IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & MUSINGA, JJ.A)

CIVIL APPEAL NO. 324 OF 2017

MAURICE ADONGO ANYANGO.....APPELLANT

AND

KENYATTA INTERNATIONAL CONVENTION

CENTRE (KICC).....RESPONDENT

*(Being an appeal against the Judgment and decree of the Employment and Labour Relations Court at Nairobi (**Linet Ndolo, J.**) dated 31st July, 2017*

in

Judicial Review Application No. 126 of 2016)

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JUDGMENT OF THE COURT

The appellant, **"Maurice Adongo Anyango"**, was first employed by the respondent "**Kenyatta International Convention Centre**" as a Procurement Assistant on 30th November 2005. He was employed on permanent terms and initially earned a monthly salary of Kshs.26,320 plus house allowance of Kshs.11,280. He faithfully carried out his duties and was on 23rd June 2015 promoted to the position of Assistant Manager and further to the Acting Procurement Manager. On 23rd June, 2015, the appellant was appointed the respondent's secretary to the Tender Committee. However, on 21st January 2016, he was surprisingly served with an interdiction notice as well as a show cause letter by the respondent's Management Board over investigations the latter had undertaken regarding procurement improprieties and which it claimed to have established some irregularities. Following his response to the letter, disciplinary proceedings were commenced against him. He appeared and defended himself regarding the impropriety allegations. However, vide a letter dated 30th May 2016, the appellant's employment was terminated on account of procurement irregularities that went against the respondent's Human Resource Disciplinary and Policies manual.

The appellant being aggrieved by the termination exercised his right of appeal. After hearing the appeal, the respondent, vide a letter dated 9th August 2016, conveyed to the appellant the result of his appeal which was to the effect that the same had been rejected. Still dissatisfied, he instituted judicial review proceedings before the employment and labour relations court seeking orders of *certiorari* to quash the letter of interdiction and termination dated 2nd January, 2016 and 30th May 2016 respectively. He further sought an order of mandamus to compel the respondent to reinstate him to his position of acting procurement manager without any loss of benefits; a prohibitory order to stop and/or restrain the respondent from interfering with the appellant's employment contract until attainment of the mandatory retirement age of 60 years. Orders of *certiorari* and declaration were also sought for purposes of bringing into court the entire proceedings of the respondent's procurement Board, relied on by the respondent in dismissing the appellant from service for quashing and for purposes of declaring all the deliberations, investigations, proceedings and or recommendations of the Board to dismiss the appellant as unconstitutional, null and void. The appellant finally prayed that all his salary arrears remaining unpaid or withheld be paid to him forthwith.

In its response, the respondent stated that the World Trade Organisation (**WTO**) had in 2014 resolved to hold the 10th WTO Ministerial Conference in Nairobi at the respondent's office. To successfully host an international conference of such magnitude, preparations required procurement of various goods and services. During the said preparations, it received various complaints with regard to irregularities in the procurement process. Among them was that the Tender Committee, with the appellant at the helm as its secretary, did not meet or failed to do so and therefore did not approve the award of any tender during the material period, yet tender awards were made and contracts entered into with various contractors. The respondent accused the appellant of failing to discharge his responsibilities as required by statute t*o wit,* the Public Procurement & Disposal Act and the regulations thereunder, and its policy documents thereby exposing it to loss and risk.

Following a disciplinary process that found the appellant culpable and in breach of his employment contract, his services were terminated.

Faced with the above scenario, the learned Judge (**Ndolo J.**) took issue with the manner in which the appellant had approached the court for relief. According to the Judge, since the appellant's claim was pursuant to an employment contract between him and the respondent and not in exercise of a statutory power, his claim ought to be governed by private law under the Employment Act and not public law by way of judicial review proceedings. The Judge found that for a decision to be amenable to Judicial Review, the decision had to have some public element and not relate exclusively to private law. Further and according to the learned Judge, that the only instance where Judicial Review proceedings would be applicable would be if the appellant was a constitutional or statutory office holder. That as it were, Judicial Review did not provide a suitable avenue to interrogate the reasons and or circumstances behind the termination of the appellant's employment. The Judge observed further that judicial review proceedings could not determine claims in the nature of special damages, such as the salary arrears claimed by the appellant. Ultimately, the Judge accorded the appellant liberty to pursue his claim under the Employment Act, 2007 and the Employment & Labour Relations Court (Procedure) Rules, 2016 but dismissed the Judicial Review application.

