



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 63 OF 2017

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF: ARTICLES 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 40, 47, 48, 50 & 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT, CAP 21, LAWS OF KENYA; AND THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF: STATE CORPORATIONS ACT, CAP 446, LAWS OF KENYA

AND

IN THE MATTER OF: THE SCIENCE, TECHNOLOGY & INNOVATION ACT, 2013, LAWS OF KENYA

AND

IN THE MATTER OF: THE PUBLIC SERVICE COMMISSION ACT, 2012

AND

IN THE MATTER OF: THE PUBLIC SERVICE COMMISSION OF KENYA DISCIPLINE MANUAL, 2008

AND

IN THE MATTER OF: THE KENYA MARINE & FISHERIES RESEARCH INSTITUTE TERMS & CONDITIONS OF SERVICE FOR MANAGEMENT STAFF, 2012

BETWEEN

1. DIXON OTIENO ODONGO

2. CHARLES NYANJONG'.....APPLICANTS

VERSUS

**THE BOARD OF MANAGEMENT, KENYA MARINE &
FISHERIES RESEARCH INSTITUTE.....RESPONDENT**

RULING

The Application

1. The ex parte Applicants were granted the leave on 10th November, 2017 to file an application for Judicial Review Orders, which they did vide Notice of Motion herein dated 1st December, 2017. The ex parte Applicant seeks the following orders:

(1) That an order of certiorari do issue removing to the High Court of Kenya and quashing the Proceedings taken before, and Decision rendered by the Respondent on **1/11/2017** Suspending the Applicants from Exercising the Duties of their respective offices;

(2) That an order of mandamus do issue compelling the Respondent to unconditionally re-admit the Applicants to their previous respective Portfolio with full remuneration including Salary, House Allowance and other Benefits.

(3) That the costs of these Proceedings be provided for.

2. The motion is supported by Statutory Statement of the ex parte Applicants filed together with the Chamber Summons dated 9th November, 2017.

3. The application is not opposed. The application was served by the advocate of the ex parte Applicants upon the Respondent on 8th December, 2017 indicating that the same would be heard on 7th March, 2018. The notice of service was received by the Respondent on 8th December, 2017. The Applicants filed affidavit of service to that effect on 14th December, 2017.

4. When the matter came up for hearing on 7th March, 2018 the Respondents were not in court, and there was no response, to the application. Mr. Mutiso counsel for the Applicants prosecuted the motion, on which he relied, and requested for the Ruling. The court reserved the Ruling for 26th April, 2018.

The Applicants' Case

5. The Ex parte Applicants claim to be adult male Kenyans of sound mind, residing and working for gain in Mombasa. They were at all times material hereto employed by the Respondent as Laboratory Technologist Fisheries Program, Head of Fisheries Laboratory, and Second Mate, under Maritime Department, respectively.

6. The Respondent is the Board of Management, Kenya Marine & Fisheries Research Institute, established under the provisions of the **Science, Technology and Innovation Act, 2013**.

7. By virtue of the Ex parte Applicants' engagement with M/S Kenya Marine & Fisheries Research Institute, the Ex parte Applicants allege that they were randomly selected to be Member and Chairman, respectively, of an *ad hoc* Tender Opening Committee, in **June, 2017** for purposes of opening and Evaluating Tender Quotation strictly on the basis of Price Quoted;

8. The said Committee comprised the following:

i. Charles Njanjong' – Chairman;

ii. Paul Obura – Secretary;

iii. Dixon Otieno Odongo – Member;

iv. Dixon Aloyo – Member;

v. Melolyne Ochieng – Member;

9. The said Committee's mandate was to open Tender Quotations in respect of **KMFRI Quotation No. 156/6/2016-2017**, Counter-Sign against all respective Quotation Leaflets to confirm safe, uncompromised receipt thereof, evaluate the Quotation strictly on the basis of Price Quoted, and forward the entire set without any alterations whatsoever, through the Committee's Secretary, to the Technical Evaluation Committee, for purposes of Evaluation and subsequent Approval.

