REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 330 OF 2011

REPUBLIC.....APPLICANT

VERSUS

KENYA ORDNANCE FACTORIES CORPORATION.....1ST RESPONDENT

EX-PARTE

ANNE GICHIMO

JUDGEMENT

Anne Gichimo (the ex-parte Applicant) was appointed as the Chief Marketing Officer of Kenya Ordnance Factories Corporation (the Respondent) in August, 2006. She worked with the Respondent up to March, 2007 when she left the organization. In May, 2008 she reapplied for the same job and in August, 2008 she was reappointed to the same position. She also served as the Commercial Services Manager in an acting capacity. In July, 2011 she was appointed the acting Farm Manger. At the beginning August, 2011 the Applicant was taken through a disciplinary process which resulted in the termination of her services on 7th December, 2011.

The Applicant being dissatisfied with the process that led to her dismissal filed these judicial review proceedings. After obtaining the leave of the court, the Applicant filed the Notice of Motion application dated 21st December, 2011 in which she prays for orders as follows:

> **"1. An Order of Certiorari to remove into this Honourable Court the decision of the Respondent dated 7th December 2011 to summarily dismiss the *ex-parte* Applicant and quash the said decision.**
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> **2. An Order of Prohibition directed at the Respondent either through its Board of Directors, a committee of the said Board of Directors or through the Managing Director from terminating the *ex-parte* Applicant's contract of employment unprocedurally and or on the purported ground of deleting computer files.**
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> **3. IN THE ALTERNATIVE, an Order of Mandamus directed at the Respondent to reinstate the *ex-parte* Applicant in her legally entitled position.**

4. The costs of this Application be provided for."

The Applicant through the papers filed herein told the Court that when she returned from her annual leave in February, 2009 she found one Col (Rtd) E. M. Gichuiya had been appointed the General Manager of the Respondent. The said General Manager made unsolicited sexual advances to her which she rebuffed. In support of this claim she attached a letter of complaint dated 11th July, 2011 which she addressed to the Managing Director of the Respondent complaining of sexual harassment by the General Manager. In February, 2011 Major General S. N. Karanja joined the Respondent as the Managing Director. It appears that the said Major General S. N. Karanja's arrival did not bode well for the Applicant. In Paragraph 12 of the statutory statement dated 19th December, 2011 the Applicant states that:

> **"12. THAT the Applicant subsequently suffered incidents of harassment and intimidation as shown below:**
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> **(a) On the 3rd of May 2011, as the Applicant was making entry into the Corporation's gates, she was confronted by the officers guarding the gate who conducted themselves such that the Applicant was humiliated by their conduct and she reported the incident to the Human Resource Manager via telephone. The officers in question were reprimanded with a charge under the military rules of engagement.**
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> **(b) The General Manager however took issue with the Applicant, and convinced the Managing Director to set up an investigative committee to investigate her conduct. A disciplinary committee sat on 16th June 2011 and purportedly found the Applicant guilty of violating staff discipline despite her not being given an opportunity to defend herself against the accusations. This was clearly irregular and malicious. A copy of an internal office memo concerning the meeting and a warning letter from the Respondent are annexed hereto and marked "AG-5".**
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> **(c) The Applicant was also informed verbally by the Managing Director to watch out for detractors who were out to finish her. She complained to the Managing Director's office, seeking to have the unfair records expunged from her file so that they would not be used against her later. Annexed hereto and marked "AG-6" is a copy of the complaint letter.**
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> **(d) The Applicant was inexplicably transferred from her substantive appointment in Commercial Services Department to the Farm Unit. On receiving the letter, the Applicant called the Managing Director on 1st August 2011 seeking audience over the transfer and met with him on 4th August, 2011, however, he refused to give the Applicant any justification for her transfer. The Applicant then complained to the Permanent Secretary–Ministry of State for Defence over the Managing Director's abuse of discretion. Annexed hereto and marked "AG-7" are copies of the letter of transfer and the complaint letter.**
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> **(e) On 24th August, 2011,the Applicant was summoned by the Managing Director who accused her of deleting files from the computer of the Commercial Sales Manager.In reply, the Applicant informed the Managing Director that the files in question had already been delivered in hard copy to his office and that final soft copies of the same were maintained in the Customer Care Office.**
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> **(f) The Managing Director unreasonably proceeded to set up a Board of Inquiry to investigate her. However, the Applicant, being apprehensive she would not get a fair hearing due to prior evidence of bad faith and malice, sought the intervention of the Inspectorate of State Corporations. Annexed hereto and marked "AG-8" are copies of an Internal Office Memo concerning the inquiry and the letter to the**

Inspectorate of State Corporations.

