



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Judicial Review 236 of 2011

**IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS OF CERTIORARI
& MANDAMUS**

AND

IN THE MATTER OF LAW REFORM ACT (CAP.26) LAWS OF KENYA

AND

**IN THE MATTER OF ARTICLE 25 AND 47 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF A DECISION MADE REACHED BY THE PERMANENT SECRETARY,
MINISTRY OF REGIONAL DEVELOPMENT AUTHORITIES**

AND

IN THE MATTER OF AN APPLICATION

BY:

REPUBLIC.....APPLICANT

-VERSUS-

THE PERMANENT SECRETARY, MINISTRY OF

REGIONAL DEVELOPMENT AUTHORITIES.....RESPONDENT

EXPARTE

ENGINEER CHARLES MWANDA

J U D G M E N T

The Exparte Applicant herein Engineer Charles Mwanda (*hereinafter referred to as the Applicant*) moved this court by way of Notice of Motion dated 10th October 2011 filed in court on even date seeking the following orders:

- a) An order of certiorari be issued to call and or bring before this court the decision of the Respondent reached on the 12th April 2011 and later revised on the 4th May 2011 and the same be quashed forthwith.
- b) An order of Mandamus be issued directed against and or at the Respondent to immediately reinstate and or let the Applicant ENG. CHARLES MWANDA, to continue with the performance and execution of his duties/assigned duties in his present position in the Respondent Ministry as Director, Regional Development, without interference and or hindrance in the conduct of his (the Applicant) said duties.
- c) Cost of these proceedings be awarded to the Applicant.

The Notice of Motion was filed pursuant to leave granted on 7th October 2011. It is supported by the statutory statement dated 6th October 2011 and the verifying affidavit sworn by the applicant on 6th October 2011 and annexures thereto.

It is premised on three grounds which are that:

- (i) The Exparte Applicant was not heard before the actions and decision complained of by the Exparte Applicant was reached.
- (ii) The Respondent relied on extraneous and irrelevant matters in reaching the decision complained of.
- (iii) The Exparte Applicant was treated unfairly by the Respondent.

Briefly, the case for the exparte applicant is that he is an employee of the Government of Kenya working as a director of Regional Authorities in the Ministry of Regional Development Authorities.

The applicant complains that while working in the aforesaid Ministry in the capacity of director, he received a letter dated 12th April 2011 written by the respondent suspending him from the performance of his duties on corruption related allegations. The decision to suspend the applicant was subsequently revised in letter dated 4th May 2011 whose content was basically the same as that of letter dated 12th April 2011 save for change of suspension to interdiction which entitled the applicant to half salary. The two letters are annexed to the applicant's verifying affidavit and are marked "CM".

In order to appreciate the full meaning and import of the said letters, I think it is important to reproduce the letter dated 4th May 2011 since it is the one which represents the respondent's last decision on the matter which is the decision sought to be impugned by the applicant in this case.

Ref.1984118534/15

Date: 4th May, 2011

Eng. Charles O. Mwanda

Director, Regional Development

Ministry of Regional Dev. Authorities

NAIROBI

INTERDICTION

Reference is made to this office letter Ref. No.84118534/13 of 12th April, 2011 which suspended you from exercising the duties of your office in order to pave way for investigations on a complaint received by the KACC of irregularities in the procurement of heavy machinery and misappropriation of public funds at Tana and Athi Rivers Development Authority during the 2009/10 Financial Year. The Kenya Anti-Corruption Commission in their preliminary investigation confirmed irregular payments were made to contractors under Economic Stimulus Programme (ESP) in the Tana Delta Irrigations Programme (TDIP) at Garsen, where you irregularly instructed the Managing Director, TARDA to issue three firms tenders for hire of heavy machinery and equipment to be used in the land preparation at TDIP and they were paid over Kshs.50 million. This action gave undue advantage and circumvented the competitive procurement process contrary to section 45 (2)(b) of the Anti-Corruption and Economic Crimes Act No.3 of 2003.

In view of the foregoing you will be deemed to be interdicted from exercising the duties of your office with effect from 12th April 2011 pending full investigations which are being undertaken on the case. While on interdiction you will be entitled to half salary.

In this regard, treat the earlier letter on “suspension with no” pay as cancelled.

ENG. CAREY O. OREGI, CBS

PERMANENT SECRETARY

The applicant complains that the decision to interdict him from his employment was made by the respondent without giving him an opportunity to be heard on the allegations levelled against him in the aforesaid letters which formed the basis of the decision to interdict him. That the said decision was consequently reached in breach of the rules of natural justice that no man should be condemned unheard.

The applicant contends that he had a good defence to the allegations levelled against him and that had he been given an opportunity to state his case before the impugned decision was taken, he would have demonstrated that he had nothing to do with the irregularities complained of in the procurement of heavy machinery and alleged misappropriation of public funds at Tana and Athi Rivers Development Authority (TARDA).

It is the applicant’s case that the respondent’s failure to give him an opportunity to be heard before deciding to interdict him amounted to violation of his constitutional right to a fair hearing and exposed him to unfair administrative action contrary to Article 47 of the Constitution of Kenya and that therefore he was entitled to the orders sought.

