



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 34 OF 2011**

**IN THE MATTER OF A DECISION BY THE CHAIRMAN, KENYA WILD LIFE SERVICE BOARD OF TRUSTEES DATED 7<sup>TH</sup> FEBRUARY 2011 INTERDICTING MR. JOACHIM W. KAGIRI, DEPUTY DIRECTOR, WILDLIFE & COMMUNITY SERVICE**

**AND**

**IN THE MATTER OF THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT, CAP 376 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE GUIDELINES FOR DISCIPLINARY PROCEDURES FOR GAZETTED OFFICERS AND NON-UNIFORMED OFFICERS IN JOB GRADES '4' TO '2'**

**AND**

**IN THE MATTER OF AN APPLICATION BY MR. JOACHIM W. KAGIRI FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**REPUBLIC.....APPLICANT**

**VERSUS**

AND

EX PARTE.....JOACHIM W. KAGIRI

**RULING**

On 23<sup>rd</sup> February, 2011 the ex parte applicant was granted leave to apply for an order of certiorari to remove into this court for purpose of quashing the decision of the Chairman of the respondent's Board of Trustees communicated vide a letter dated 7<sup>th</sup> February, 2011. Leave was also granted to apply for an order of prohibition to prohibit the respondent from interdicting, dismissing or discharging any disciplinary measures in violation of **The Wildlife (Conservation & Management) Act Cap 376**, the respondents Human Capital Policy and Procedures Manual and the respondent's Guideline for the Disciplinary Procedures for gazetted officers and non-uniformed officers in grades "4 to 2". The ex parte applicant had also prayed that grant of the aforesaid leave do operate as a stay of the decision of the respondent as contained in the letter dated 7<sup>th</sup> February, 2011. However, the court declined to grant any ex parte orders in respect thereof and directed that the prayer be argued inter partes on 2<sup>nd</sup> March, 2011.

This morning, the respondent through Messrs Lutta and company advocates, filed a replying affidavit and the application as to the issue of stay was argued.

Mr. Njenga for the ex parte applicant sought to rely on his client's affidavit sworn in support of the application for leave. The ex parte applicant is the respondent's Deputy Director, Wildlife and Community Service. His affidavit shows, *inter alia*, that he joined the respondent's service as an Assistant Warden II on 25<sup>th</sup> August, 1986 and over the years rose through the ranks to the current position. On 14<sup>th</sup> January, 2011 the ex parte applicant held a meeting with the respondent's Director and discussed various issues. The Director accused him of circulating official documents to members of staff and some unauthorized persons. The Director expressed his disapproval of the ex parte applicant's communication with one Mr. Omondi of Pegasus Media and Telecommunications Network. The ex parte applicant alleged that during the meeting he was not given an opportunity to formally respond to the allegations levelled against him by the Director.

On 7<sup>th</sup> February, 2011 the ex parte applicant received an interdiction letter signed by the Chairman of the respondent's Board of Trustees. The letter read as follows:

**"INTERDICTION**

**In the recent past, you have conducted yourself in a non-professional manner while conducting and discharging your duties as a uniformed and disciplined officer of the service. Details in my possession, demonstrate that you have contravened sections of the Official Secrets Act, KWS Human Capital Policy and Procedures Manual and The Public Officer Ethics Act, 2003, details of which are fully in the realm of your knowledge.**

**Consequently, it has been decided to interdict you from the service with immediate effect in order to facilitate full investigations into this matter.**

**During the period of interdiction you will receive half (1/2) of your monthly basic salary. You are further required to comply with any lawful instructions that you will receive from time to time.**

**(Signed)**

**Hon. David Mwiraria, EGH,  
CHAIRMAN, KWS BOARD OF TRUSTEES**

The ex parte applicant stated that the procedure for the conduct of disciplinary inquiries for employees of the respondent is outlined in **The Kenya Wildlife Service Human Capital and Procedures Manual, 2006** and in respect of employees in grades “4 to 2” in disciplinary procedures for gazetted officers and non-uniformed officers in Job Grades “4 to 2”. He said that the decision to interdict him was wrongly arrived at for various reasons among them being that:

- (a) There were no preliminary investigations conducted and no inquiry file was opened contrary to Rule 1.4(i) of the applicable disciplinary procedures.**
- (b) He had not been informed of the charges levelled against him.**
- (c) He had not participated in any forum where his conduct had been discussed other than the informal meeting with the Director on 14<sup>th</sup> January, 2011.**
- (d) The interdiction by the Chairman of the respondent’s Board of Trustees violated the express provisions of Rule 1.4(ii) of the applicable disciplinary procedures.**

For the aforesaid reasons, the ex parte applicant urged the court to stay his interdiction pending hearing and determination of the judicial review proceedings.