(g) On 26th August 2011, the Managing Director wrote to the Chairman of the Board recommending the Applicant's suspension. The Applicant was however not suspended and continued in full employment. Annexed hereto and marked "AG-9" is a copy of the said letter.

(h) The corporation engaged Data Handlers to find out what had been deleted from the computer. Data Handlers wrote to the Corporation and confirmed that there were deletions and were to furnish the Corporation with a comprehensive report on 29th August 2011 via email. Annexed hereto and marked "AG-10" is a copy of the said letter.

(i) Data Handlers, who did not incorporate the Applicant in their investigations, later sent to the Corporation an email which showed that the computer files being extracted were from a Human Resources Computer and not from a computer at Commercial Sales Department. Annexed hereto and marked "AG-11" is a copy of the said email.

(j) On 8th September 2011, Data Handlers wrote to the Corporation and reported that 'the suspect performed in data recovery circles what is called secure wipe where all traces of existence of data was erased'. The Applicant has absolutely no knowledge of the alleged 'secure wipe'. Annexed hereto and marked "AG-12" is a copy of the said letter."

The Applicant further states that the Managing Director treated her unfairly up to the time she was summoned before the disciplinary committee and dismissed summarily.

At Paragraph 23 of the aforesaid statutory statement the Applicant demonstrates the unfairness meted against her in the following words:

"23. THAT the above situation is a culmination of a systematic conspiracy by the Managing Director and the General Manager of the Corporation to unfairly and illegally remove the Applicant from the Corporation's employment and in gross abuse of office.

(a) The Applicant was subjected to unsolicited sexual advances from her General Manager which when she repulsed exposed her to subjective bias.

(b) The Managing Director, despite being aware of the 'detractors who were out to finish the applicant' failed to exercise his discretion to halt any potential prejudice against her.

(c) The Managing Director's actions against the Applicant were procedurally ultra vires as the Applicant was not interdicted during the purported investigations against her as is spelled out in the Corporation's Terms and Conditions of Service.

(d) The Applicant was not given an opportunity to defend herself before the initial disciplinary committee that sat on 16th June 2011.

(e) The Applicant was not given an opportunity to call witnesses to defend herself at her disciplinary hearings. She was not allowed to present evidence showing that digital copies of the allegedly deleted files were still securely stored in the Respondent's system

(f) The Managing Director alleges to have based his decision on the findings of an

investigative committee which acted solely at his direction.

(g) The Managing Director reached a decision that was based on improper investigations and was prejudicial to the Applicant.

(h) The decision of the Managing Director to dismiss the Applicant was *ultra vires* as only the Board had authority to do so. The said decision is without basis in law and amounts to abuse of the office.

(i) The Managing Director went ahead to summarily dismiss the Applicant notwithstanding the fact that she had a pending appeal with the Chairman of the Board.

(j) The purported investigation and dismissal of the Applicant is in contravention of the rules of Natural Justice."

The Applicant therefore avers that her removal was unlawful, unprocedural, contrary to the rules of natural justice and aimed at achieving vindictiveness and vengeance against her.

The application is opposed. The Respondent's grounds of opposition are found in the replying affidavit sworn on 10th June, 2013 by the Respondent's Human Resource Manager, Lieutenant Colonel Peter Kiplagat. It is the Respondent's case that the Applicant was not a diligent employee and prior to her dismissal she had received warning letters. The Respondent asserts that the Applicant was dismissed from service after deleting certain files from the computer in the Commercial Services Department and that she was taken through a fair process prior to her dismissal.