The application is opposed by the respondent through the grounds of opposition filed on 29th November 2011. The respondent in his grounds of opposition advanced the position that the applicants’ motion lacks merit for the following reasons:

- 1) That the Notice of Motion dated 10th October 2011 is premature, misconceived and an abuse of the court process.
- 2) That the interdiction of the Applicant is provided for by statute to facilitate investigation into his conduct and that of the procurement committee.
- 3) That the interdiction was necessary to facilitate impartial investigations which would not be possible while the applicant is still in office.
- 4) That the ex-parte Applicant’s prayers for an order of certiorari and mandamus are not amenable to judicial review.

To further advance their respective positions, both parties filed written submissions which their counsels

highlighted before the court on 14th March 2012.

Having considered the application, the submissions made by Mr. Buti for the applicant and Mr. Kaumba for the respondent and the authorities relied upon by both parties, I find that since the respondent did not file a replying affidavit to respond to matters of fact deponed to by the applicant in his verifying affidavit, the depositions in the said verifying affidavit are not contraverted and are deemed to have been admitted by the respondent.

In view of the foregoing, it is my finding that there are only three issues that arise for determination by this court which are as follows:

- (1) Whether the respondent's decision to interdict the applicant is amenable to judicial review.
- (2) Whether in making the impugned decision the respondent breached the Rules of Natural Justice.
- (3) Whether the applicant is entitled to the reliefs sought.

It is common ground that the decision to interdict the applicant was made by the Permanent Secretary in the Ministry of Regional Development Authorities. The Permanent Secretary obviously made the said decision in his capacity as the Accounting Officer in the Ministry charged with the responsibility of overseeing its smooth operations and management of its Human Resource. In performing the many different tasks encompassing the above broad functions, the respondent was executing his duties as a public officer in the said Ministry on behalf of the Government of Kenya.

He was therefore performing public duties and functions and if in the performance of those duties he made decisions which adversely affected the rights of third parties owing to his failure to act fairly or in accordance with the law, the said decisions are amenable to judicial review. This is because judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, statutory bodies or public officers who in the execution of their duties have a duty to act fairly in order to ensure that their decisions and actions do not exceed their authority and that they do not abuse their powers by acting arbitrary or unreasonably to the detriment of citizens who appear before them.

Mr. Kaumba learned Counsel for the respondent submitted that the impugned decision was not amenable to judicial review allegedly because it related to the Applicant's contract of employment with the respondent. Mr. Kaumba however conceded in his submissions that judicial review would still be available in such a situation if the decision maker did not follow the law and the decision was not reached fairly where rules of natural justice were not complied with. This admission by the Respondent resolves the first issue conclusively and there is no need to go into any length to analyse the authorities relied upon by the applicant on this issue since the point they sought to establish is already admitted by the respondent.

Besides, though it was not expressly stated by either the applicant or the respondent, the decision to interdict the applicant was apparently made under Regulation 23 of the Public Service Commission Regulations of 2005. The said regulations amount to subsidiary legislation made under the Service Commissions Act Cap.185 Laws of Kenya. It was therefore a decision made in the exercise of statutory powers conferred on the respondent and this court has supervisory jurisdiction by way of judicial review to ensure that such powers are not abused or exercised arbitrarily or irrationally subjecting citizens to unfair treatment.

On the issue of whether the respondent violated the rules of natural justice in making the impugned decision, the applicant has argued that the respondent did not give him an opportunity to be heard on the allegations of impropriety levelled against him before interdicting him from Government Service and this in his view amounted to a breach of the first rule of natural justice that no man shall be condemned unheard (*audi alteram partem*).

The fact that the applicant was not given an opportunity to be heard before the impugned decision was made is not disputed by the respondent but the respondent asserts that the said decision was made to facilitate investigations and it was at the investigation stage that the applicant would have been given a chance to be heard on the allegations forming the basis of the said decision. According to the respondent, the applicant's application is premature in that the impugned decision was meant to facilitate investigations into allegations made against him which are yet to be conducted and it was at the stage of conducting investigations that the applicant would have been heard on the said allegations. This claim by the respondent is not challenged by the applicant. The applicant's contention is that he ought to have been given a chance to tell his version of the story before the decision to interdict him from his employment was taken.

Looking at the letter dated 4th May 2011, it is clear that the applicant was interdicted pending full investigations into the allegations made against him. It therefore follows that the impugned decision was not a final decision regarding the applicant's right to employment. It was like an initial step taken to commence investigations to establish the truthfulness or otherwise of the allegations levelled against the applicant. I agree with the respondent that it is only at the investigation stage of the allegations that the respondent or any of his authorized officers would have heard representations from all adversely mentioned parties including the applicant herein before making a final decision on whether to retain or dismiss the applicant from employment. In this case, the applicant approached the court before the said investigations were conducted and before any final decision was made by the respondent on the matters in question.

The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principal of justice. The right to be heard accrues to any person whose rights or interests are likely to be adversely or prejudicially affected by decisions made by a court, tribunal or persons exercising judicial or quasi judicial powers or charged with the responsibility of making administrative decisions. There are however qualifications to this general rule. The rule will not apply to preliminary or provisional decisions or decisions which are not final in character.