10. It is alleged that the said Committee, as duly-constituted, sat, in the explained absence of **Melolyne Ochieng (Member)**, and discharged its mandate on **27/06/2017**, whereupon it stood automatically dissolved through conclusive discharge of said mandate.

11. On or about **1/11/2017**, the Ex parte Applicants reliably learnt that the Respondent intended to issue them with Suspension Letters on even date, effectively Suspending them from the day-to-day discharge of their duties and responsibilities within the institution, on account of unspecified allegations leveled against them, and without their knowledge and participation, contrary to the Rules of Natural Justice and the

express Provisions of the foregoing Statutes.

12. On **2/11/2017**, through their Advocates on record, the Ex parte Applicants wrote to the Director, Kenya Marine & Fisheries Research Institute, intimating their position on the matters in issue, and demanding, inter alia, strict adherence to the Law and the Rules and Regulations made thereunder, in respect of the Respondent's dealings with them.

13. On **3/11/2017**, the Respondent, through the Legal Officer, Kenya Marine & Fisheries Research Institute, responded to the aforementioned Letter, and assured the Ex parte Applicants of the Respondent's commitment to strict adherence to the Law and Rules of Natural Justice.

14. On **4/11/2017**, the Ex parte Applicants were served with a Letter dated **1/11/2017** titled "**Suspension Letter**", from the Respondent through the Director, **KMFRI**, effectively Suspending them from exercising the duties of their office from the said date pending finalization of their "case," and citing, inter alia, Provisions of the Kenya Marine & Fisheries Research Institute Terms and Conditions of Service for Management Staff.

15. The Ex parte Applicants maintain that as a precursor to any Suspension under the auspices of both the Public Service Commission of Kenya Discipline Manual, 2008 (**Section 10**) and the Kenya Marine & Fisheries Research Institute Terms and Conditions of Service For Management Staff, 2012, (**Section 9**), the subject of a Suspension has to have been Charged with and/or Convicted for a Criminal Offence **prior** to any such Suspension, viz:

"i) Section 10, Public Service Commission of Kenya

Discipline manual,

SUSPENSION

a. If a public officer has been convicted of a serious criminal offence, he or she shall be served with a show cause letter which shall contain a communication on suspension, a sample of which is provided in appendix IV.

b. If the misconduct is one which can lead to dismissal, the officer will be served with a show cause letter which shall also contain a communication on suspension, a sample of which is provided in appendix V.

c. A public officer whose suspension has been lifted shall promptly be served with a decision letter, a sample of which is provided in appendix VI

d. A public officer who is on suspension shall be entitled to be paid house, medical and other allowances as may be applicable.

e. Interdiction and suspension can only be uplifted by the Authorized Officer on recommendation or advice by the MHRMAC.

i. Section 9.8.4, Kenya Marine & Fisheries Research Institute Terms and Conditions of Service for Management Staff.

SUSPENSION

i. Where an employee has been charged with serious offence/major breaches of discipline the employee shall be suspended by the Director from exercising official duties pending investigations and determination of the case.

ii. The Institute shall have the discretion to finalize such a case administratively separate from Court process if it is of the view that the offence amounts to gross misconduct and is injurious to its interest or image.

iii. An Employee who is suspended may not leave his/her duty station without the authority of the Director or an Officer who is empowered to give such permission.

iv. While an employee is under suspension, he/she shall not be entitled to any salary. However in cases of hardship and on request, such an employee may be granted alimentary allowance in such amount as the Board may consider appropriate depending on the circumstances of each case, provided the amount paid does not exceed $\frac{1}{2}$ of the employees gross monthly salary.

v. An employee on suspension shall be required to report to the office once a week during the period of suspension.

vi. Where an employee suspended is not ultimately dismissed, the salary withheld during the period of suspension shall be paid to him.

vii. Suspensions are interlocutory punishments that may need reviewing at least after Six (6) Months except where the case is in Court of Law.

ii. Section 9.8.5, Kenya Marine & Fisheries Research Institute,

DISCIPLINARY PROCEDURE

Where the Director considers it necessary to institute disciplinary proceedings against an employee, the Director shall forward a Statement of the Charge(s) preferred against him/her and shall invite the employee to respond in writing within a specified period.