At paragraph 22 of the replying affidavit the Respondent demonstrates the fairness of the disciplinary process as follows:

"22. THAT the Applicant was subjected to a fair and impartial disciplinary process. The fairness and impartiality of the process is demonstrated through the following:

(i) The Applicant was requested by the disciplinary committee to name any person in the disciplinary committee that she thought would be biased and not objective in deciding her case. The Applicant herein informed the committee that she was not comfortable with the Finance Manager – Mr. D K Towett. The disciplinary committee replaced Mr. D K Towett with the Quality Assurance Manager Engineer L Kerich.

(ii) The Applicant was thereafter comfortable with the composition of the disciplinary committee to avail a witness to which she declined.

(iii) The Applicant was requested by the disciplinary committee to defend herself, a request which she declined. Annexed herewith and marked JK-8 is a copy of the Case Proceedings on the Applicant's file deletion from the CSM's Office Computer on 7th December, 2011."

Further the Respondent contends that the matter herein is one of an employment contract and that being so the same does not fall in the realm of judicial review.

The Respondent strongly submitted that this Court has no jurisdiction to deal with this matter. It is therefore important to dispose of this issue before proceeding any further. The Supreme Court had the opportunity of expressing itself on the issue of jurisdiction in the case of **SAMWEL KAMAU MACHARIA & ANOTHER v KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR** when it stated that:

> **"68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission*** (Applicant), Constitutional Application Number 2 of 2011. **Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

When the issue of jurisdiction is raised by a party, the court must dispose of the issue before doing anything else.

The Respondent submits that this Court lacks jurisdiction on two grounds. The first ground is that the Applicant has attacked the merits of the decision and not pointed out any fault, in the decision making process. The Applicant submits that this Court can only concern itself with the decision making process and not the merits of the decision.The Respondent submits that the Applicant has not demonstrated that there was any illegality, irrationality or procedural impropriety in the process that led to her summary dismissal. The Respondent further submits that the Applicant appears to be asking this Court to hear her disciplinary case which is outside the scope of judicial review.

In response, the Applicant submitted that she is attacking the decision making process and the Respondent being a public authority is subject to the supervisory jurisdiction of this Court.

Still on the issue of jurisdiction, the Respondent submits that since this matter touches on an employer-employee issue, the right forum would be the Industrial Court. Mr. Kaumba instructed by the Attorney General for the Respondent cites Articles 162 and 165 of the Constitution which create courts to hear employment and labour relations matters and at the same time denies the High Court jurisdiction to hear such matters.

The Respondent's counsel cited the decision of the Court of Appeal **REPUBLIC v MWANGI S KAIMENYI EX-PARTE KENYA INSTITUTE FOR PUBLIC POLICY AND RESEARCH ANALYSIS (KIPPRA) [2013] eKLR** to demonstrate that matters of employer-employee relationship are not matters for which judicial review orders can be issued. In that case, the Court of Appeal expressed itself as follows:

> **"15. Judicial review remedies are discretionary and the court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law, not private law. In normal circumstances, employment contracts are not the subject of judicial review. In the case of *R - V- BRITISH BROADCASTING CORPORATION – Ex Parte Lavelle (1983) 1 WLR 1302*, it was emphasized that judicial review remedies are not available in a situation of employer-employee relationship. It was stated in the Queens Bench Division that:-**
>
> ***"since the disciplinary procedure under which the applicant was dismissed arose out her contract of employment and was purely private and domestic in character, the applicant was not entitled to relief by way of certiorari".***
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> **16. In an ordinary contractual relationship of master and servant, if the master**

> **terminates the contract, the servant cannot obtain orders of certiorari. If the master rightly ends the contract, there can be no complaint. If the master wrongfully ends the contract, the servant can purse a claim for damages. In *REPUBLIC – V- JUDICIAL SERVICE COMMISSION Ex parte Stephen Pareno HC Misc. Civ. App No. 1025 of 2003,* it was correctly stated that where an officer has left office for some time it would not be desirable to force the parties together again because it would be contrary to the policy of the law and not in the public interest and the principle of master and servant clearly apply. The court further stated that "the applicant has been separated from his former employer by a six months break. Although the applicant has sought a public law remedy what he is in fact asserting is his individual right and a private law remedy appears the most efficacious in this circumstances"."**

Mr. Kaumba for the Respondent therefore strongly submits that this matter is before the wrong forum.

