REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 1082 OF 2004

REPUBLIC .....APPLICANT

VERSUS

THE INSPECTOR GENERAL

CORPORATIONS.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

Ex-Parte

TITUS K BARMAZAI

JUDGMENT

Titus K Barmazai (the Applicant) was a General Manager with East African Portland Cement Company Limited (EAPCC) between June, 1995 and December, 1998. From December, 1998 until February, 2003, when he was suspended, he was the Managing Director of EAPCC. He seeks judicial review orders by way of the notice of motion dated 1st September, 2004 as follows:-

> **"1. THAT the Applicant be granted an Order of Prohibition and Certiorari directed against the Honourable Attorney General of the Republic of Kenya and/or the Inspector General (Corporations) barring them from acting and/or further acting on the Certificate of Surcharge, Serial Number 072, dated 15th July 2004 and/or from issuing a Surcharge Certificate with any variation in substitution thereof akin to the same Surcharge Certificate dated 15th July 2004 against the Applicant.**
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> **2. THAT the Applicant be granted an order of certiorari to issue to remove into the High Court and quash the Certificate of Surcharge Serial Number 072 dated 15th July 2004 and the Letter Reference No. ISC/EAPCC/TF/2003 headed "Certificate of Surcharge" dated 15th July 2004.**
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> **3. THAT the Applicant be granted an Order of Prohibition directed to the Inspector General (Corporations) and/or the Attorney General of the Republic of Kenya to Prohibit them from retrospectively applying the provisions of State Corporations Act, Cap 446 of the Laws of Kenya against directorship and stewardship of the Applicant Titus K Barmazai as the Managing Director of the East African Portland Cement Limited when**

the Company was in fact exempt from the provisions of the State Corporations Act Cap 446, Laws of Kenya.

4. THAT the Honourable Court be pleased to give further orders and/or directions as it may deem fit and just to grant.

5. THAT the costs of this application be provided for."

The 1st Respondent is the Inspector General (Corporations) and the 2nd Respondent is the Attorney General.

The facts of this case are undisputed. Through a notice of intention to surcharge dated 17th November, 2003 the Applicant was informed by the 1st Respondent that:-

> **"Between 31st July 2000 and 31st January, 2003 you expended Kshs.4,211,112.64 by use of Senator Visa Card Nos. 4314 1199 0000 3336, 4314 1199 0000 3374 and 4314 1199 0000 8997 in contravention of the Office of President Circular No. OP 9/2A/Vol. 41/42 of 17th March, 1993 which inter alia banned the use of Credit Card by directors and chairmen of state corporations.**
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> **Under the powers conferred on the Inspector-General (Corporations) by Section 19 of the State Corporations Act, Cap. 446 I am obliged to surcharge you for irregular expenditure. However, before a surcharge certificate is issued to you, you are hereby given 14 days' notice from the date of this letter to show cause why you should not be surcharged for the loss incurred by the East African Portland Cement Company."**

The Applicant responded to the notice through a letter dated 24th November, 2003.

All was quiet until the Applicant received a letter dated 15th July, 2004 forwarding to him a Certificate of Surcharge No. 072 for Kshs.4,211,113.00. That is what triggered these proceedings.

According to the statutory statement dated 12th August, 2004 the decision to surcharge him attracts judicial review orders for the following reasons:-

> **"15. THAT the basis of the Certificate of Surcharge dated 17th November 2004 Serial Number 072 is an alleged Circular OP NO. 9/29/vol.41/42 of 17th March 1993. The circular was never given to him. He was never made aware of its existence. There was no way of his knowing of the existence of the said circular at all. The Company did not have a copy of the circular on its records. It is not possible to claim that the Applicant knew or ought to have known of the circular. The Surcharge Certificate has not been issued on the proper premises and ought not to take effect.**
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> **16. THAT the preceding Managing Director of the Company, one Mr. John G. Maina for the period between 1986 to 1998 used the Credit Card facility during his term in office, inclusive of the period the circular was allegedly in force. The said Managing Director, Mr. J. G. Maina told the Applicant that he was entitled to the use of the credit card amongst other facilities, in the presence of Senior Managers. The said previous Managing Director did not refer to the existence of the circular. The Applicant while employed as a Manager for the period from June 1995 to December 1998 was aware in his personal knowledge that the Managing Director made use of the Credit Card facility. He was never made aware of the existence of any such circular during the said period as a Manager. In the circumstances the circular has never had any life or effect at the Company.**

17. THAT further, to single out the Applicant on account of the use of the card would be discriminative, which discrimination is based on ulterior motives.