In case of particular complexity, and if the employee has not exonerated himself/herself sufficiently, the case shall be referred to a Disciplinary Committee chaired by the Director or his/her authorized Officer.”

16. The Ex parte Applicants maintain that the stipulated procedures prior to action undertaken by the Respondent were not followed, as no formal charges have been presented against them nor have they been Charged with and Convicted for any Criminal Offence as required by both the Public Service Commission of Kenya Discipline Manual, 2008 and the Kenya Marine & Fisheries Research Institute Terms and Conditions of Service For Management Staff, 2012, and their purported Suspension is therefore Ultra Vires, Illegal, Null and Void *ab initio*.

17. The Ex parte Applicants maintain that in the foregoing process, the Respondent has totally failed, refused and/or neglected to discharge its mandate within the confines of Justice, Equity, Fairness, Constitutionality, the Rule of Law, Rules of Natural Justice and Protection of Fundamental Rights and Freedoms enshrined in the Constitution of Kenya, 2010 as well as the express Provisions of the Public Service Commission of Kenya Discipline Manual, 2008, as read together with the Kenya Marine & Fisheries Research Institute Terms and Conditions of Service For Management Staff, 2012.

The Determination

18. I have carefully considered the ex parte Applicants motion. Judicial Review process is not concerned with the merits or correctness of a decision made by an administrative body. It is a discretionary remedy which is more concerned with the process leading to the decision. It ensures that public bodies exercising authority do so while properly clothed with procedural legality.

19. In this matter the Applicants are employees of the Respondent, and at the time of their alleged suspension they were carrying out a tender process. Whether or not they mismanaged that process is not a decision for this court to make. But if the Respondent found the ex parte Applicants culpable for any part of that process the Respondent is obligated to follow the due process of law to suspend them, or to discipline them.

20. In this matter, the court is not in a position to dispute what the ex parte Applicants have stated, since the Respondent has failed to respond to the application. However, the ex parte Applicants are under the Public Service Commission. The Ex parte Applicants maintain that as a precursor to any Suspension under the auspices of both the Public Service Commission of Kenya Discipline Manual, 2008 (**Section 10**) and the Kenya Marine & Fisheries Research Institute Terms and Conditions of Service For Management Staff, 2012, (**Section 9**), the subject of a Suspension has to have been Charged with and/or Convicted for a Criminal Offence **prior** to any such Suspension (see the relevant sections of the law as quoted above).

21. It is clear to this court that the Respondent acted with heavy hand and *ultra vires* the Public Service Commission of Kenya Disciplinary Manual. The Respondent also failed to comply with its own disciplinary procedure. Further, the Respondent violated several Articles of the Constitution of Kenya among them failure to provide fair administrative action under Article 47; failure to provide access to justice under Article 48; failure to provide access to fair hearing under Article 50; failure to respect human dignity under Article 28 and failure to ensure equality and freedom from discrimination.

22. In short, the treatment the ex parte Applicants have received from the Respondent fall short of what is required in terms of procedural justice where the issue concerns livelihood of a citizen. It is appalling that in this age and time we still have institutions in Kenya which encourage primitive violation of human and fundamental rights, and still do that with impunity. In the instant case the Respondent did not even think it worth itself to attend to these proceedings and to defend itself. This is a clear violation of Article 10 of the Constitution for contempt of the legal process by a public body.

23. For the foregoing reasons the motion before the court has merit. The same is allowed as prayed.

24. The Respondent shall pay the costs of the application.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 3rd day of May, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Onyango Advocate for Applicant

Mr. Kaunda Court Assistant.