On his part Mr. Kanjama for the Applicant submitted that this Court has all along had jurisdiction to deal with cases like the one before this Court. Mr. Kanjama filed further submissions on 2nd December, 2013 and made an in-depth analysis on the issue of the jurisdiction of a judicial review court. In my view, the relevant issue is whether this Court has jurisdiction in employer-employee matters.

The Applicant's case is that where there is a public law element in a matter, judicial review has a role to play. The Applicant submitted that her employment by the Respondent had statutory underpinning since the Respondent operated under the provisions of the State Corporations Act (Cap 446). The Applicant asserted that the Respondent's authority to discipline its employees was therefore derived from statute and not from private contracts of employment. Further, the Applicant contends that her challenge is directed at the disciplinary process and not the merits of the decision. In support of this argument Mr. Kanjama cited the decision of Koome, J (as she then was) in **REPUBLIC V MUNICIPAL COUNCIL OF NAKURU EX-PARTE SAMUEL THUO KANGEA [2006] eKLR** in which she stated that:

> **"The matter of concern in this case is whether when the respondent arrived at the decisions complained about due process was followed in the decision making process while noting that in Judicial Review applications the court is not concerned with the merits of the decision but with the due process."**

It is the Applicant's case that this matter is an appropriate one for the issuance of judicial review orders.

The Applicant submits that the fact that an alternative remedy is available does not of itself oust the jurisdiction of the judicial review court. Counsel for the Applicant therefore asserts that the fact that the Constitution established the Industrial Court to deal with employment matters does not deny the Applicant the right to approach this Court for appropriate orders.

In line with the above argument, Mr. Kanjama went ahead to submit that under Article 165(6) of the Constitution the High Court is granted **"supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function, but not over a superior court".** Mr. Kanjama therefore contends that the special supervisory supervision granted by the Constitution is exclusive to the High Court and cannot be exercised by the Industrial Court. He further submitted that the Industrial Court cannot grant the orders of certiorari and mandamus sought by the Applicant since such orders can only be granted by the High Court in exercise of its special supervisory jurisdiction. The Applicant's counsel therefore urged this Court to find that it has jurisdiction to decide whether the process leading to the removal of the Applicant was proper.

In response, Mr. Kaumba for the Respondent submitted that the Industrial Court has powers similar to those of the High Court and it can therefore issue the judicial review orders of certiorari, prohibition and mandamus. He relied on the decision of Majanja, J in **UNITED STATES INTERNATIONAL UNIVERSITY (USIU) V ATTORNEY GENERAL [2012] eKLR** in which he held that the Industrial Court has power to hear and determine constitutional issues arising in employment matters. In the above cited case, Majanja, J opined:

"44. In the final analysis, I would adopt the position of the Constitutional Court of South Africa in Gicaba v Minister of Safety and Security (supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), Section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.

45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011."

Looking at the submissions by the parties before this Court it is clear that two extreme propositions have been advanced. According to the Applicant, the Industrial Court cannot exercise the supervisory jurisdiction bestowed upon the High Court by Section 165(6) of the Constitution. In essence, the Applicant is saying that the Industrial Court cannot issue judicial review orders. On the other hand, the Respondent submits that this Court cannot deal with matters relating to employment and labour relations since such matters were reserved for the Industrial Court by Article 165 (5)(b) of the Constitution.

Jurisdiction gives a Court the authority to determine the issues before it-see the decision of the Supreme Court in **SAMUEL KAMAU MACHARIA** (supra). The question of jurisdiction must therefore be dispensed with before the Court can proceed further. On the issue of jurisdiction I find that there are three sub-issues namely:

1. Whether the Industrial Court can issue judicial review orders;
2. Whether this Court has jurisdiction to issue judicial review orders in matters touching on employment and labour relations; and
3. Whether judicial review orders are the most efficacious remedies in employment and labour relation cases.

