



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**JR NO 2 OF 2016**

**ENOCK NYAKUNDI ONCHWARI.....APPLICANT**

**VERSUS**

**THE NATIONAL AUTHORITY FOR THE CAMPAIGN AGAINST ALCOHOL AND**

**DRUG ABUSE.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF EXECUTIVE OFFICER (NACADA).....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

Mr Mogere for Applicant

Mr Muriuki for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr Odukenya for 3<sup>rd</sup> Respondent

**JUDGEMENT**

1. This judicial review application was commenced at the High Court and was subsequently transferred to this court on 14<sup>th</sup> April 2016. This court granted leave to the exparte applicant to file the substantive motion which leave also operated as stay of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents action to interdict the applicant pending hearing and determination of this suit.

2. The substantive motion was filed on the 3<sup>rd</sup> May 2016. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed replying affidavit on 6<sup>th</sup> June, 2016 and the applicant filed a supplementary affidavit on 1<sup>st</sup> July 2016. The parties thereafter filed written submissions on 1<sup>st</sup> July 2016 respectively.

**Submissions by the Applicant**

3. The applicant seeks inter-alia:

- i. An order of certiorari to remove into this court the decision of the respondents dated 28<sup>th</sup> October 2015 to suspend the applicant and quash the said decision.
- ii. An order of mandamus compelling the respondent to reinstate the applicant to his position with the Respondent.

- iii. An order of prohibition to prohibit the respondents either through its board of directors, or a committee of the said board of directors from suspending the applicant without following due process.
- iv. That the court be pleased to give further orders and directions as it may deem meet and just.
- v. That costs be provided for.

## **Background**

4. The ex-parte applicant was appointed as the acting Chief Executive Officer of the 1<sup>st</sup> respondent by a letter dated 8<sup>th</sup> May 2014 having been the Director Finance and Administration of the 1<sup>st</sup> respondent. This followed interdiction of the then Chief Executive Officer the 1<sup>st</sup> respondent herein, following the numerous deaths that rocked various parts of the country as a result of consumption of illicit liquor on or about 8<sup>th</sup> May 2014.

5. Whilst in office, the ex-parte applicant authorized and/or facilitated the procurement of advertisement contracts costing Kshs 67,339,139. There were no funds available and the respondent had to make post-facto appeal of funds from the parent ministry and treasury which authority was refused. This led to the impugned disciplinary process against the ex-parte applicant. He was interdicted on 28<sup>th</sup> October 2015 and was to show cause why disciplinary action should not be taken against him. The ex-parte applicant afraid that he was being victimized and that a fair process will not be applied in the disciplinary hearing commenced these proceedings and got interim orders staying the process pending the hearing and determination of this application.

## **The Law**

6. The ex-parte applicant submits that the process leading to the interdiction of the applicant was unprocedural and against the principles of natural justice. That by dint of Article 47 of the Constitution which provides for fair administrative action every person is entitled to a fair hearing which was not accorded him.

7. That the letter of show cause dated 24<sup>th</sup> October 2015 charges the applicant of irregularities in the procurement and award of certain advertisement contracts that were in breach of the guiding procurement laws most specifically the Public Procurement and Asset Disposal Act, 2005 and the Public Procurement and Disposal Regulations of 2006 that had occurred between 10<sup>th</sup> May 2014 to 15<sup>th</sup> June 2014.

8. The applicant submits that the 1<sup>st</sup> respondent being an employer to the applicant is empowered to conduct investigations either on its own initiative or on recommendation by the relevant agency of government. The disciplinary procedure to be followed is subject to the 1<sup>st</sup> respondent's human resource manual and procedure manual 2012. In this respect regulation 9.14 of the 1<sup>st</sup> respondent's human resource manual marked annex ii to the applicant's verifying affidavit provides for the disciplinary steps to be undertaken as follows;

- i. All the facts of misconduct to be obtained and evaluated to establish whether an alleged misconduct has in fact occurred.
- ii. The employee must in all cases be given the opportunity of stating his/her side of the case.
- iii. Having done the above, if it is established that the misconduct has occurred appropriate disciplinary action shall be taken.
- iv. A date for review of the matter shall be agreed with the employee concerned.

v. In the event of serious misconduct such as theft or use of violence in the work place the laid down steps in the disciplinary procedure under dismissal shall apply.

9. The applicant submits that the respondent deviated from the aforesaid procedure in that even though a show cause letter was served on the applicant, the applicant was required to appear before the board of directors on the 31<sup>st</sup> March 2015 vide a letter dated 27<sup>th</sup> October 2015 but the board did not convene nor was a date for the sitting agreed with him.

