



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 333 of 2010

IN THE MATTER: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI
AND PROHIBITION

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP.26, SECTION 8 & 9) AND THE KENYA
AIRPORT AUTHORITY ACT (CAP.395)

VERSUS

REPUBLIC.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....RESPONDENT

EXPARTE

ANTHONY MUTHUMBI WACHIRA

J U D G M E N T

Prior to 29th October 2010, the exparte applicant herein Antony Muthumbi Wachira (*hereinafter referred to as the Applicant*) was employed by the respondent, the Kenya Airports Authority as its General Manager in-charge of Information and Communication Technology (ICT). He was employed in this capacity vide an appointment letter dated 28th February 2006.

In the course of his employment, the applicant oversaw the implementation of some ICT projects which included the installation of Local Area Network and Wide Area Network (LAN/WAN/ in the respondent's various stations across the country.

In October 2009, the respondent's internal audit department conducted an audit on the implementation of the ICT projects and compiled a report which raised several queries pointing to serious shortcomings regarding the competence of the ICT department in the implementation of the LAN/WAN project.

Both the initial and amended versions of the audit report were served on the applicant before he was summoned to attend the Board Audit Committee on 4th June 2010 to respond to issues raised in the audit

report.

The applicant made both written and oral presentations to two organs of the respondent namely the board audit committee and the staff committee of the board on different dates defending himself against adverse allegations levelled against him in the audit report.

On 29th October 2010 however, the respondent summarily dismissed the applicant from his employment on grounds of gross misconduct.

Aggrieved by the respondent's decision, the applicant moved to this court seeking leave to commence Judicial Review proceedings against the respondent for orders of certiorari and prohibition. Leave was granted on 15th November 2010 subsequent to which the applicant filed a Notice of Motion dated 25th November 2010 seeking the following orders:

- 1) ***An order of certiorari to remove into this honourable court the decision of the respondent dated 29th October 2010 to summary dismiss the applicant and quash the said decision.***
- 2) ***An order of prohibition to prohibit the respondent either through its board of directors, a committee of the said board of directors or through the managing director from terminating the applicant's contract of employment without following due process.***
- 3) ***That the honourable court be pleased to give further orders and directions as it may deem meet and just.***
- 4) ***That costs be provided for.***

The application is supported by the grounds stated on the face of the application, the statutory statement dated 10th January 2012, the applicant's verifying affidavit sworn on 12th November 2010 and further affidavit sworn on 1st December 2010 and annexures thereto.

It is evident from the court record that prior to the filing of the substantive motion, the applicant had filed a claim in the Industrial Court in Cause No.1590 of 2010 in which he had sought orders of reinstatement into the respondent's employment and in the alternative, damages and compensation for unlawful and unfair termination of employment. On application by the respondent, the case at the industrial Court was stayed pending the hearing and determination of this case.

The applicant's case is that the respondent's decision to summarily terminate his employment was made without following due process of the law as it was made in breach of the rules of natural justice.

It is the applicant's contention that the respondent failed to furnish him with a copy of the audit report and minutes of the audit committee of the board which contained accusations levelled against him before summoning him to show cause why severe disciplinary action should not be taken against him.

The applicant further claimed that one of the auditors who co-authored the audit report one Samson Kimilu was the Secretary of the audit Committee of the Board which recommended his dismissal from employment and that for that reason, the committee as constituted was not impartial.

It was therefore the applicant's position that he was not given a fair hearing and that the respondent violated the rules of natural justice in arriving at its decision to terminate his employment.

The applicant urged the court to allow the application and grant the reliefs sought.

The application is opposed by the respondent through the replying affidavit sworn on 8th December 2010 by Samson Kimilu, the head of the internal audit department of the respondent.

Before filing the replying affidavit, the respondent filed a notice of preliminary objection on 7th December 2010 seeking dismissal of the applicant's Notice of Motion on grounds that the same was incurably defective and incompetent for having violated the provisions of Order 53 Rule 1(2) and (4) of the Civil Procedure Rules. The preliminary objection also challenged this court's jurisdiction to entertain and determine the applicant's application for judicial review.

The challenge on jurisdiction was based on grounds that the dispute between the parties revolved around the alleged unlawful termination of the applicant's contract of service which fell in the realm of private law and ought to be adjudicated before the Industrial Court which was clothed with exclusive jurisdiction to handle all disputes related to employment and labour relations.