I have already reproduced the arguments of the advocates of the parties in respect of the identified issues. I will therefore proceed to make my decision on those issues.

The Industrial Court is a creature of Article 162 of the Constitution which provides the system of courts in Kenya as follows:

"162.(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(*a*) employment and labour relations; and

(*b*) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article."

As can be seen in Article 162(1) the courts that are to be established by Parliament under Article 162(2) are in the category of superior courts. The other superior courts are the Supreme Court, the Court of Appeal and the High Court. Article 162(2) of the Constitution provides that the courts to be established under that provision will have the status of the High Court.

In accordance with Article 162(2) Parliament enacted the Industrial Court Act, 2011 and at Section 4 the Industrial Court was established:

"4. (1) In pursuance of Article 162(2)*(a)* of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.

(2) The Court shall be a superior court of record with the status of the High Court.

(3) The Court shall have and exercise jurisdiction throughout Kenya."

Section 12 of the Industrial Court Act, provides the jurisdiction of the Court as follows:

"12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

***(a)* disputes relating to or arising out of employment between an employer and an employee;**

***(b)* disputes between an employer and a trade union;**
***(c)* disputes between an employers' organisation and a trade unions organisation;**

***(d)* disputes between trade unions;**

***(e)* disputes between employer organizations;**

***(f)* disputes between an employers' organisation and a trade union;**

***(g)* disputes between a trade union and a member thereof;**
***(h)* disputes between an employer's organisation or a federation and a member thereof;**

***(i)* disputes concerning the registration and election of trade union officials; and**

***(j)* disputes relating to the registration and enforcement of collective agreements.**

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;
(vi) an award of damages in any circumstances contemplated under this Act or any written law;
(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just."

Among the orders that the court can grant is any other appropriate relief that it may deem fit. As can be seen, the other remedies provided by Section 12 are similar to the orders of certiorari, prohibition and mandamus available in judicial review. In fact the interim preservation order including injunctions that can be granted by the Industrial Court can be equated to an order of stay of proceedings available in judicial review. A prohibitory order serves the same purpose with an order of prohibition. An order of reinstatement of an employee can serve the purpose of orders of certiorari and mandamus. In my view therefore orders of judicial review as they are traditionally known or their equivalents can be obtained in the Industrial Court. In claims arising from a breach of the Bill of Rights, the Constitution in Article 23 provides for among other remedies an order of judicial review. The Applicant herein claims that she was denied the right to fair administrative action. This is a right within the Bill of Rights (Article 47). I therefore agree with the decision of D. S. Majanja, J in **UNITED STATES INTERNATIONAL UNIVERSITY**, supra, that the Industrial Court can exercise powers pertaining to the High Court in constitutional petitions arising within matters reserved for it. I would add that this power extends to the issuance of orders similar to those found in the judicial review field.

The Industrial Court has powers similar to those of the High Court. It is a specialized Court designed to meet a specific need i.e. hear and determine matters touching on employment and labour relations. It can, in its area of operation, do all that which the High Court can do including exercising supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function as per Article 162(6) of the Constitution. To argue, as Mr. Kanjama wants this Court to hold, that the Industrial Court cannot issue judicial review orders where appropriate, is equivalent to saying that the Industrial Court is not of the same status with the High Court. Such a position would amount to undermining the clear provision of Article 162(2) of the Constitution which states that the courts to be created by Parliament will have the status of the High Court. I therefore find that the Industrial Court can issue judicial review orders.