Rather than heed to the Judge's advice, the appellant chose to mount this appeal seeking to challenge those findings. The appeal is based on a Memorandum of Appeal dated 11th September 2017 raising six (6) grounds. The appellant faults the Judge's failure to find that the respondent's board of management had no role to play in his disciplinary process; for finding that the court could not determine matters of salary arrears while the court could by an order of mandamus order the payment of salary arrears; for holding that the issues raised in his suit could not be canvassed through Judicial Review proceedings; for failing to consider his application on merit and supposedly relying on technicalities to dismiss the suit; for failing to hold that his disciplinary process was illegal and for making a determination that aids in the abuse of office.

The appeal was canvassed by way of written submissions and limited oral highlights. In his submissions, the appellant urged that the board of directors exceeded its mandate by calling for disciplinary action against him when he was not part of the management. According to the appellant, any disciplinary process against a person in his job group required the head of human resource to be part of it. He argued that since his letter of dismissal had been signed by the chairperson of the board of directors, it did not come from the management as it ought to have. That as per the respondent's Human Resource disciplinary policies manual, the disciplinary process against him ought to have been by the management and not under the ambit of the board of directors. In a nut shell, the appellant submitted that the board transgressed upon his rights and the High Court ought to have quashed the resultant irregular decision to dismiss him.

The High Court had jurisdiction to grant the prayers sought under section **12** of the Employment Act, 2007 and so he argued that he was properly before the court. He faulted the learned Judge's finding that the issues he raised in his application related to public law and not private law. He opined that judicial review was not concerned with the merits of the case but rather the due process, authority and or abuse of office. He further submitted that since the disciplinary hearing and subsequent dismissal were allegedly irregular, illegal, null and void, the High Court had power to quash the decisions and failure to address the issues in his claim was a perpetuation of injustice and ratification of abuse of office by the respondent's board of directors.

It was also the appellant's submission that under section 12 of the Employment Act, 2007, the trial court had powers to make such orders as may be necessary for the ends of justice since the fundamental duty of the court is to do justice to parties. The appellant argued that an aggrieved party is not required to resort to some other procedure other than judicial review if that other procedure is less convenient or otherwise less appropriate. He cited the authority of **Paul Kuria Kiore vs. Kenyatta University, Petition 396 of 2014** for that proposition. He also cited the case of **Shah Vershi Devji & Co. Ltd v The Transport Licensing Board (1971) EA 289** to advance the argument that a party who wanted to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power could do so through judicial review as courts have now generally adopted a very liberal approach to judicial review since it is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Further, that courts must resist the temptation to try and contain judicial review in a straight jacket and resist being rigidly chained to the past defined situations of *locus standi* and look at the nature of the matter before them.

He termed his termination illegal for breaching section **4** of the Fair Administrative Action Act and section **41 (1)** and **(2)** of the Employment Act. He accused the respondent of bias on the basis that the managing director who issued the tender award letters without prior approval of the tender committee was not subjected to any disciplinary process and his inactions and failing were instead apportioned to him. He refuted the allegations levelled against him since, he argued, as the acting procurement manager he had no powers to audit and report to the tender committee the activities already approved. After all, he submitted, he performed his role in the 10th WTO Ministerial Conference well and was recognized for it through an award of a certificate of appreciation. The appellant finally submitted that he had a legitimate expectation of being reinstated back to his job by the respondent.

Opposing the appeal, the respondent in its submissions reiterated that it established procurement irregularities related to the WTO Conference at a time when the appellant was the acting procurement manager in charge of all its procurement processes following his appointment on 16th April 2016. That, given the appellant's role in the procurement process which included ensuring that the corporation adhered to relevant procurement laws in its procurement, it initiated disciplinary proceedings against him which it undertook in accordance with the law and its human resources manual culminating in his dismissal. To counter the appellant's claims that his dismissal was illegal for being undertaken by the board of directors rather than the management, the respondent pointed out that by virtue of the appellant's appointment as an acting procurement manager in charge of procurement processes, his position fell under job group 3 as per its human resources manual. As such, disciplinary proceedings against him could only be undertaken by the board of directors. It maintained that the disciplinary process was legally sound and procedurally fair.

