



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 997 OF 2003

JOHN FITZGERALD KENNEDY OMANGA.....PLAINTIFF

VERSUS

THE POSTMASTER GENERAL

POSTAL CORPORATION OF KENYA

& 2 OTHERS.....DEFENDANT

JUDGEMENT

This is a case for judicial review, brought pursuant to the provisions of order 53 of the Civil Procedure Rules, as read together with sections 8 and 9 of the Law Reform Act.

The applicant, John Fitzgerald Kennedy Omanga has asked this court to grant him the following orders:

“1. That this Honourable court be pleased to issue an order of certiorari removing from the 1st Respondent, the Postmaster General of the Postal corporation of Kenya, into the High court and then quash the decision of the 1st Respondent to interdict the Applicant JOHN FITZGERALD KENNEDY OMANGA, and Commence disciplinary proceedings against the Applicant herein.

2. THAT this Honourable Court be pleased to issue an order of prohibition against the 1st, 2nd and 3rd Respondents prohibiting the Respondents from continuing or effecting the disciplinary proceedings initiated by the 1st Respondent against the Applicant, JOHN FITZGERALD KENNEDY OMANGA

3. THAT this Honourable court be pleased to issue an order of mandamus to compel the 2nd

Respondent, Applicant, OMANGA, intended Applicant OMANGA Corporation (hereinafter as **the** **JOHN FITZGERALD** **controlling officer of the KENNEDY** **to initiate and undertake any** **disciplinary proceedings against the** **JOHN FITZGERALD KENNEDY** **as laid down by the Postal** **of Kenya Staff Regulations** **called “POSTA CODE”).**

4. THAT costs of this application be borne by the Respondents.”

The proceedings are supported by the applicant’s affidavit

In response to the application, the 1st Respondent filed a replying affidavit.

During the hearing of this case, Mr. E. N. Mwangi, Advocate for the applicant notified the court that his client had abandoned prayer 3, in the Notice of Motion. Effectively therefore, the only prayers being sought by the applicant are certiorari, to quash the 1st Respondent’s decision to interdict him, and prohibition directed against the Respondents, so that they should not continue, undertake or give effect to the disciplinary proceedings which were initiated by the 1st Respondent.

As at the time these proceedings were commenced, the applicant was the Assistant General Manager, Strategy and Business Development, at the Postal Corporation of Kenya. His employer is a public body, charged with the responsibility of providing postal services in Kenya, and also as between Kenya and the rest of the world.

The Postal corporation of Kenya has established a body of regulations that governs the relationship between the said corporation and its staff. The said regulations are embodied in a document named the **“Posta Code.”**

Part 3 of the Posta Code sets out the **“Disciplinary Procedures”**. In a nutshell, the applicant is now contending that the 1st Respondent flouted the Post Code, as he is said to have acted without the requisite authority.

What did the 1st Respondent do?

It is the applicant’s case that the only person entitled to commence disciplinary procedure against the applicant is the **“controlling officer,”** who is defined as;

“an officer not below scale 8 or an officer of equivalent rank who is in charge of a postal or telecommunications corporation.”

As far as the applicant was concerned, his **“controlling officer”** was none other than the General Manager, Strategy and Business Development.

In Response to this line of submissions, Mr Maingi, advocate for the respondents, faulted the applicant's understanding of the phrase "controlling officer." As far as the respondents were concerned, the General Manager, Strategy and Business Development could not be the applicant's "controlling officer." At most, submitted the respondents, the General Manager, Strategy and Development could only be the Head of Department.

Having given due consideration to the issue, I find that the applicant was directly answerable to the General Manager, Strategy and Development. However, that fact alone would not have constituted the said General Manager into the applicant's "**controlling manager**".

Indeed, I do notice that there are other persons known as "**Supervising Officer**", in the Posta Code. This latter category of officers are defined as employees who have the

"responsibility to oversee, direct or supervise the work or operations of other employees."