18. THAT the Company was not subject to the circular considering that it was a limited liability company governed by the Companies Act, Cap 486, not State Corporation Act, Cap 446.

19. THAT the Company had in any event (and without prejudice to any averment herein), a State Corporation exemption.

20. THAT the card facility was never abused as alleged or at all.

21. THAT the Surcharge notice has been issued without affording the Applicant a reasonable and/or adequate and/or sufficient opportunity to be heard.

22. THAT in the absence of availing the report upon which the Certificate of Surcharge is issued the inspector is acting as an Investigator on the issue, a Prosecutor and a Judge resulting in the Surcharge Certificate.

23. THAT to the extent to which in fact the card was used for the Corporation's good and welfare the Applicant's right to protection of property is being imperiled and jeopardized.

24. THAT as a Managing Director the Applicant was entitled in fact and in law to manage the Company and to exercise discretion to the best of his knowledge and abilities towards the welfare of the Company provided he acted in good faith. In the event he was entitled to protection of law for such exercise of a director's duties. That the Applicant acted in good faith in every conceivable perspective.

25. THAT the Surcharge Certificate was issued by the Inspector General, (Corporations) under circumstances that show that he acted *ultra-vires.*

26. THAT the Surcharge Certificate issued is illegal for *inter-alia* failure to comprehend the law regulating the decision to issue it, is irrational, unreasonable, and outrageous and is a result of procedural impropriety.

27. THAT the Inspector General (Corporations) is in any event stopped from issuing a Certificate of Surcharge as the Company's directors, shareholders and Government made statements and representations inconsistent with the Company's obligations to the State Corporations Act, Cap 446.

28. THAT the Certificate of Surcharge has not been issued by the Inspector in good faith."

The grounds upon which the reliefs are sought, as reproduced above, essentially captures the Applicant's case and there is no need to say more.

The respondents opposed the application through the replying affidavit sworn on 11th December, 2012 by Edward Ngigi the Acting Inspector General (Corporations). It is the respondents' case that EAPCC was at all material time a state corporation and therefore subject to the provisions of the State Corporations Act (the Act). The respondents contend that the use of credit card by state corporations was banned via a circular dated 17th March, 1993 which was reinforced through another circular dated 29th April, 1993 barring the use of credit cards by all permanent secretaries and chief executives of state corporations. The respondents concede that the President in 1997 did exempt EAPCC from the Act but assert that the exemption had no legal basis since the President had no power to grant an exemption under Section 2 of the Act. In the alternative, the respondents argue that even if EAPCC was legally exempted from the Act,

the exemption did not lift the Government's directive of 1993 barring the use of credit cards by chief executives of state corporations.

It is the respondents' case that the Applicant was given an opportunity to be heard and was indeed heard before the certificate of surcharge was issued. It is further the respondents' case that the law was followed prior to the issuance of the certificate of surcharge and the Applicant ought to have appealed instead of resorting to the judicial review process.

Finally, the respondents submitted that the Applicant cannot be allowed to claim that he was not aware of the contents of the circular since ignorance of the law is no excuse and the Applicant being an occupant of such a high office ought to have exercised due diligence in carrying out his duties and learning the operations of the organization.

In my view the issues to be determined in this matter can be summarized as follows:-

1. Whether the Act under which the certificate of surcharge was issued was applicable to EAPCC;
2. Whether the rules of natural justice were complied with;
3. Whether lack of knowledge of the circular banning the use of credit cards exempted the Applicant from its application;
4. Whether the decision to surcharge the Applicant was discriminatory; and
5. Whether the orders sought should issue.

