



**Republic v Lake Basin Development Authority; Chere (Exparte Applicant) (Judicial Review E045 of 2023) [2024] KEELRC 1913 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1913 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
JUDICIAL REVIEW E045 OF 2023**

**CN BAARI, J  
JULY 25, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LAKE BASIN DEVELOPMENT AUTHORITY ..... RESPONDENT**

**AND**

**FREDRICK ONYANGO CHERE ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The Ex Parte Applicant lodged this proceeding vide a Notice of Motion dated 26<sup>th</sup> February, 2024 pursuant to leave granted by this Court on 7<sup>th</sup> February, 2024. He seeks the following reliefs: -
  - i. That this Honourable Court be pleased to grant an order of judicial review by way of Certiorari, to bring before this court the Respondent's decision contained in the letter dated 27<sup>th</sup> October, 2023, and proceedings leading to the said decision, for purposes of having it quashed, and annulled, together with all consequential orders, if any, made thereon by the Respondent pursuant to the said decision.
  - ii. That this Honourable Court be pleased to grant an order of judicial review by way of Mandamus compelling the Respondent, its agents or any such person acting pursuant to that decision to reinstate the Applicant to his previous position held before the letter dated 27<sup>th</sup> October, 2023 dismissing him from employment.
  - iii. That the costs of the application be borne by the Board members of the Respondent. together with the Respondent jointly and severally.
2. The Motion is premised on the grounds That:



- i. On 8<sup>th</sup> November, 2023, the Ex-Parte Applicant received a letter dated 27<sup>th</sup> October, 2023 in which the Respondent purported to summarily dismiss him from employment on account of gross misconduct. In it, the Respondent accused the Ex Parte Applicant of absenteeism despite being reinstated to work following this court's judgment in Kisumu ELRC Judicial Review Application No. E015 of 2022 delivered on 15th March, 2023.
- ii. The events leading to the issuance of the letter dated 27<sup>th</sup> October, 2023 by the Respondent are marred with irregularity and bad faith and are a clear abuse of powers by the Respondent and its board members for reasons THAT;
  - a. Between sometime in February, 2022 to date, the Respondent has attempted to frustrate, intimidate and victimize the Ex-Parte Applicant for reasons unknown to him by attempting to terminate him from employment unprocedurally at least 3 times in a period of less than 24 months by issuing various letters seeking to either summarily dismiss him from employment or to place him under indefinite suspension with no salary pending the hearing and determination of purported disciplinary proceedings initiated against him.
  - b. Some of these letters include the one dated 10<sup>th</sup> December, 2021 and 9<sup>th</sup> September, 2022 addressed to the Ex-Parte Applicant, and which prompted him to institute similar proceedings where he sought and obtained orders of certiorari, mandamus and prohibition in Kisumu ELRC Judicial Review No. E002 of 2022 and E015 of 2022 and the court ordered the Respondent to reinstate him to employment, as well as compute his dues which it held unreasonably, but the Respondent has failed and declined to do so, and in the latter proceedings, has been found guilty of contempt of Court.
  - c. The Respondent's latest letter dated 27<sup>th</sup> October, 2023, is absurd and irrational in circumstances where the Respondent had 'reinstated' the Ex Parte Applicant through the letter dated 5<sup>th</sup> April, 2023 and about a week later, placed him on indefinite suspension for the same reasons that it had terminated him from employment through a similar letter dated 9<sup>th</sup> September, 2022, which action formed the basis of judicial determination in Kisumu ELRC Judicial Review No. EO15 of 2022, which was determined in favour of the Ex-Parte Applicant herein.
  - d. The Ex-Parte Applicant complied by reporting to the office of Managing Director for purposes of having a meeting with him but his efforts proved futile since the said officer refused, and or declined to have any meeting with him.
  - e. The conduct of the Respondent leading to the issuance of the letter dated 27<sup>th</sup> October, 2023, depicts the Respondent as acting under ulterior motives, thus abusing its powers, since the parties herein are involved in active litigation in Kisumu ELRC Judicial Review Application No. E015 of 2022, where though the court had delivered judgment in favour of the Ex-Parte Applicant, the Respondent had openly disobeyed the orders of the court by refusing to integrate the Applicant back into employment and reinstate him to the previous position he held or at all, which prompted the Ex-Parte Applicant to file the Notice of Motion Application dated 27<sup>th</sup> April, 2023 in that suit, and the Court has found the Respondent guilty of contempt of court.
  - f. When the Ex-Parte Applicant filed the application dated 27<sup>th</sup> April, 2023, this Honorable court issued stay of any disciplinary proceedings against the Ex Parte





