of 2012 the applicant attacks the appointment of the interested party (William Kibet Kiprono) for being malicious, illegal and in contravention of the law.

In Case No. 375 of 2012, the Attorney General (1st respondent), the Permanent Secretary in the Office of the President (3rd respondent) and the Ministry of Forestry and Wildlife (4th respondent) opposed the application through grounds of opposition dated 1st November, 2012 which are in the following terms:-

1.THAT the instant application is predicated upon an erroneous interpretation and understanding of the law and amounts to unnecessary exploitation of judicial resources.

2.THAT the contract between the Applicants and the Respondents herein was for a specific and fixed period of three (3) years and therefore the contract was deemed to have been discharged automatically if at the conclusion of the said term the parties to the contract did not renew it.

3.THAT the instant application is an abuse of the court process and an abuse of judicial resources and as such should in the interests of justice be dismissed so as to allow the court to utilize its limited time and resources in adjudication of more deserving matters.

4.THAT the Applicant has not demonstrated sufficient grounds to warrant issuance of the orders sought by this honourable court.

5. THAT failure by the Applicant to challenge the Appointment of Mr. Julius Kipngetich Kangongo as the Director of the 2nd Respondent and also as his immediate successor to the said office amounts to a tacit acknowledgement and acquiescence by the Applicant that the contract between him and the Respondents has since lapsed.

KWS (the 2nd respondent) opposed the application through replying affidavits sworn on 16th October, 2012 by Valentain Wilson Kamani and Thomas Ogola respectively. KWS adopts its response in Case No. 278 of 2011. KWS informed the court that the interested party's appointment is contained in Gazette Notice No. 14348 of 5th October, 2012 and the applicant's claim that the appointment is unlawful had no basis. It is also KWS' case that there is no vacancy in the office of the director and the orders sought cannot issue. Through the supplementary affidavit already referred to, the applicant informed the court that the President had no powers to appoint the interested party since the powers of appointment are by law reserved for the Board of KWS.

All the parties filed written submissions in support of their respective positions. As can be seen from the pleadings, these two matters are indeed intertwined. They all concern the alleged termination of the applicant's employment as the Chief Executive Officer of KWS, a state corporation.

In my view therefore, the issues for the court's determination are:-

(1) Whether the applicant's employment has been terminated;

(2) If the answer to No. 1 above is in the affirmative then the second issue is whether the said termination was lawful;

(3) Whether the applicant is deserving of the orders sought; and

(4) Who should meet the costs of these applications?

After careful consideration of the issues, I have come to the conclusion that determining some of the issues before the court may result in injustice to the applicant. I say so because there is High Court Civil Case No. 295 of 2005 in which the applicant essentially seeks orders that are aimed at obtaining reliefs similar to those sought in the matters before this court. I will, for reasons to be found in this judgement, try as much as is practicable, to avoid the issues that can be resolved through HCCC No. 295 of 2005. In doing so, I am conscious that the remedies available in the judicial review arena are limited and even if I were to find in favour of the applicant he may still end up leaving this court empty-handed.

Has the applicant's appointment as the Chief Executive Officer of KWS been terminated? It is the applicant's case that his appointment has never been terminated since Gazette Notice No. 1071 of 3rd October, 2003 which put him in office has never been revoked. The respondents think otherwise. The applicant argued that Gazette Notice No. 10336 of 24th December, 2004 which appointed Julius Kangogo Kipngetich as the director of KWS is irrelevant since the same ended up revoking Gazette Notice No. 7092 of 2003 which dealt with appointments to a different organization all together. KWS submitted that the Gazette Notice that ought to have been revoked was No. 7091 of 2003 and not 7092 of 2003. KWS submits that this was a mistake which cannot come to the aid of the applicant. I will not be tempted to take the road that the applicant is leading me to for that is the road of technicalities. Looking at Gazette Notice No. 10336 it is clear that President Mwai Kibaki was appointing Julius Kangogo Kipngetich to be the Director of KWS. It follows that the Gazette Notice that was supposed to be revoked was the one which had appointed his predecessor who is the applicant herein. Even if the applicant is correct in his argument, I will still find that he really has no case in so far as the appointment of Julius Kangogo Kipngetich is concerned. He did not enjoin him as a party and this court cannot make any determination about the legality of his appointment without hearing him. No orders were sought to quash the said appointment and the application was brought in 2011 which was about seven years after the event. The applicant has not explained the inordinate delay. In my view the applicant's appointment as the Director of KWS was terminated on 24th December, 2004 when somebody else was appointed into the office. The provisions of the Anti-Corruption and Economic Crimes Act cannot come to his aid as he had not been charged in court at the time Mr. Julius Kangogo Kipngetich was appointed to replace him. He was charged after he had been removed from office and the provisions of the said Act do not apply in the circumstances of his case.