After hearing both parties on the preliminary objection on 10th November 2011, the court in its ruling delivered on 9th December 2011 found that it had jurisdiction to hear and determine the applicant's notice of motion and proceeded to dismiss the respondent's preliminary objection.

The respondent's case is summarized in the replying affidavit sworn by Mr. Samson Kimilu. In the replying affidavit, the respondent denied the applicant's claim that he was not given a fair opportunity to be heard before he was summarily dismissed from employment. According to the respondent, due process was followed as the applicant was given an opportunity to make both written and oral presentations to two committees of the respondent's Board and it is only after hearing his responses to queries in the audit report that he was found to have demonstrated negligence and incompetence in the performance of his duties as a result of which the respondent suffered financial loss.

The deponent averred that being head of the respondent's internal audit department, his role in the audit committee of the Board was purely secretarial and that he did not take part in the committee's deliberations. The respondent maintained its position that the applicant's Notice of Motion was incompetent and ought to be dismissed with costs.

I have considered both the written and oral submissions made in court by Mr. Kanjama learned counsel for the applicant, Mr. Tiego learned counsel for the respondent and all the authorities cited. I find that the following key issues emerge for determination:-

- (1) Whether the applicant's Notice of Motion is incompetent and incurably defective.
- (2) Whether the respondent followed due process or whether it breached the rules of natural justice in the disciplinary proceedings which culminated in the applicant's dismissal from employment.
- (3) Whether the court can grant the reliefs sought.
- (4) What order should be made on costs?

In his submissions in support of the respondent's case, Mr. Tiego submitted that the applicant's suit was incompetent and fatally defective for two reasons. The first reason cited by Mr. Tiego is that the judicial review proceedings had been commenced in contravention of Section 34 of the Kenya Airports Authority Act and secondly, that the applicant's complaints are not justiciable under this court's Judicial review jurisdiction as they relate to alleged breach of employment which was in the domain of private law as opposed to public law. Mr. Tiego further submitted that the correct forum for the resolution of the dispute between the parties being a dispute between an employer and employee is the Industrial Court or any other civil court and not a judicial review court which by virtue of Section 8 of the Law Reform Act was prohibited from exercising either civil or criminal jurisdiction.

I have looked at Section 34 of the Kenya Airports Authority Act (*hereinafter referred to as the Act*). It prohibits the filing of any legal proceedings against the respondent unless one month had elapsed after written notice was served on its managing director of intention to commence contemplated legal action giving particulars of the intended claim. It also provides that the legal proceedings should be commenced within 12 months of the act or omission giving rise to the claim.

It is the respondent's position that since the applicant failed to serve the respondent's managing director with notice of intention to commence the instant proceedings, the proceedings are incompetent and the Notice of Motion should be struck out.

Mr. Kanjama learned counsel for the applicant countered this argument by submitting that the limitation concerning commencement of proceedings against the respondent under Section 34 of the Act was not applicable to judicial review proceedings since by their very nature, they are proceedings *sui generis*. They are neither civil nor criminal proceedings.

I wholly concur with the submissions made by Mr. Kanjama that the applicant's failure to comply with the requirements of Section 34 of the Act did not render his notice of motion incompetent. This is because judicial review proceedings are special proceedings which are exclusively governed by Section 8 and Section 9 of the Law Reform Act and Order 53 of the Civil Procedure Act. All other Acts of parliament including the Kenya Airports Authority Act have no application to judicial review proceedings. The procedure for commencement of judicial review proceedings is set out in Order 53 of the Civil Procedure Rules and once a party complies with that procedure, he is not obligated to comply with any other procedure set out in any other legislation. The first limb of the respondent's objection to the current proceedings therefore fails.

On the second limb of the respondent's objection, the respondent challenged this court's jurisdiction to hear and determine the applicant's Notice of Motion on grounds that it raised issues of private law which can only be entertained in a civil court and not a court exercising judicial review jurisdiction.

I note that this same issue was raised in the preliminary objection raised by the respondent earlier in these proceedings. After hearing and considering arguments made by the party's advocates on record on the issue of the court's jurisdiction, the court made its decision in a ruling delivered on 9th December 2011. It is therefore not necessary to reconsider the issue of jurisdiction afresh since the court's findings on that issue are already on record. Suffice it to say that this court found that it had jurisdiction to entertain and determine the applicant's Notice of Motion.