7. It is the Respondent's case that following realization of this breach it initiated disciplinary proceedings and suspended the Applicant via a letter dated 20<sup>th</sup> April, 2023.
8. Pursuant to the suspension the Respondent avers that the Applicant sought and obtained a stay of the disciplinary action via a court order of the 27<sup>th</sup> April, 2023.
9. It is the Respondent's assertion that despite the stay which had the effect of lifting the suspension the Applicant still absconded duty.
10. The Respondent avows that the abscondment persisted for four months necessitating the Applicant's summary dismissal on 27<sup>th</sup> October, 2023. Additionally, the Respondent states that it restructured its departments and the position held by the Applicant was no longer available, hence reinstatement was not practical.
11. In Conclusion the Respondent avows that its relationship with the Applicant is governed by an employment contract, hence was in the purview of private law.
12. Through directions taken on 16<sup>th</sup> April, 2024, parties agreed to canvass the Application by way of written submissions.
13. Both parties filed submissions on the substantive Judicial Review Motion.

#### **The Ex-parte Applicant's submissions**

14. It is submitted for the Ex-parte Applicant that the orders of Certiorari and Mandamus are merited on the grounds that the Respondent's decision was tainted with irrationality and procedural impropriety. The Ex-parte Applicant avers that the Respondent failed to follow the procedure in the [Employment Act](#) and in its policy.
15. The Ex-parte Applicant asserts his right to challenge his dismissal process on the basis of the Court of Appeal case of Egerton University v James Tuitoek & Chief of Staff and Head of Public Service [2021] eKLR where the court cited Pastoli v Kabala District Local Government & others [2008]2 E.A in the following terms: -
 

“In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.”
16. In buttressing irrationality and procedural impropriety, the Ex-parte Applicant cites the Respondent's failure to abide by Clause 12.6.1-12.6.3 of the Human Resource Policies Manual on the procedure to be followed on absenteeism. Additionally, he cites Section 41 of the [Employment Act](#) which he affirms is couched in mandatory terms.
17. Regarding the Respondent's alleged restructuring, the Ex-parte Applicant submits that no evidence has been availed to prove the same.
18. The Ex-parte Applicant is of the firm position that entrenchment of Judicial Review under [the Constitution](#) elevated it to a substantive and justiciable right transcending the technicalities of common law. He cites Praxedes [Saisi & 7 others v Director of Public Prosecutions & 2 others \(Petition 39 & 40 of](#)



[2019](#) (Consolidated) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) where the Supreme Court stated that: -

“It is our considered opinion that the framers of *the Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.”

### The Respondent’s Submissions

19. It is the Respondent’s submission that the quashing of the decision to dismiss the Ex-parte applicant via the judgment of the 23<sup>rd</sup> of March, 2023 was not a bar to subsequent disciplinary proceedings. The Respondent argues that after ensuring compliance by fully constituting its board it issued a notice to show cause which was also temporarily stayed on 27<sup>th</sup> April, 2023.
20. The Respondent submits that this stay had the effect of lifting the Ex-parte Applicant’s suspension, but he instead absconded duty for upwards of 6 months. This behaviour the Respondent avows justified summary dismissal as per the *Employment Act* and his contract of employment. The Respondent cites the case of National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR at 507, where the High Court reiterated that a court cannot rewrite a contract, and that parties are bound by the terms of their contract unless coercion, fraud or undue influence is proven.
21. It is the Respondent’s submission that Judicial Review remedies are only available in public law and not in a private contractual relationship. The Respondent cites the Court of Appeal in Makupa Transit Shade Limited & another v Kenya Ports Authority & another [2015] eKLR where the court stated that judicial review remedies cannot be used to assert private law.
22. The Respondent further cites Shadrack Kibichi Bundotich v Permanent Secretary Ministry of Lands & Housing [2007] eKLR where the court cited with approval the case of Berkshire Ex Parte Walsh [1985] Qb 152 and Rep v BBC Ex Parte Lavelle [1983] 1 All Er 241 wherein it was stated that: -

“An Application for Judicial Review had to show that a public law right which he enjoyed had been infringed; ..... but a distinction had to be made between infringement of statutory powers giving rise to public law rights and those that arose solely from breach of contract of employment.”
23. Additional reliance is placed on Daniel Mutisya Kivuva v Machakos Golf Club [2019] eKLR among other cases where the court in recognising that the application was a judicial review camouflaged as constitutional petition, stated that judicial review cannot enforce purely private law rights.
24. Without prejudice to the foregoing and with regard to the mandamus orders of reinstatement, the Respondent submits that it is not automatic. It asserts that the factors in Section 49 (4) of the *Employment Act* have to be taken into consideration before reinstatement. They rely on National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR where the court while citing *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union CA No.188 of 2014* stated as follows:-

“Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word “may”, which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies...are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13



considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his losses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."