In Halisbury's Laws of England, 4th Edition Vol.I, Page 175 the learned author states:

"The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be found".

In this case the decision to interdict the applicant was a preliminary decision awaiting outcome of investigations into allegations of impropriety levelled against him. It was not a final decision terminating the applicant's employment with the Ministry of Regional Development Authorities which would have had the effect of irreversibly and adversely affecting the applicant's right to livelihood without having given him an opportunity to respond to the allegations levelled against him. A final decision in such circumstance would also have amounted to a violation of the applicant's legitimate expectation that he would continue working in the Ministry till he attained the mandatory retirement age unless his services were terminated due to misconduct or other reasons in accordance with the law.

The respondent's fear or apprehension that if not interdicted the applicant might interfere with the intended investigations is in my opinion reasonable given the seniority of the applicant's position in the Ministry.

In any event, the applicant still had opportunity to state his case when investigations into the allegations of impropriety made against him were being carried out in order to determine his suitability to continue serving his employer.

In my opinion, the interdiction of an employee for the purposes of conducting investigations relating to allegations that touch on an employee's conduct is the first step in disciplinary proceedings in

all organizations not only in the Public Service.

The court can only intervene by way of judicial review to stop an employee's interdiction if it is demonstrated that the said provisional decision was made in bad faith for ulterior motives without sufficient cause, was irrational or made outside the decision makers mandate and was contrary to the law.

In the instant case, none of the above conditions have been demonstrated by the applicant. No evidence has been tendered to show that the respondent acted contrary to the law or the decision was motivated by bad faith or was unreasonable within the meaning of *Wednesbury's* unreasonableness.

As for the claim that the decision was made in breach of the rules of natural justice, it is my view that given the provisional nature of the decision, the applicant's right to fair hearing was not compromised since no final decision had been reached in the matter and the applicant still had opportunity to prove his innocence of the allegations made against him at the investigation stage of the disciplinary proceedings.

I also find no evidence to suggest that the respondent treated the applicant unfairly. As the letter of 4th May 2011 demonstrates, the applicant remained an employee of the respondent and was entitled to half salary as provided by the law till investigations into the matter in question were finalized and a final decision concerning his employment was made. If after investigations were completed he was exonerated, the Public Service Commission regulations require that he would be reinstated to his position with his half salary forgone during the period of interdiction paid to him but if he is found unsuitable to continue serving in that position, his services would be terminated in accordance with law.

For all the foregoing reasons, it is my finding that the applicant has not demonstrated that he is entitled to the orders of Certiorari sought in Prayer (a).

Turning now to the prayer for order of Mandamus, it is my finding that the applicant is also not entitled to the order of Mandamus as sought in Prayer (b).

As held by the Court of Appeal in the case of R -Vs- Kenya National Examination Council Exparte Gathenji, the order of mandamus is a command from the High Court directed to any person, corporation or inferior tribunal requiring him or them to perform a statutory or public duty which he/they had failed or refused to perform to the detriment of the applicant. In this case, the applicant has not demonstrated that the respondent was under a statutory or public duty to reinstate the him to his position while investigations into his alleged manipulation of the tendering process and misappropriation of funds at TARDA were going on and that the respondent had failed to execute that duty.

In the absence of evidence to that effect, this court does not have any basis upon which to issue an order of Mandamus. Besides, it would be in my humble view unjust and imprudent for a Court to make orders which would have the effect of reinstating an interdicted employee to his official position while disciplinary proceedings meant to determine the employee's suitability to continue serving his employer were being conducted and had not been finally determined one way or the other.

The court should be wary of making orders that might be seen or be interpreted as interference in an employer's disciplinary process unless there is evidence that the same was initiated and conducted contrary to the law.

In any case, the respondent will have discretion to decide whether to reinstate the applicant to his former position or to terminate his services depending on the outcome of the intended investigations. If the court were to issue the order of Mandamus as sought, it would have the effect of compelling the respondent to exercise his discretion in a specific way even before the said investigations are conducted and/or concluded which is not permissible in law.

Since the applicant has failed to demonstrate that the respondent is statutorily required to reinstate him to his position while awaiting conclusion of the investigations into his alleged impropriety in service, I find that the applicant has failed to prove that he is entitled to the relief sought in Prayer 1(b). The order

of Mandamus is therefore not available to him and I decline to issue the same as prayed.

However, since it was not disclosed to the court whether the intended investigations have been started or not and considering that the applicant was interdicted on 4th May 2012, the dictates of fairness and justice demand that such investigations should be carried out expeditiously so that the applicant gets to know his fate as soon as possible.

Judicial review is all about fairness and due process and in order to ensure that the applicant is treated fairly by his employer, I direct that in the event that the said investigations have not been started, the same should be commenced and concluded within the next four months and in the event that the applicant's services are eventually terminated, he shall be paid his terminal benefits according to the terms of his employment.

I make no order as to costs. Each party to bear its own costs.

Dated, Signed and Delivered by me at Nairobi this **15th** of **June** 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

N/A by both parties (Applicant & Respondent)