Having resolved the preliminary issues raised by the respondent regarding the validity of these proceedings, let me now turn to the 2nd issue which actually constitutes the main issue for determination in these proceedings. The second issue requires a determination whether the respondent in its disciplinary proceedings observed the rules of natural justice before making its decision to summarily dismiss the applicant from its employment.

Mr. Kanjama submitted that the respondent violated the rules of natural justice in that though the applicant had been served with the audit report and made both written and oral presentations in response to adverse findings attributed to him and his ICT department to the audit committee of the Board, he was not given clear notice and notification of the charges he was expected to address himself to when he appeared before the staff disciplinary committee of the Board to show cause why disciplinary action should not be taken against him. It is the applicant's case that despite several requests in letter exhibited as annexures marked **A MWA** and **A MWII**, the respondent's Managing Director refused to furnish him with a copy of the minutes of the deliberations of the audit committee of the Board which he needed in order to adequately prepare and present his defence before the staff disciplinary committee.

The applicant also raised the issue of bias stating that Mr. Samson Kimilu who co-authored the audit report also served as the Secretary of the audit committee of the Board and that two members of the audit committee of the board who proposed his summary dismissal also sat as members of the staff disciplinary committee of the Board which decided on his summary dismissal.

On these grounds, the applicant asserted that the respondent had violated the rules of natural justice that requires that no man should be a judge in his own cause.

On his part, Mr. Tiego submitted that the respondent had complied with the rules of natural justice to the letter. He submitted that the applicant was given a fair opportunity to be heard in response to the adverse

findings made against him in the audit report.

According to the respondent, the fact that the applicant was served with a copy of the audit report and was given a chance to make both written and oral presentations before two committees of the Board before the decision to terminate his services was made means that the respondent had fully complied with the rules of natural justice. It was further submitted on behalf of the respondent that if after hearing the applicant's responses the respondent made a wrong decision, that decision cannot be the subject of review since Judicial Review is concerned with the decision making process and not with the merits of the decision itself.

The rules of natural justice are fundamental principles in our justice system. Two cardinal principles constitute the rules of natural justice which are that no man shall be a judge in his own cause (*Nemo iudex in causa sua*) and that no man shall be condemned unheard (*audi alteram partem*).

It is now settled law that these twin rules of natural justice are inherent in all proceedings be they judicial, quasi-judicial or administrative as long as the proceedings affect the rights or interest of a citizen.

The rules of natural justice are all about fairness and they must be observed by not only courts and tribunals but also by persons or public bodies who have a duty to act fairly.

The respondent is a statutory body established under Section 3 of the Act. It derives its power to hire members of staff and to exercise disciplinary control over them from Section 29(1) of the Act. In the exercise of that statutory power, the respondent has a legal obligation to act rationally and fairly. It therefore goes without saying that the respondent in its disciplinary proceedings was duty bound to strictly observe the rules of natural justice.

The first tenet of the rules 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 judgment over matters in which they have either a pecuniary or other form of interest in order to avoid the perception or likelihood of bias. The rule against bias is well captured in Halsbury's laws of England 4th edition Vol.1(1) Para.86 where the author states:-

“It is a fundamental principle (often expressed in the maxim *nemo iudex in causa sua*) that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man may be a judge in his own cause. Hence, where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted and the court will grant an order of prohibition to prevent it from adjudicating, or an order of certiorari to quash a determination arrived at by it, or such other remedy (for instance, an injunction or a declaration) as may be appropriate”.

In this case, the applicant claims that the respondent contravened the rule against bias as the Secretary to the audit committee had co-authored the audit report on the basis of which the disciplinary proceedings were being held and that two members of the audit committee which had recommended the applicant's dismissal from employment also sat in the staff disciplinary committee which finally sealed the applicant's fate in line with the audit committee's recommendations.

These allegations were denied by the respondent.

In paragraph 29 of the replying affidavit, Mr Samson Kimilu averred that his role in the audit committee was limited to that of Secretary and that he did not participate in the committee's deliberations by making any presentations or contributions and was therefore not involved in the committee's decision making process. This claim by the respondent was not contravened by the applicant in his further affidavit sworn on 1st December 2010.