In this case, the General Manager Strategy and Development is an officer within the scale which entitles him to be a "**controlling officer**". However, he is not in charge of a postal or telecommunications corporation. In my understanding the said General Manager is in charge of a department within the corporation which is charged with the said corporation's strategy and business Development. He could be, properly described, as the appellant's "**Supervising Officer**", by virtue of the fact that the applicant was directly answerable to him.

As I understand it, the Posta Code was put together at a time when the Posts and Telecommunications Corporation was a single unit. Since then, two distinct corporations have been carved out, one to handle Postal Services, and the other to handle Communications. The entity handling postal services is the Postal Corporation of Kenya, whilst that handling Communications is the Communications Commission of Kenya.

The applicant did concede that the 1st Respondent was the Chief Executive of Postal Corporation of Kenya. He is therefore in charge of that corporation. Upon my first reading of the Posta Code, and having listened to the competing submissions by counsel, I formed the view that the 1st Respondent could be correctly, termed as the applicant's "**controlling Officer**", as defined in paragraph 1.2.14 of the Posta Code. However, upon my further reading of the functions and roles assigned to the said controlling officers in Part 3 of the Posta Code, I came to the conclusion that the phrase could not have been intended to mean the Chief Executive of the corporation. For instance, paragraph 3.2 reads (in part) as follows:

"Where the proposed punishment is within the powers delegated to the controlling officer, he shall determine the punishment and inflict it without delay. Where the punishment is outside the powers delegated to the controlling officer, he shall make his recommendation to his superior officer or to the Divisional manager or the Head of Department, as the case may be."

If I were to hold that the controlling officer was the Chief Executive of the corporation, I would then be unable to fathom who his "**Superior Officer**" would be; and also how such superior officer may have powers that were wider in scope, compared to those held by the Chief Executive. Thus, whereas the definition in paragraph 1. 2. 14 suggests strongly that the controlling officer would be the Chief Executive, the usage of

the phrase in para 3 of the Posta Code renders that meaning inapplicable. I would therefore invite the attention of the Postal Corporation of Kenya to the apparent disparity between the two provisions in the Code, and ask them to harmonize the same.

In the meantime, I do not have to resolve that issue, as the outcome of these proceedings are not dependant on that. I say so because the applicant himself did concede that there was no express stipulation in Posta Code requiring the controlling officer to be the person who either commenced disciplinary proceedings or had to make a finding of guilt or innocence of the employee.

The main reasons for the applicant's complaints are that the 1st Respondent lacked authority to interdict him, and also that the 1st Respondent flouted the rules of natural justice.

In order to analyse the case, I first need to set out some background to it. First, the applicant was appointed to the position of Corporation Secretary on 27th January 2000. Thereafter, the applicant was transferred to the position of Assistant General Manager EMS services, on 2nd May 2003, before being transferred to his current position (as Assistant General Manager, Strategy and Business Development) on 4th August 2003.

On the other hand, the office of the 1st Respondent was occupied by Mr. Dan Kenneth Ameyo as from 25th March 2003. Shortly after Mr. Ameyo was appointed Postmaster General, he wrote to the applicant and other Senior Officers, seeking answers to issues, which he believed to have been improperly handled. Upon my reading of the issues raised by the 1st Respondent, I feel that his questions may very well be justified.

However, I am also obliged to remind myself, as I hereby do, that the proceedings before me are for judicial review. Therefore, although I may feel that the issues raised by the 1st respondent may be well founded, it is not my role, in these proceedings to delve further into that aspect of the matter.

In *Miscellaneous Application No. 316 of 2001 Antony John Kibiribir versus the Land Registrar Kilifi District & 3 Others*, E. M. Githinji J. (as he then was) expressed himself thus:

“It is trite law that in Judicial review applications the court is not concerned with the merits of the decision but with the decision making process.”

I therefore need only concern myself with the questions as to whether or not the 1st Respondent had authority to interdict the Applicant; and whether or not he flouted the rules of natural justice, at the time he was arriving at his decision.