On the first issue the Applicant's argument is twofold. Firstly, he submitted that EAPCC is a private company and the Act is therefore not applicable to it. In support of this submission, the Applicant has referred the Court to communication made to him by Government officials to the effect that EAPCC should be treated as a private company. He has also annexed the certificate of incorporation of the company to show that it is indeed a private company. The Applicant also cited a letter dated 15th June, 2000 addressed to the Permanent Secretary of the Ministry of Tourism, Trade and Industry by the Permanent Secretary/Secretary to the Cabinet and Head of the Public Service in which it is indicated that the Government had gradually reduced its shareholdings in the EAPCC and:-

> **"In view of the foregoing, the Government's representation on the Board should now be reviewed so that it is proportionate to its Shareholding and the appointment of the Board Chairman should be done by the Shareholders as is the case now in former State Corporations where the Government through divesture is no longer the majority Shareholder like Kenya Airways or Kenya Commercial Bank."**

In the written submissions, counsel for the Applicant also cited the decision of Warsame, J (as he then was) in **MARK OLE KARBOLO AND 4 OTHERS v ACTING MINISTER OF INDUSTRIALIZATION & ANOTHER [2012] eKLR** to support the argument that EAPCC is a private company. In that case the learned Judge had to decide the legal status of EAPCC.

The second limb of the Applicant's argument as to why the Act is not applicable to EAPCC is the exemption of EAPCC by the President of the Republic of Kenya from the provisions of the Act. The fact that EAPCC was indeed exempted from the provisions of the Act is not disputed and is confirmed by a letter dated 1st September, 1997 addressed to the Permanent Secretary Ministry of Commerce and Industry by the Permanent Secretary/Secretary to the Cabinet and Head of Public Service. The said letter is supported by Legal Notice No. 177 in the Kenya Gazette of 5th September, 1997.

The issue as to whether EAPCC is a state corporation or a public listed company was addressed in detail by Warsame, J (as he then was) in the case of **Mark Ole Karbolo**, supra. The learned Judge after considering the rival submissions by the parties concluded that EAPCC was a state corporation. I agree with the findings of the learned Judge as relates to the legal status of EAPCC.

There are several factors which point to the fact that EAPCC was indeed a state corporation. It should be noted from the beginning that the Applicant was appointed by the Government of Kenya as the Managing

Director of EAPCC and he cannot turn around to claim that EAPCC was a private company. Secondly, apart from the correspondences cited by the Applicant showing that there was an intention to privatize EAPCC, everything else points to the fact that EAPCC was indeed a state corporation. The letters cited by the Applicant acknowledged the fact that EAPCC was a state corporation. The fact that EAPCC was a state corporation for all intents and purposes was also confirmed by the action of "exemption" from the Act by the then President of the Republic of Kenya.

On the issue of the legal status of EAPCC at the time relevant to this matter, I find that it was a state corporation. The Act was therefore applicable to it and the Applicant's assertion that he ought not to have been surcharged, as EAPCC was a private company, therefore fails.

Secondly, the Applicant submitted that the Act was not applicable to EAPCC since it had been exempted from the provisions of the Act by the President. On this issue, the respondents submitted that the exemption by the President of EAPCC from the provisions of the Act was invalid and cannot be relied upon to conclude that EAPCC was not subject to the provisions of the Act. In support of this submission counsel for the respondents cited the decision of the Court of Appeal in **REPUBLIC v. ATTORNEY GENERAL & 15 OTHERS EX-PARTE KENYA SEED COMPANY LIMITED AND 5 OTHERS [2010] eKLR** in which the Court held at paragraph 51 that:

> **"We think for ourselves that the superior court was right in its appreciation of the purported exemption. There was no power donated to the President under the Act to confer exemptions to Parliamentary enactment on the control and regulation of State Corporations. The express power to "exempt" was only introduced by section 5A of Act No. 2/02 which amended the original Act. The President initially could only "declare" by notice in the Gazette that any other body corporate was not a State Corporation, but there has never been any such lawful declaration."**

The decision of the Court of Appeal is on all fours on the issue raised by the Applicant as to the exemption of EAPCC from the Act. As was observed by the Court of Appeal, Section 5A of the Act was introduced in 2002. That was over four years after the President allegedly exempted EAPCC from the Act. Again, as noted by the Court of Appeal, the President in 1997 had no power to exempt any state corporation from the provisions of the Act. That being the legal position, EAPCC remained a state corporation despite the existence of Legal Notice No. 177 of 1997. The Applicant's argument that he was not liable to surcharge because EAPCC was not a state corporation therefore fails.