In the absence of evidence to the contrary and in line with the principle that what is not denied is deemed to be admitted, the court can only conclude that the said Samson Kimilu only offered secretarial

services to the audit committee and did not participate in its deliberations. The attempt by the applicant to demonstrate bias against Mr. Kimilu in written submissions filed on his behalf cannot suffice since submissions are not equivalent to evidence and cannot take the place of evidence. I also find that the applicant failed to tender evidence to prove his claim that his written response to queries in the audit report submitted via Email had been substantially altered or amended by Mr. Kimilu without his knowledge before it was placed before the audit committee.

There was also no evidence tendered to demonstrate the applicant's claim that two members of the audit committee also sat as members of the staff disciplinary committee.

In view of the foregoing, it is my finding that the applicant has failed to demonstrate that the respondent contravened the first tenet of the rules of natural justice in conducting the disciplinary proceedings against him.

On the right to be heard, it is common ground that the applicant was served with the audit report that had made adverse findings against him and the ICT department which he headed prior to his dismissal. The report highlighted shortcomings in the implementation of the ICT projects which the applicant being the head of ICT was supposed to oversee and ensure efficient implementation. It is also not disputed that the applicant was given an opportunity to make both written and oral presentations before the audit and staff committees of the board in response to queries raised in the audit report.

I have looked at the documentation annexed to both the verifying affidavit sworn by the applicant and the replying affidavit sworn by Samson Kimilu on behalf of the respondent. Having done so, I am not satisfied that the opportunity given to the applicant to defend himself especially before the staff disciplinary committee of the Board amounted to a fair hearing as contemplated by the rules of natural justice.

The very brief letter inviting the applicant to attend the staff committee of the Board on 21st October 2010 read as follows:

“KAA/374537

18th October 2010

Mr. Anthony Wachira

General Manager (ICT)

NAIROBI

IMPLEMENTATION OF LOCAL AREA NETWORK AND WIDE AREA NETWORK PROJECTS

I refer to the above.

You are invited to have a session with the Staff committee of the Board on Thursday, 21st day of October 2010 starting at 9.00 am in the KAA Headquarters Boardroom.

Kindly avail yourself.

Yours sincerely

ENG. S.M. GICHUKI
MANAGING DIRECTOR

The letter did not notify the applicant what kind of session he was supposed to have with the staff committee of the Board or the agenda for the proposed session.

The letter did not specifically notify the applicant that he was to attend the staff committee of the Board to show cause why disciplinary action should not be taken against him and the charges on which he was expected to defend himself.

In disciplinary proceedings like those that faced the applicant in this case, the right to be heard includes the right to be given adequate notice not only of the time and venue of the proceedings but also notice of the charges levelled against the person proposed to be disciplined by his accusers in order to adequately prepare his defence.

In this case, the letter summoning the applicant to attend the disciplinary proceedings was brief and plain with no indication of the agenda expected to guide the meeting he had been invited to attend. It was like a summon giving the applicant notice to attend a court without giving him notice of the charges he was going to face. I fully associate myself with the remarks made by my brother J. Lenaola in **R -Vs- Kenya Medical Training College Ex parte James Kipkonga Kandagor Misc. Civil Appn. No.10 of 2004** where when discussing the need for notice to attend disciplinary proceedings to include charges being levelled against the person being tried stated,

“A person being tried is entitled to disclosure of the charges and the evidence against him. Days when secrecy of such matters was the norm are long gone. This duty on the part of those laying charges is continuous and applies both at the pre-trial stage and continues during trial.....”

While I fully appreciate the respondent's submissions that the applicant had been served with the audit report prior to his meeting with the staff committee of the Board, it is important to note that the audit report was a voluminous document detailing many aspects of the shortcomings noted in the audit regarding the implementation of the ICT projects some of which were not necessarily pointed against the applicant as a person. The audit report cannot in all fairness amount to a statement of the charges that the applicant was expected to defend himself against in the disciplinary proceedings.

It is important to note that the applicant had extensively responded to all queries in the audit report both in writing and orally before the audit committee and according to the respondent as shown in the letter dated 1st October 2010 authored by the respondent's managing director, the applicant's responses had been found to be unsatisfactory.