The respondent filed a replying affidavit through **Sharon Jelagat Kisire**, the Head of Human Capital Department. She stated that she had been advised by the respondent’s Director, **Mr. Julius Kipngetich**, that:

- (i) The applicant was interdicted to pave way for investigations.**
- (ii) The applicant is still an employee of the respondent despite having been interdicted.**
- (iii) The disciplinary process where the applicant may show cause has not commenced.**
- (iv) It is desirable that the applicant stays away from the respondent’s duties while investigations are being undertaken.**

The deponent further stated that the ex parte applicant had been disclosing the respondent’s official information without authority to persons not in the employment of the respondent with the aim of disparaging the image of the organization. A bundle of the ex parte applicant’s e-mails obtained from the respondent’s computer records were annexed to the affidavit. They show that the ex parte applicant had been sending unauthorized material to various people including one Bernard Ezekiah Omondi Mirinya.

One of the said annexures is a story said to contain falsehoods which the ex parte applicant shared with the press and was published, bringing the respondent's credibility to question. The deponent further stated that the ex parte applicant will not suffer any irreparable loss if the order of stay is not granted.

Both Mr. Njenga and Mr. Lutta made brief submissions in support of their respective clients' depositions. I have considered the contents of the said affidavits as well as counsels' submissions.

I will first dispose of two issues that were raised by Mr. Lutta as preliminary objections. The two issues are that:

**“1. The application is improperly intitled having been commenced in the name of the “Republic” as the Applicant before leave was granted.**

**2. Notice to the Registrar was not issued and if issued the same was not issued timeously and has not been served upon the respondent.”**

As regards the first preliminary objection, Mr. Lutta cited FARMERS BUS SERVICE & OTHERS vs. TRANSPORT LICENCING APPEAL TRIBUNAL, [1959] E.A. 779 and WELAMONDI vs. THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA [2002] 1 KLR 486. In the aforesaid decisions, it was held that judicial review proceedings are issued in the name of the Republic and applications of such orders must be correctly intitled. The name of the Republic is inserted after leave has been granted. That remains the position in law. However, the fact that the ex parte applicant's application for leave was not properly intitled does not, in my view, render the application incompetent. **Article 159 (2) (d) of the Constitution of Kenya, 2010** requires the court to administer justice without undue regard to procedural technicalities. The aforesaid omission does not go to the root of the application and is not prejudicial to the respondent.

With regard to the second preliminary objection, **Order 53 of the Civil Procedure Rules, 2010** has done away with the requirement of serving Notice to the Registrar prior to institution of an application for leave to apply for judicial review orders. I dismiss the preliminary objections and will now deal with the merits of the ex parte applicant's application.

It is not in dispute that the ex parte applicant is the respondent's Deputy Director, Wildlife and Community Service, and that he was interdicted vide a letter dated 7<sup>th</sup> February, 2011. The reasons for interdiction are well stated in the said letter. The interdiction took effect on the aforesaid date. By 23<sup>rd</sup> February, 2011 when the ex parte applicant appeared before the court, he had been under interdiction for more than two weeks. It will therefore appear that the ex parte applicant is urging the court to stay what has already taken place.

Secondly, although the ex parte applicant's main argument is that the respondent breached certain provisions of the respondent's Human Capital and Procedures Manual, 2006, he did not demonstrate that his employment and the terms and conditions thereof are statutorily underpinned. In R vs. EAST BERSHIRE HEALTH AUTHORITY ex parte WALSH [1984] 3 ER 425 it was held that:

**“Whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee's position and not on the fact of employment by a public authority per se or the employee's ability or the interests of the public in the functions of the authority. Where the authority was required by a statute to contract with its employees on specified terms with a view to employees acquiring private law rights a breach of contract was not a matter of public law and did**

**not give rise to any administrative law remedies, it was only if the authority failed or refused to contract on specified terms that the employee had public law rights to compel the authority to comply with its statutory obligations.”**

The aforesaid legal principle has been applied locally in various authorities, one of them being **REPUBLIC vs. VICE CHANCELLOR, JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY ex parte CECILIA MWATHI & ANOTHER [2008] eKLR.** In view of the foregoing, it is doubtful whether judicial review proceedings are efficacious as a remedy for the alleged breaches of the disciplinary procedures.

Thirdly, the ex parte applicant is still an employee of the respondent. The respondent is yet to carry out full investigations into the issues that may have caused the ex parte applicant's interdiction. Interdiction of an employee for purposes of carrying out investigations relating to issues that touch on such an employee is a normal practice in any institution. It is doubtful whether it can be the basis of court intervention by way of judicial review orders except where it is sufficiently demonstrated that the interdiction is contra statute.

Lastly, the ex parte applicant will not suffer substantial loss in the event that stay is not granted if after investigations it turns out that the interdiction was not warranted. This is because he will be entitled to all his unpaid salaries and other benefits over the period of interdiction. On the other hand, if after finalization of the investigations it is found that there are sufficient grounds to terminate the ex parte applicant's services, I believe the respondent will pay him all his terminal dues.

For the aforesaid reasons I decline to order that the leave that was granted on 23<sup>rd</sup> February, 2011 do operate as stay of the respondent's decision to interdict the ex parte applicant. The respondent shall have the costs of this application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MARCH, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – court clerk**

**Mr. Njenga for the ex parte applicant**

**Mr. Lutta for the respondent**