The Posta Code empowers the Board of Directors to exercise disciplinary control over the staff. The Board has expressly delegated some of the said power to the Managing Director, who in turn has authority to delegate further down.

Pursuant to the provisions of part JI, paragraph 1.2 of the Posta Code;

“The Managing director or the Board of directors will direct on the manner of dealing with any disciplinary case which is not covered by Post code.”

Therefore, there cannot be a blanket statement excluding any person or category

of persons from the authority to exercise disciplinary control. Each case must be looked at on its own circumstances. In other words, even though part J5 of the Posta Code spells out the summary of the delegated disciplinary powers, it is not exhaustive in itself. By virtue of paragraph 1.2 of the code, the Board of Directors or the Managing Director could give directives on the manner of dealing with any disciplinary case which was otherwise not

specifically covered by the code. Thus the 1st Respondent could be directed by the Board or the Managing Director on how to deal with the Applicant's disciplinary case.

In this case, there was a Board of Directors meeting on 25th August 2003. At that meeting, one of the items that was discussed was a report by the sub-committee on the payment of legal fees to the firm of Kipkorir Titoo & Kiara Advocates. One of the recommendations in that report was that the legal fees paid to that firm of advocates be recovered. Having discussed the report of the sub-committee, the Board of Directors passed the following resolution, which is numbered, minute No. 41/2003;

“The recommendations of the sub-committee were approved and the board directed that the matter be referred to the Kenya Anti Corruption Police Unit and Efficiency Monitoring Unit for full investigations.

The Board further recommended that the officers involved in the excessive payment be sent on interdictions pending completion of investigations.”

From the foregoing, it is clear to me that the decision to interdict the officers involved in the excessive payment of legal

fees, was passed by the duly authorized organ, the Board of Directors.

There can be no doubt that the applicant was one of the officers who were involved in the said payment. Indeed he explains his involvement, in his memo dated 28th May 2003, which was addressed to the 1st Respondent. Therefore, the decision by the Board of Directors touched the applicant, directly, even though he is not named in the resolution itself.

Thereafter, the 1st Respondent directed the General manager, in charge of Human Resources to send a letter dated 1st September 2003. by the said letter, the Applicant was notified as follows amongst other things:

“7 Interdiction from Duty

7.1 In view of the above serious omissions that have caused massive loss of official funds, I have to inform you that it has been decided to interdict you from duty with effect from the date you receive this letter pending the nature of disciplinary action to be taken against you. While under interdiction, you will be entitled to half salary only until interdiction is lifted.

7.2.....

7.3 You are finally required to submit reasons in your defence as to why a severe and deterrent disciplinary action, which may include your dismissal from service, should not be considered on account of the foregoing serious offences. Your explanation is required within forty-eight (48) hours upon receipt of this letter. Should you fail to respond within the given period, it will be assumed that you have no reasons to offer in your defence and the intended measure will be effected without further reference to you.”

The 1st Respondent does not have the authority to enforce the disciplinary procedures, in his capacity as the Chief Executive to the Corporation. He could only have such authority when, and to the extent it is given to him by either the Board or the managing Director.

In this case, he had drawn the attention of the Board of Directors to the issue of excessive payment of legal fees. The Board decided to have interdicted, all officers who were involved in the excessive payment. However, there is nothing before me, which indicates that the Board of Directors mandated the 1st Respondent to give effect to that resolution, to interdict the officers. Without the express mandate from the board, the 1st Respondent would not have had authority to write the memo dated 1st September 2003.

Of course, I do appreciate the fact that in an ideal set up, the Chief Executive of an organization would be commended for giving effect to the decisions passed at a meeting of the Board of Directors. He would not need to be specifically told to carry out the actions, which the Board had passed. But given the express wording of the Posta Code, the only organ, which has disciplinary authority, is the Board of Directors, unless it expressly authorizes someone else.