10. That the 1<sup>st</sup> and 2<sup>nd</sup> respondent then without consultation with him convened a board meeting for 18<sup>th</sup> June 2015 with the sole agenda of discussing the applicant's disciplinary conduct. The applicant was forced to rush to the board sitting without prior preparation in form of documentary evidence to validate his oral averments. The applicant was also not supplied with documents forming the basis of the charges against him.

11. The 1<sup>st</sup> respondent thereafter proceeded to interdict him in disregard of the aforesaid procedure in the human resource manual. The respondent was therefore in gross breach of the applicant's right to fair hearing, fair administrative action as well as the principle of natural justice. The applicant relies on Blacks Law Dictionary ninth edition at page 788 where a hearing in relation to administrative law has been described as

*“any setting in which an affected person presents arguments to a agency decision maker “while fair hearing is defined as*

*“a judicial or administrative hearing conducted in accordance with the due process”.*

12. The applicant submits that fair administrative action is focused on the manner in which a decision is taken rather than on whether the decision is correct. Therefore a person must be accorded an opportunity to defend himself such as the applicant herein. The applicant relies on various cited cases on the import of natural justice to wit **Kanda Vs the Government of Malaya (1967) Ac 322 cited by Korir J in Republic Vs Inspector General Corporations & Another Ex-parte Titus K. Barmazai (2013)eKLR** where it was reiterated as follows;

*“in the opinion of the lordships however the proper approach is somewhat different. The rule against bias is one thing.*

13. 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 iudex in causasua. They have recently been put in two words impartiality and fairness. But they are separate concepts and are governed by separate considerations. The applicant submits that the process of a fair hearing demands that a person be given opportunity to prepare his defence before he is condemned. That this is underpinned under Article 50 (1) (c) of the constitution and section 4 (3) (e) of the Fair Administrative Action Act 2015”.*

14. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents breached this requirement as against the applicant and the result of the denial may be dismissal. It is therefore important that the applicant be given an opportunity to present his submissions in rightful context before any disciplinary action is taken against him. The applicant further relies on **Nyongesa and 4 others –Vs- Egerton University College (1990) eKLR** where it was stated.

*“It is the duty of courts to curb excesses of officials and bodies who exercise administrative or disciplinary measure. Courts are the ultimate custodians of the rights and liberties of people whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings on enquiry are of an internal disciplinary character”.*

15. The applicant submits therefore the issue of prematurity of the suit does not arise especially in light of

the fact that the interdiction had the effect of cutting his remuneration and this punishment ought to have awaited the outcome of investigations. The time a punitive action is taken against an employee, the action is open to challenge and can no longer be said to be internal process that the court ought not to interfere with.

16. In conclusion, the applicant submits that the interdiction has no basis as it is not founded on a justifiable reason pursuant to a fair procedure. It is therefore an affront on the applicant's right to human dignity. The application should therefore be allowed. Secondly, the applicant argues that the board of directors of the 2<sup>nd</sup> respondent are judges in their own cause. The applicant submits that the initial complaints levelled against him were a result of a fall out between himself and the 2<sup>nd</sup> respondent the current CEO of the 1<sup>st</sup> respondent being investigated for misconduct.

17. The 2<sup>nd</sup> respondent sought to exonerate himself from previous procurement irregularities by choreographing trumped up charges against the applicant who had taken over from him temporarily on an acting capacity. That the applicant is being accused by way of irregularities on matters approved by the 1<sup>st</sup> respondent's board of directors which serves as its governing organ. In the minutes of board meetings held on 3<sup>rd</sup> June 2014, the board had approved the impugned transactions.

18. In any event, the board meeting held on 7<sup>th</sup> July 2015, which adopted the staff and welfare committee's resolution to interdict the applicant was invalidly constituted as the chairperson lacked the mandate to sit in the board as per section 6 of the Nacada Act, 2012. The 2<sup>nd</sup> respondent complained to the national government on this matter at the same time sat in the 1<sup>st</sup> respondents staff and welfare board committee meeting held on 18<sup>th</sup> June 2015 which unanimously resolved to interdict the applicant. The applicant submits therefore that both the 1<sup>st</sup> respondents, board of directors who approved the procurement of services which the applicant is now accused of flouting and the 2<sup>nd</sup> respondent who is the complainant exhibit a conflict of interest while conducting disciplinary proceedings against the applicant. The applicant relies on **Republic –Vs- Kenya Airport Authority Ex-parte Antony Muthumbi Wachira (2012) eKLR** where Judge Githua J stated;

*“The first tenet of the rule of natural justice that no man shall be a judge in his own cause prohibits the participation of persons with an interest in a matter from participating in proceedings or sitting in judgements over matter in which they have either pecuniary or other form of interest in order to avoid the perception or likelihood of bias”.*