The argument of the Respondent was the opposite of the argument of the Applicant. Mr. Kaumba for the Respondent asserted that Article 165(5) of the Constitution bars this Court from hearing any matter touching on employment and labour relations since such matters are reserved for the Industrial Court. As already stated, Article 165(6) gives the High Court and all courts with the status of the High Court supervisory jurisdiction. That supervisory jurisdiction is not limited, except maybe by the Constitution. It is a jurisdiction that is meant to ensure fairness and good governance in public bodies. The importance of this supervisory jurisdiction is entrenched in Article 47 of the Constitution which provides that:-

"47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3)……"

The High Court cannot therefore be locked out from exercising jurisdiction when it comes to supervision of subordinate bodies even in matters that are preserved for the Industrial Court. When it comes to the issue of procedural fairness, the jurisdiction of the High Court cannot be taken away. The High Court would, however, not ordinarily deal with matters reserved for another superior court by the Constitution. In fact in the case of **REPUBLIC v MWANGI S KIMENYI EX-PARTE KIPPRA (supra)** the Court of Appeal clearly indicated that there are instances when judicial review remedies are available in contracts of employment. The Court observed that:

> **17. This is not to say that judicial review remedies cannot be available in contracts of employment. There are instances when such remedies are available. One such instance is when the contract of employment has statutory underpinning and where there is gross and clear violation of fundamental rights. In the case of *CHIEF CONSTABLE OF NORTH WALES POLICE – V- EVANS* *(1982) I WLR 1155*, Lord Hailsham pronounced himself thus:**
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> "***the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court" (See also Commissioner of LANDS – V- KUNSTE HOTEL LIMITED 1995-1998 1E.A. 1 (CAK))***
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> **18. In the case of *ERIC MAKOKHA & OTHERS – V- LAWRENCE SAGINI & OTHERS CA No. 20 of 1994 at NRB*, this court defined statutory underpinning. It was stated:**
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> ***"the word statutory underpinning is not a term of art. It has no recognized meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean the employees removal was forbidden by statute unless the record met certain formal laid down requirements. It means some employees in public positions may have their employment contract guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible that this is the true meaning of what has become the charmed words "statutory underpinning". The statute makes it mandatory that a certain procedure must be observed in some contracts of employment before termination,. Examples are constitutional office holders such as judges and the Attorney General".***

The judgment in that case was delivered in March, 2013. By then, the Industrial Court had been established. I therefore do not agree with Mr. Kaumba that the establishment of the Industrial Court has extinguished the powers of this Court to issue judicial review remedies, where appropriate, in matters touching on employment and labour relations. The issue to be considered is whether the employment in question has statutory underpinning. It is not enough for an applicant to say that the employer is a creature of statute like the Applicant herein claims. An applicant must show that the position itself has statutory underpinning. The Applicant has not done so in this case.

The third question on the issue of jurisdiction is whether judicial review orders are the most efficacious remedies in this matter. I will address this matter after considering the merits of the application before the Court.

I have already stated the background of this matter. Having carefully perused the pleadings and documents placed before the Court, I find that the Applicant was taken through two different disciplinary proceedings. The first one related to alleged harassment of security personnel by the Applicant. The incident is said to have occurred on 3rd May, 2011. A Board of Inquiry was formed to investigate an

allegation that the Applicant had abused military officers guarding the gate of the Respondent Corporation on 3rd May, 2011. After investigations the Board of Inquiry concluded that the Applicant refused to obey instructions of the gate sentries and used abusive language on them.The Board recommended that disciplinary action be taken against the Applicant for conducting herself in a manner not befitting a senior manager and failing to adhere to the procedures and regulations of the Corporation. The same Board also recommended that disciplinary action be taken against one Senior Private Mohammed Noor for disobeying his senior who had directed him to allow the Applicant to enter the Corporation's premises. The Applicant was given a warning by the Managing Director through a letter dated 17th June, 2011. I do not think that the Applicant challenges the proceedings of this particular process.

On 11th July, 2011 the Applicant wrote a letter to the Managing Director raising various complaints about alleged sexual harassment by the General Manager. The Managing Director responded through a letter dated 4th October, 2011. In the interim the Applicant had been transferred to the Farm Division as a farm manager and allegations had arisen that she had deleted information from a computer in the Commercial Services Division where she had been the manager before her transfer. A Board of Inquiry had been formed to look into her conduct.