The applicant argued that William Kiprono Kibet was not appointed through a competitive process. He however did not place any evidence before the court to support this claim. In any case he has such a personal interest in the matter to the extent that any ordinary bystander would conclude that this challenge on the appointment of William Kiprono Kibet is driven by jealousy and malice. Further, his employment having been terminated in 2004, then he has no reason for questioning the appointment of Mr. William Kiprono Kibet as a replacement of Mr. Julius Kangogo Kipngetich. At all times, judicial review proceedings must be brought in utmost good faith.

The applicant has invited me to find that the termination of his services was unlawful. I wonder whether he carefully considered the impact of such determination in view of the fact that he has sued for damages in HCCC No. 295 of 2005. I will in the interests of justice shy away from taking this challenge. If indeed the applicant wanted this court to determine the legality of his dismissal, then he ought to have withdrawn HCCC No. 295 of 2005. For the applicant's own interest I will therefore make no decision on this issue. Fortunately, as will emerge in the course of this judgment, this matter will be decided on other issues.

In Case No. 278 of 2011 the applicant is asking for an order of mandamus to compel the respondents to pay him Kshs.135, 543, 500/= being salary and allowances. An order of mandamus is issued to a public body to compel it to perform a statutory duty owed to an applicant. The applicant has not established a basis for his claim for an order of mandamus. An order of mandamus can only be available to the applicant if KWS fails to pay whatever it is ordered by the court to pay the applicant once HCCC. No. 295 of 2005 is finalized. As of now, KWS has no statutory obligation to pay Kshs. 135, 543, 500/= to the applicant. Application No. 278 of 2011 therefore fails and the same is dismissed.

As for Application No. 375 of 2012 the applicant prays for an order of prohibition prohibiting the gazettment of the appointment of the interested party. He also seeks an order of prohibition to prohibit the respondents from terminating his contract and from restraining him from assuming office. I have already said that the applicant's contract was terminated in December, 2004. There is therefore no contract that the respondents can terminate. It is trite law that an order of prohibition looks into the future and is meant to stop an illegality from taking place. The applicant however, seeks to stop what has already taken place. Only an order of certiorari could have come to his aid but I hold the view that the six months rule would have denied him such an order. The same position applies to his attempt to block the interested party from assuming office. By the time he came to court on 12th October, 2012 an order of prohibition could no longer issue since the interested party had already assumed office. The applicant admitted this fact in his pleadings and specifically in prayer (d) through which he seeks an order of certiorari. Thomas Ogola in paragraph 6 of KWS' replying affidavit swore that the appointment of the interested party had been gazetted through Gazette Notice No. 14348 of 5th October, 2012. The applicant never disputed this fact. In the 4th prayer of the application the applicant sought to quash the appointment of the interested party. As already stated elsewhere in this judgment, the applicant has not established any basis for seeking such an order. This particular prayer also fails. As can be seen, none of the orders sought in Case No. 375 of 2012 can be granted to the applicant. As such the same is dismissed.

Finally I must state that what the applicant has placed before this court is a dispute between an employer and an employee. Such a dispute ought to be resolved by resorting to other legal channels availed by Parliament. In **STAFF DISCIPLINARY COMMITTEE OF MASENO UNIVERSITY & 2 OTHERS v PROF. OCHONG' OKELLO [2012] eKLR** the Court of Appeal observed that:-

“However, orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University

and other parties.”

The Court of Appeal repeated the same sentiments in **REPUBLIC v PROFESSOR MWANGI S. KAIMENYI & 2 OTHERS, Civil Appeal No. 160 of 2008** and stated that:-

“The grievance of the respondent is founded on the alleged unprocedural termination of his second contract of employment by the Permanent Secretary. If the person who terminated it had no authority to do so, or if the procedure as outlined in the contract was not followed, these are issues of breach of contract to be canvassed in private law proceedings. We hold that legality or otherwise of termination of contracts of employment that have no statutory underpinnings are matters of private law and the remedies available are private law remedies. In the instant case, the learned judge erred in granting a public law remedy in a contract of employment that had no statutory underpinning. The error is fatal when it is taken into account that the court had found that KIPPRA had a litany of grievances against the respondent.”

I think it is now established law that orders of judicial review are not available to protect a contract of employment which has no statutory underpinning. The applicant's contract of employment had no statutory underpinning and as such judicial review remedies are not available to him.

The end result is that the two applications before this court are dismissed with costs to the respondents and the interested party.

Dated, signed and delivered at Nairobi this 16th day of April , 2013

W. K. KORIR,

JUDGE