Yet again, I do appreciate that by writing the letter of 1st September 2003, the 1st Respondent was not purporting to have authority to interdict the applicant. The decision to interdict the applicant had already been passed by the Board of Directors. Effectively, therefore, the 1st Respondent did not interdict the applicant. I therefore believe that it would be wrong for the applicant to complain that the 1st Respondent interdicted him without authority.

But all said and done, the 1st Respondent did something without requisite authority from the Board as follows;

- (a) He had only placed before the Board, issues to do with the payment of Legal fees to advocates. On that point, the Board resolved to interdict the officers who had been involved. However, without seeking the mandate of the Board, the 1st Respondent so widened the scope of the offences against the Applicant that they numbered six (6) instead of one;**
- (b) He limited the Applicant's time for response to forty eight (48) hours. Bearing in mind the Board's resolution to interdict the officers concerned "pending completion of investigation", the 1st Respondent acted without requisite authority when**

he limited the Applicant to no more than 48 hours.

This second issue also gives rise to another concern; that of natural justice. I say so because of two reasons;

(i) First, by virtue of paragraph 3.6 of the Posta Code.

“Disciplinary cases should be dealt with expeditiously so that if punishment is inflicted it may follow the offence as rapidly as possible.”

In the light of that provision, every employee is entitled to expect that disciplinary cases shall be presented expeditiously. By so doing, the corporation would be entitled to demand fast responses from the employee, as the matters would be relatively fresh in the employee’s mind. Indeed, I believe that that is the reason for paragraph 3.1 of the Code, which stipulates that the offender’s reply shall normally be required within 48 hours of receipt of the letter embodying the facts of the case.

In this case, the matters, which the applicant was being asked to respond to, dated back several years. Therefore, it was patently unreasonable to expect the applicant to be in a position to respond in detail, within 48 hours.

(ii) Secondly, the applicant had written to the 1st Respondent asking for some files, so as to enable him extract the information necessary for the answers sought. There is no proof before me that the files were made available to the applicant. In the circumstances, it was very unreasonable to expect the applicant to provide detailed explanations without the benefit of the relevant documents.

In the circumstances prevailing, is the applicant entitled to the orders for certiorari and prohibition?

The respondents submit that that he is not. They pointed out that the Posta Code has provision for appeals. In the circumstances, the respondents contend that these proceedings, which were instituted only some four (4) days after the letter of 1st September 2003, are premature.

In the treatise *“Principles of Judicial Review”*, the learned authors, **De Smith, Wolff and Jowell’s** expressed the following view, at P. 566;

“For the court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort.”

However, the said learned authors also appreciated that:

“the applicant will not however be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. The other body may for example lack the power to deal with the issue. The other procedure may be less expeditious and if the matter is urgent the court may allow the application to proceed.”

The applicant had been given some 48 hours to put forward his defence. He had not done so. And as he had not obtained, from the 1st Respondent, the files necessary to enable him put together his defence, there was a very real risk of “*severe and deterrent disciplinary action, which may include your dismissal from service.*” would be undertaken, without any further reference to the applicant. That was the warning expressed in the letter dated 1st September 2003.

In the light of the foregoing circumstances, I hold the considered view that the applicant was entitled to move the court by way of judicial review. Had he waited, there are chances that he would have been dismissed. By seeking leave to institute these proceedings, and successfully canvassing for an order that leave should operate as a stay, the applicant did secure his position. I consider that any other procedure would have been less appropriate.

In the circumstances, I find merit in prayer 1 of the application. However, as there is no evidence before me that the Respondents were about to continue, undertake or effect any disciplinary proceedings against the applicant, on the basis of the action initiated by the 1st Respondent, I decline to grant an order of prohibition.

As regards costs, the applicant had sought 3 prayers. After the respondents had put forward their response, the applicant abandoned prayer 3. Finally, prayer 2 was disallowed.

In the circumstances, the order that commends itself to me as being fair on the issue of costs, is that each party shall bear his own costs.

It is so ordered.
Dated at Nairobi this 13th day of October, 2004

FRED A. OCHIENG
Ag. JUDGE