The Board came up with a report on 14th September, 2011 in which it formed an opinion that:

> **"Having gone through the statements, questions and answers and the findings, the Board is of the opinion that the outgoing Commercial Service Manager (M/s Ann Gichimo) was not happy with her removal from the office of commercial service manager and probably she wanted to make the work of the incoming Commercial Service Manager (Mrs. Magdalene Ochola) difficult by deleting all files that relate to the operations of the Commercial Services Department. She therefore has a case to answer."**

The Board then went ahead and recommended that the Applicant's case be placed before the Disciplinary Committee.

On 7th December, 2011 the Applicant appeared before the Disciplinary Committee. The Applicant rejected the inclusion of the Finance Manager Mr. D. K. Towett in the Committee and he was replaced by the Quality Assurance Manager, Engineer L. Kerich. In the course of the proceedings, the Applicant indicated that she did not wish to proceed with case as the same was already with higher authorities. She also indicated that the offence she was alleged to have committed was criminal in nature and it should go to a civil court for further action. The Applicant was urged to proceed with the matter and she became obstinate. The Disciplinary Committee then proceeded to make a determination dismissing the Applicant from service with effect from 7th December, 2011.

The question to be answered by this Court is whether the Applicant was taken through a fair process. The procedure for disciplining employees of the Corporation is contained in a document called **"Terms and Conditions of Service"** of July 2008. Paragraph 10.3 of the said document provides that:

> **"For discipline cases regarding Heads of Departments, the Disciplinary Committee shall consist of the Managing Director as the Chairman, the General Manager and any other two (2) Heads of Department. The Human Resources and Administration Manager will be the Secretary to the Committee."**

The Applicant did not complain about the composition of the Disciplinary Committee. I have looked at the membership of the Committee and find that the same appears to have been made up of the authorized officers.

The Applicant claims that the Board of Directors ought to have disciplined her. This argument is not supported by the Regulations. It is only the Chief Executive Officer who should be disciplined by the Board of Directors.The Applicant even objected to the inclusion of Mr. D. K. Towett in the Disciplinary

Committee and her objection was upheld. This is actually a sign of fairness on the part of the Disciplinary Committee.

The Applicant alleges that she was not given an opportunity to call witnesses.She also claims that she was denied a chance to demonstrate that she had not deleted any files. The proceedings clearly show that she was taken through a fair process and she never asked to call witnesses and neither is there evidence that she attempted to adduce any evidence. In fact it is clear that she refused to participate in the proceedings. She also rejected the chance she was given to make submissions. The Disciplinary Committee could not have forced the Applicant to participate in the proceedings. It was enough for the Committee to give the Applicant an opportunity to be heard.

The Applicant alleges that she was not interdicted during the investigations as required by the Regulations. Failure to interdict the Applicant did not prejudice her in anyway.The fact that she was not interdicted did not result in any unfairness in the disciplinary process. The Applicant alleged sexual harassment but it seems that she only raised this issue in an attempt to forestall the disciplinary process. She did not explain why she kept quiet from 2009 when she was allegedly sexually harassed only to remember about the incident two years later when the disciplinary process commenced.

Looking at the entire disciplinary process, I find that the Applicant was given an opportunity to be heard. The process was fair. I therefore find that the Applicant has not established grounds for grant of judicial review remedies. It must always be remembered that judicial review is a tool used to ensure that those who interact with public bodies are treated fairly. It is targeted at the decision making process and not at the merits of the decision.

Even if the Applicant had established grounds for grant of the orders sought, I would still have declined to grant those orders. Judicial review remedies are discretionary and before issuing the orders the Court ought to consider whether they are the most efficacious in the circumstances of the case. The Applicant was employed in a facility that deals with the production of ammunition. Her working relationship with her superiors was ruined by the disciplinary process she was taken through. She complained against both the General Manager and the Managing Director. Granting her the orders sought would mean taking her to work in this hostile environment. It would not be in the interest of anybody, including herself, to grant the orders sought. The Applicant had more suitable alternative remedies including seeking damages for wrongful dismissal. Judicial review remedies are therefore not the most efficacious in the circumstances of this case.

For the reasons stated above, I find that this application has no merit and the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 13th day of March, 2014

W. K. KORIR,

JUDGE OF THE HIGH COURT