25. The Respondent's further submission is that the Ex-parte Applicant had not discharged the burden of proving exceptional circumstances warranting reinstatement. It cites *Gatebi v Savannah Brands Company Ltd (Cause E650 of 2022)* [2023] KEELRC 600 (KLR) (13 March 2023) (Ruling) to buttress this position.
26. Furthermore, the Respondent submits that reinstatement is impracticable for the dual reasons that the Ex-parte Applicant's previous position no longer exists and its relationship with the Ex-parte Applicant had irretrievably broken down. On the non-existent position, the Respondent cites the Court of Appeal in *United States International University v Eric Rading Outa* [2016] eKLR where the lower court was faulted for reinstating the Respondent to a non-existent position.
27. On the irretrievable nature of their relationship, the Respondent cites the Ex-parte Applicant's abscondment from duty and the case of *Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others* [2018] eKLR where the Court of Appeal faulted the judge for forcing an employment contractual relationship on an employer. The court stated that: -

"None of those factors were considered by the trial court. There was, therefore, no factual or legal basis for the order made on reinstatement and it cannot stand. As this Court emphatically stated in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR, the remedy of reinstatement should not be given except in very exceptional circumstances. In our own assessment of this case, the confidence between the employer and employees had irretrievably broken down and there was no inquiry as to whether the same or similar posts still existed with the employer. We agree with the appellant that an order for reinstatement in this case would be an imposition of an employee on an unwilling employer by the court, contrary to the laws of contract."
28. The Respondent equally cites the case of *Keter v Family Bank Limited (cause) E009 of 2022* [2023] KEELRC 1970 KLR where it was held that reinstatement would not be tenable or appropriate in the circumstances of broken-down trust.

### **Analysis and Determination**

29. I have considered the motion, the replying affidavit in opposition and the rival submissions. The singular issue for my determination is whether the Ex parte Applicant merits grant of Judicial Review orders.
30. The Applicant argues that he merits the orders sought on the premise that the decision was tainted with irrationality and procedural impropriety. The Ex-parte Applicant further avers that the Respondent



failed to follow the procedure in the *Employment Act*, read with its Human Resource Policy requiring that the Ex-Parte Applicant be accorded a hearing before any decision is made to terminate him from employment.

31. In determining whether or not the Ex Parte Applicant merits the orders sought, this Court's role is to determine whether the decision to summarily dismiss the Applicant is tainted with illegality, irrationality and procedural impropriety. (See *Pastoli v Kabala District Local Government Canal & Others* [2008] 2EA 300 at pages 300-304).
32. The Court of Appeal in *Municipal Council of Mombasa v Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007* [2002] eKLR, had this to say on judicial review orders: -

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court 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 this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.”
33. Further in *Kenya National Examination Council v Republic exparte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR, the Court of Appeal had occasion to discuss the scope and efficacy of judicial review orders when it held in respect of prohibition that: -

“It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.”
34. The general rule is that an order of mandamus is limited to where there is a specific legal right and there is no specific legal remedy to enforce the right or the alternative legal remedy is less convenient, beneficial and effectual. (See *Halsbury Laws of England* 4th ed. Vol 1. Para 89).
35. The Ex-parte Applicant impugns the decision to institute disciplinary action against him. Dismissal of employees falls squarely within the ambit of the *Employment Act*, 2007 and the issues of summary dismissal and reinstatement are adequately catered for under the Act.
36. Furthermore, the decision to punish an employee is the prerogative of an employer. Initially the Ex-parte Applicant was reinstated on account of the Respondent not having a fully constituted Board in place at the time of his dismissal.
37. In my view, once the Board was fully constituted, and it exercised its prerogative to dismiss the Ex-parte Applicant, the court cannot interfere in the exercise of this prerogative. In the case of *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* [2015] eKLR the Court stated that judicial review remedies cannot be used to dictate to a statutory body how to implement its discretion.
38. The Applicant has not proved that the decision to dismiss him is tainted with illegality, irrationality or procedural impropriety as to warrant grant of the judicial review orders of certiorari that he seeks.



39. Further and as correctly submitted by the Respondent, the quashing of the decision to dismiss the Ex-parte Applicant via the judgment of this Court rendered on 23<sup>rd</sup> March, 2023, was not a bar to subsequent disciplinary proceedings against the Applicant.
40. The Court notes that the Ex parte Applicant seeks to have the Respondent's condemned to pay costs of the application for disregarding the orders of this court issued in Kisumu ELRC Judicial Review No. E002 of 2022 and E015 of 2023. For the Ex parte Applicant to file a fresh suit seeking to enforce orders granted in two others suits he filed on similar issues, is to say the least an abuse of the process of the court.
41. It is also clear that this motion is not fashioned as a contempt application, hence compliance with the stay orders issued in the matter does not arise.
42. In the end, I find the motion devoid of merit and is for dismissal. It is dismissed with costs to the Respondent.
43. It is ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF JULY, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance

Mr. Okelloh present for the *Ex-Parte* Applicant.

Mr. Barasa h/b for Mr. Nyamodi for the Respondent

Ms. Anjeline & Debra – C/As

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