Even assuming that there was a valid exemption from the provisions of the Act, such an exemption would in my view not come to the aid of the Applicant. The exemption clause (Section 5A of the Act) introduced in 2002 provides that:

> **"5A. (1) Subject to subsection (2), the President may, by notice in the Gazette, exempt a state corporation, not being a state corporation established under section 3, from any of the provisions of this Act.**
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> **(2) Notwithstanding the provisions of subsection (1), an exemption granted under this section shall not exempt a state corporation from the provisions of sections 5, 10A, 11, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 or 29.**
>
> **(3) ……..."**

The powers of the 1st Respondent are found in sections 18 and 19 of the Act and as per Section 5A(2) an exemption granted by the President does not exempt a state corporation from the provisions of sections 18 and 19 among other sections.

The second issue is whether the rules of natural justice were complied with. The rule of natural justice was summarized in the case of **KANDA v THE GOVERNMENT OF MALAYA [1962] AC 322** as follows:-

> **"In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bais is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the maxims: *Nemo judex in causa sua:* and *Audi alteram partem*. They have recently been put in two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations."**

After enunciating the rule, the Court then proceeded to consider the right to be heard and stated that:-

> **"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."**

The Applicant herein complains that he was not given an opportunity to be heard. His counsel further went ahead and submitted that his defence was never considered. In order for a person who has been accused to be satisfied that he has been taken through a fair process, he must believe that his defence has indeed been considered. That is what fairness calls for. The Applicant through the letter dated 24th November, 2003 gave a two page response to the 1st Respondent's notice of intention to surcharge. There was unexplained silence until the time the letter dated 15th July, 2004 and the Certificate of Surcharge Serial No. 072 were delivered to him. The said documents did not mention whether the defence given by the Applicant had been considered.

That the Applicant was given a hearing is not in dispute. The Applicant was informed about the intention to surcharge him. He was asked to respond and he wrote to explain why he should not be surcharged. As already stated, it is not known whether the 1st Respondent considered the Applicant's response.

Section 20 of the Act provided a solution to the Applicant. Once the decision to surcharge him was made, he had a right to ask for written reasons for the decision. Since the Applicant did not utilize the opportunity availed to him by the Act, it cannot be said that no reasons were given for the decision to surcharge him. The Applicant cannot be heard to say that his defence was not considered since the Act had given him an opportunity of finding if the defence had been considered or not.

The respondents have submitted that the Applicant has not established illegality, irrationality or procedural impropriety on the part of the 1st Respondent so as to bring this matter within the threshold of judicial review. They assert that the Applicant ought to have filed an appeal with the Tribunal instead of instituting these proceedings.

It is not disputed that Section 22 of the Act provides an avenue for appealing against the decisions of the 1st Respondent by creating the State Corporations Appeal Tribunal. Counsel for the respondents submits that the Applicant has not exhausted the avenues created by the Act and he is therefore not deserving of the orders sought. He invited me to follow the decision of the Court of Appeal in **REPUBLIC v NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY, COURT OF APPEAL AT NAIROBI, CIVIL APPEAL NO. 84 OF 2010** in which the Court stated that:

> **"Mr. Ngatia, for the appellant, did not contend before the trial Judge or before us that there was no right of appeal against the Respondent's order of 20th January, 2009; what Mr. Ngatia maintained before the trial Judge as well as before this Court is that in spite of the right of appeal provided under *section 129* of the Act the Appellant was entitled to approach the High Court by way of judicial review. The trial Judge, as we have stated, agreed with that contention but went on to consider whether the orders sought should be granted and why those orders were preferred over the appeal process. She also held that the Appellant had not explained why the process of judicial review was preferred over the appeal process……**

We agree with Mr. Ngatia that the issue raised in the Appellant's notice of motion were in the domain of public law. But we do not accept that once a matter falls within the public law domain, judicial review is the only way to litigate upon it or it must be through the judicial review process. As we pointed out earlier, Mr. Ngatia did not contend that the matter fell outside the jurisdiction of the Tribunal specifically created to deal with disputes concerning the environment. The Tribunal itself is a public body created by statute to administer the appeal process under the Act; it cannot deal with matters concerning private law for instance. The learned Judge was merely weighing the issue of whether the High Court was in a better position to deal with the matter than the Tribunal. She dealt with the speed or pace at which the Tribunal would be able to resolve the matter and compared that with the speed or pace which would be adopted by the busier courts. She dealt with the expertise available in the Tribunal as against the High Court and such like matters and having taken all those considerations into account, she concluded that the matter ought to have been dealt with by way of an appeal rather than by way of judicial review. The Judge backed up her decision with authorities…….