The managing director notified the applicant that the audit committee of the board had concluded that his handling of the ICT projects raised issues of integrity on his part.

Though the respondent's refusal to furnish the applicant with a copy of the entire minutes/resolutions of the audit committee on grounds of confidentiality may have been justified, the dictates of fairness required the respondent to at least serve the applicant with an outline of the responses which had been found to be unsatisfactory and why together with the charges levelled against him touching on his integrity so that he could appropriately and adequately defend himself both in his written representations to the managing director in compliance with directions given in the letter dated 1st October 2010 and in his oral presentations before the staff committee of the Board.

Failure to serve the applicant with a statement of the specific charges made against him and to give him notice that his session with the staff committee of the Board was meant to serve as disciplinary proceedings against him in my opinion fell short of the legal requirement to give the applicant a fair opportunity to defend himself against all or any of the allegations made against him. It is therefore my finding that the respondent did not fully comply with the rules of natural justice

Considering that the applicant's right to earn a living was at stake, the respondent ought to have strictly adhered to the rules of natural justice before arriving at the impugned decision.

Is the applicant then entitled to the reliefs sought?

In this case, the applicant seeks the orders of certiorari to quash the respondent's decision summarily dismissing him from employment and an order of prohibition prohibiting the respondent and any of its organs from terminating the applicant's employment without following due process.

It is trite law that the remedies of certiorari and prohibition will issue against public authorities or bodies to either quash or prohibit the implementation of decisions which had been made in excess of or without jurisdiction, for errors of law on the face of the record or made in breach of the rules of natural justice.

However, in the case of prohibition, the order can only issue to prohibit threatened unlawful action or contemplated decisions if when made would be unlawful but it cannot issue to prohibit decisions which have already been made.

This is why it was held by the Court of Appeal in **Kenya National Examination Council -Vs- R. Exparte Geoffrey Gathenji & 9 Others, C/Appeal No.266 of 1996** that prohibition looks into the future and it is powerless against events which had already occurred.

From the foregoing, it is clear that the remedy of prohibition is not available to the applicant in this case as the decision to summarily dismiss him from employment was made on 29th October 2010 even before the instant proceedings were commenced.

With regard to the remedy of certiorari, I find that even though the respondent acted within its jurisdiction in summarily dismissing the applicant from its employment in the exercise of its statutory mandate under Section 29 (1) of the Act, it failed to observe due process in making its decision as it did not fully comply with the rules of natural justice. The applicant has therefore demonstrated that he is deserving of the remedy of certiorari.

It must however be remembered that the remedy of certiorari just like the other judicial review remedies is a discretionary remedy and even where grounds exist to warrant its issuance, the court can nevertheless decline to grant it if weighing one thing against the other, the court is satisfied that it is not the most efficacious remedy to grant given the circumstances of the case. The discretion of the court being a judicial one must however be exercised judiciously on the basis of sound legal principles and on the evidence before the court.

In this case, it is evident that the decision to dismiss the applicant from employment was made about two years ago. It is common ground that the position of ICT Manager previously occupied by the applicant has since been filled by the respondent.

In the premises, I find that issuing an order of certiorari to quash the respondent's aforesaid decision will not serve any useful purpose. Certiorari is not an efficacious remedy for the applicant in the circumstances of this case. In my opinion, issuing an order of certiorari would be an exercise in futility and the policy of the law is that courts of law should not act in vain.

The court also takes cognizance of the fact that the applicant has an alternative remedy which he has already utilized by filing a claim at the Industrial Court seeking inter alia, general and exemplary damages for unlawful termination of employment. This means that even if the applicant is unsuccessful in this suit, he is not left without a remedy.

Taking all relevant facts into account, I am satisfied that this is not a suitable case for the court to exercise its discretion in granting the order of certiorari. I accordingly decline to grant the said order as sought in prayer 1.

In the end, the applicant's Notice of Motion dated 25th November 2010 fails in its entirety. It is hereby dismissed.

Considering that the applicant's suit would have succeeded had it not been overtaken by events, I find that it would be fair and just to award the applicant the costs of these proceedings. It is so ordered.

DATED, SIGNED and DELIVERED by me at Nairobi this 11th day of October 2012

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

Mr. Kanjama for Applicant

Mr. Ogolla for the Respondent