19. The applicant concludes that the decision to interdict him was tainted with unfairness and ought to be set aside. The applicant emphasis the point relying on the case of **Council of Civil Servants Union -Vs- Minister of Civil Service (1985) Ac 2** as follows:

*“Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking decision. The unfairness may be in non-observance of the Rules of natural justice or to act with procedural fairness towards one to be affected by the rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”.*

## **Respondents Submissions**

20. The applicant in consultation with the 1<sup>st</sup> respondent's board proposed to have several advertisement aired via the various media outlets in order to create awareness and warn the public on the existence of the killer alcohol. This coincided with the FIFA world cup tournament and the national broadcaster, Kenya Broadcasting corporation (KBC) had the exclusive rights to air live proceedings of the tournament across the country, the applicant recommended KBC be the exclusive media house contracted to air the advertisements aimed at warning the public on the adulterated alcohol.

21. That the law allows for direct procurement of service from one government entity to the other without

being subjected to a tendering process. That upon the 2<sup>nd</sup> respondent's reinstatement as the CEO of the Authority, he cross checked all transactions authorized by the applicant while he was acting as Acting CEO and he brought forth allegations of irregular procurement of advertisement contracts against various authority officers including the applicant. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in the replying affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> respondent sworn by the CEO Dr Milton Okedi states that it was within the rights of the 1<sup>st</sup> respondent as an employer to investigate malpractice and sanction the perpetrators in accordance with the law and its Human Resource Manual.

22. That the applicant approved irregular media contracts without following due process and has left the 1<sup>st</sup> respondent with unpaid bills of Kshs 67,336,188 a fact that has been reiterated by several government agencies including Ministry of Interior and Co-ordination of National Government, the National Treasury and the Public Procurement Oversight Authority. That the 1<sup>st</sup> respondent observed all the tenets of natural justice during the disciplinary process against the applicant by ensuring that the applicant was given a fair hearing giving him an opportunity to defend himself as well as ensuring that he is heard by an unbiased body that was acting within its powers.

23. The respondent rely on Court of Appeal decision in **Municipal Council of Mombasa –vs- Republic and Another [2000] eKLR** to the effect.

*“The court exercising its jurisdiction in a judicial review matter is not entitled to act as a court of appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself such as whether there was or there was no sufficient evidence to support the decision and that as we have said is not the province of judicial review”.*

24. The respondents further rely on the Court of Appeal decision in **Judicial Service Commission –Vs- Gladys Boss Shollei & Another [2014] eKLR** where the court held;

*“The constitutional right to fair hearing encompasses several aspects. These include the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the stay or challenge the case against her/him and the individual having the benefit of a public hearing before a court or other independent and impartial body”.*

25. The respondents submit all the requirements for a fair administrative action have been met by the respondents in that the applicant was issued a letter of show cause dated 24<sup>th</sup> October 2014. The applicant responded to the letter by a letter or reply dated 31<sup>st</sup> October 2014. The procedure was inconforming with clauses 9.10.1 and 9.10.2 of NACADAS Human Resource Policy. The clause titled 'steps in disciplining process' reads....

*“9.10.1 The Authority shall constitute a staff Disciplinary Advisory Committee to handle and determine all disciplinary cases. The Chairman of the committee shall be the Chief Executive Officer or a delegated appointee. The Head of Department shall be members of the committee while the Human Resource Manager shall be the secretary of the committee”.*

*“9.10.2 The supervisor shall issue the employee with a show cause letter. The employee shall within seven (7) days of receipt of the show cause letter state his defence in writing. The supervisor shall compile a report and submit to the staff Advisory Committee”.*

26. The respondent submits that the Authority reviewed the content of the applicant's response to the show cause letter and was not satisfied with the explanations given therein to satisfy the un-procedural procurement. This prompted the respondent to invite the applicant for a hearing before the staff and welfare Board committee, a sub-committee of the board of directors by a letter dated 27<sup>th</sup> March 2013. The applicant appeared before the committee on 18<sup>th</sup> June 2015 where he had opportunity to make oral submissions in his defence. That the applicant had close to 3 months to prepare his defence, a period that is reasonably sufficient in the circumstances thus rebutting his submission that he was not given ample time to prepare his defence.