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge."

The Court of Appeal correctly stated the law in the above cited case. The question to ask is whether judicial review is the most efficacious remedy in the circumstances of the case before me. Where an Act of Parliament provides a dispute resolution mechanism, judicial review should not be resorted to. However, the fact that an alternative remedy is available does not of itself lock out an applicant from accessing a judicial review court. Whether judicial review is the most efficacious remedy depends on the circumstances of each case. The matters to consider are clearly explained by the authors of **Halsbury's Laws of England in the 4th Edition 2001 Reissue at 141, Para 67** in the following words:

"The courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal or where some other body has exclusive jurisdiction in respect of the dispute. However, judicial review may be granted where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' or 'where there is no other equally effective and convenient remedy'. This is particularly so where the decision in question is liable to be upset as a matter of law because it is clearly made without jurisdiction or in consequence of an error of law. Factors to be taken into account by a court when deciding whether to grant relief by judicial review when an alternative remedy is available are whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review; and whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body. Further, a court should bear in mind the purpose of judicial review and the essential difference between appeal and review."

I will therefore proceed to consider whether judicial review is the best remedy in the circumstances of this case. One of the reasons put forward by the Applicant as to why he should not be surcharged was that he

was not aware of the circular that had banned the use of credit cards. He further told the Court that when he took over the office his predecessor one Mr. J.G. Maina told him that he was entitled to use the credit cards among other facilities. He averred that this information was passed to him in the presence of senior managers. The respondents did not reply to this particular statement and it is presumed that the Applicant is telling the truth. In fact the respondents' reply to the Applicant's statement is that ignorance of the law is no excuse.

The circular upon which the surcharge was based amounted to internal instruction. The same ought to have been brought to the attention of the Applicant. He cannot be said to have known about all the circulars that were filed away in the drawers of the corporation. It was incumbent upon the respondents to demonstrate to the court that the Applicant knew of the circular and its contents. Sections 10-15 of the Employment Act, 2007 provides that an employer has a duty to provide an employee with all the information relevant to his employment. It is also important to note that a circular cannot be equated to a statute. The respondents cannot therefore be heard to say that the Applicant should not plead ignorance of the circular. The Applicant's assertion that he was not aware of the circular was therefore a good defence. This court has not been provided with information by the respondents as to whether the Applicant's defence was considered. In my humble view, failure to consider a defence raised by a party to proceedings before a tribunal or public authority amounts to a breach of the rules of natural justice.

The Applicant also contended that the decision to surcharge him was discriminatory. He told the court that his predecessor had used the same facility and yet he had not been surcharged. This fact was not disputed by the respondents. There is no evidence on record to show the action, if any, taken against the Applicant's predecessor. The treatment of the Applicant and his predecessor ought to have been uniform in the circumstances of this case.

One of the definitions given to the term "discrimination" by **Black's Law Dictionary** (9th Edition at page 534) is **"differential treatment, esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."** There was no good reason for treating the Applicant differently from his predecessor. The Applicant has a point when he claims that his treatment was discriminative. No reason was tendered by the respondents to explain the discrimination. I therefore agree with the Applicant that the decision to surcharge him was discriminative. Maybe if the 1st Respondent had given reasons then one could have understood why the Applicant's predecessor was not surcharged. The Applicant had in his response to the notice of intention to surcharge clearly indicated that his predecessor had used the credit card facility and had told him that he could utilize the same.

The question that remains to be answered is whether the orders should be granted. Judicial review is a remedy available to those who have not received fair treatment from public authorities. The Applicant has clearly established that he was not taken through a fair process. The orders sought are therefore available to him. His application succeeds and orders are issued as prayed. There will be no orders on costs.

Dated, signed and delivered at Nairobi this 5th day of December, 2013

W. K. KORIR,

JUDGE OF THE HIGH COURT