27. The Authority took into consideration the applicant's oral and written defence in its decision to interdict him pending further investigations from the independent procurement oversight authority. The applicant's case has no merit and ought to be dismissed. The 1<sup>st</sup> respondent did not act ultravires its authority since it has legal and regulatory mandate to discipline any of its employees. The respondent finally relied on the case in **Republic –Vs- National Transport & Safety Authority & 10 others Exparte James Maina Mugo [2015] eKLR** where it was held;

*“It follows therefore that where the resolution of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale of this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merit of the dispute in the ordinary civil suit”.*

28. For these reasons, the respondent pray that the application be dismissed with costs.

### **Determination**

29. The issue for determination is whether the exparte applicant has established on a balance of probabilities existence of suitable grounds to issue judicial review remedies sought against the decision of the respondents to interdict the applicant from his employment pending further investigations.

30. The court has carefully examined the facts of the case and the law applicable from the papers filed of record and the able submissions by the counsel for the parties and has come to the following conclusions;

31. The applicant was properly issued with a notice to show cause pursuant to clause 9.10.2 of NACADA Human Resource Policy. The applicant responded to the notice to show cause by a letter dated 31<sup>st</sup> October 2014 in which he gave written explanation as to why he was not guilty of alleged misconduct. The respondents were dissatisfied with the explanation made by the applicant and they invited the applicant to appear before the staff and welfare board committee, a sub-committee of the board of directors which has the legal mandate to hear disciplinary cases in respect of employees of the 1<sup>st</sup> respondent.

32. That the notice to appear before the committee is dated 27<sup>th</sup> March 2015 and was timeously received by the applicant. The applicant appeared before the committee on 18<sup>th</sup> June 2015, about three months after the notice to attend the hearing was received by the applicant. The applicant has not produced any letters by himself requesting that he be provided with any particular documents to facilitate his defence. The applicant has not alleged or demonstrated that he was not prepared when he appeared before the committee on 18<sup>th</sup> June 2015. The applicant did not indicate that he requested to be given more time and or opportunity to supplement his defence.

33. Clause 9.14.1.1 of the NACADA Human Resource Policy provide for interdiction as follows;

*“9.14.1.1 Interdiction is a procedure applied on serious disciplinary cases that require investigations involving any breach of the Authority's policies in order to allow establishment of facts of the case.*

*9.14.1.2 An employee who is on interdiction will be paid 50% of his basic monthly salary less any statutory deductions. During the period the employee will continue earning applicable allowance in full-----*

*9.14.1.3 -----*

*9.14.1.4-----*

9.14.1.5 *Interdiction shall not exceed six (6) months within which investigations should be completed and disciplinary action determined*”.

34. The applicant has not shown at all that the respondents have derogated from the procedure. The applicant was notified of the serious charges laid against him and was asked to showcause why disciplinary action should not be taken against him. The respondents gave him a full hearing before a duly authorised committee of the board.

35. It is the court’s considered view and holding that the conduct by the respondent did not violate the cardinal rule of natural justice articulated herein before in this judgement. It is also the court’s further finding that the respondent has thus far acted in keeping with the law and its Human Resource Policy. The applicant is under interdiction on half pay pending investigations of the case.

36. The interdiction took place by a letter dated 28<sup>th</sup> October 2015 which contain reasons for the interdiction. The suit was filed on 4<sup>th</sup> April 2016 before the expiry of the six (6) months period within which the respondent is obligated to keep its employees on interdiction.

37. The applicant was granted an injunction on the said 4<sup>th</sup> April 2016 by the court hence pre-empted any further action on the part of the respondents pending the hearing and determination of this suit. The action by the applicant effectively cushioned the respondents against the provisions of clause 9.14.1.5 of the NACADA Human Resource Policy which makes it mandatory to only suspend an employee for not more than six (6) months.

38. The court is satisfied that no excesses have been exhibited by the 1<sup>st</sup> and 2<sup>nd</sup> respondents within the meaning of **Nyongesa & 4 others –Vs- Egerton University College supra**. The court is equally satisfied and in line with the decision in **Daniel –Vs- Duke of Norfolk (1949) I ALLER** at 118 cited with approval in **Peris Wambogo Nyaga –Vs- Kenyatta University (2014) eKLR** as follows;

*“There are in my view no words which are of uniform application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting and that whatever standard is adopted it is essential that the person concerned would have had a reasonable opportunity of presenting his case”.*

39. That the applicant has had a reasonable opportunity of presenting his case and he should not second guess the outcome of the pending investigations. In the circumstances of this case the remaining time of 6 (six) months period within which the interdiction will remain lawful will commence running again from the date of this judgement.

40. Accordingly, the respondents have less than 24 days within which to conclude the pending disciplinary process failing which the applicant will have recourse in terms of clause 9.14 of the NACADA Human Resource Policy.

41. Accordingly the judicial review application has no merit and the same is dismissed. Costs to follow the outcome.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of October, 2016**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**