In the respondent's view, what was essentially before court was an application for judicial review seeking orders against an employer for its decision to terminate an employee's contract of employment. According to it, it was trite law that actions/decisions or omissions complained of in judicial review must have been made by a body/institution or individual exercising statutory power infusing some public element therein. It relied on the case of **R v Kenya Airports Authority & Anor, *ex parte* Moses Echwa (2015) eKLR**, for the proposition that the dispute herein could not be construed to fall in the realm of public law. The respondent discounted the authorities cited and relied on by the appellant on the basis that they concerned *locus standi* in judicial review proceedings and were not concerned with an employee/employer relationship which is governed by the Employment Act and the Employment and Labour Relations Court (Procedure Rules). In its opinion, the appellant ought to have approached the Employment & Labour Relations Court if he felt aggrieved as the circumstances of this case were

not exceptional as to invoke the jurisdiction of the judicial review court.

Furthermore, it was urged, the alternative procedure available to the appellant was not less convenient or otherwise less appropriate to invite judicial review proceedings. By adopting judicial review, the appellant denied the court a chance to interrogate the respondent's reasons for dismissal since the court was limited only to the procedure leading to the dismissal. It cited the case of **Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Anor (2016) eKLR** for the proposition that where there is clear procedure for redress of a particular grievance prescribed by law, then that procedure ought to be strictly followed and that a purely labour dispute ought to be resolved by the application of the Employment Act as well as the regulations thereunder. This is especially since the law relating to termination of employment is governed by section **41** of the Employment Act and not provisions of the Fair Administrative Act.

It further submitted that reinstatement was unavailable to the appellant as the relief, provided in section **49 (4)** of the Employment Act could only be issued by the Employment and Labour Relations Court which would have a chance to take into account the considerations provided thereunder. By bringing his claim through judicial review, the appellant denied the trial court a chance to examine the claim in its entirety. It opined further that the appellant could not fault the High Court for failing to exercise its jurisdiction under sections **12 (3)** of the Employment & Labour Relations Court Act and section **49** of the Employment Act when judicial review limited the court's jurisdiction to procedure and not the reasons or merits of termination. In conclusion, the respondent submitted that the appellant had failed to demonstrate that the trial court acted on wrong principles of law in reaching its decision and finding. Accordingly this Court has no sufficient or grounds to disturb the decision.

This Court's jurisdiction when sitting on a first appeal is pursuant to rule **29** (1) of the Court of Appeal Rules. Restated, this Court on a first appeal conducts a retrial by way of re-evaluating and reconsidering the evidence placed before the High Court so as to reach its own conclusions. The mandate was properly espoused in **Selle & Another v Associated Motor Board Company Ltd & Others (1968) 1 EA 123**, as follows;

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

No doubt cognizant of those principles, the parties in the present appeal have gone to considerable lengths to argue the merits of their respective positions before this Court. The appellant has in essence submitted on how the decision to terminate his employment by the respondent was so illegal that it invited the High Court to call up the decisions for quashing. The respondent has on its part maintained that its decision to dismiss the appellant was in accordance with the law and its human resource manual. However, it is manifestly clear that the learned Judge in her determination did not delve into the merits of the case. The Judge in her determination steered clear of the merits of the case and did not delve into an exposition of the law based on the facts of the case. Her determination was solely based on the procedure by which the appellant had approached the court. The Judge observed as follows;

> ***"In my view, once an employee comes through the gate of Judicial Review, the Court misses the opportunity to interrogate not only their employment record but also the reason and circumstances of the termination."***

As is apparent, the Judge considered herself limited to interrogate the appellant's claim due to the inappropriateness of the procedure adopted in bringing the claim before court. In our view, it is not therefore open for the parties to fault the learned Judge on issues that the Judge never considered or made a determination on. Not only does this Court lack the benefit of the reasoning of the court on those issues but delving into the merits of the appellant's claims would undermine or preempt his case should he choose to proceed to the Employment & Labour Relations Court in the event this appeal fails. The only issue for consideration before this Court is whether the learned Judge erred in refusing to consider the merits or allow the appellant's application for judicial review. This Court will only interfere with the Judge's findings if it is shown that they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. See **Mwanasokoni v Kenya Bus Service Ltd (1982-88) 1 KAR 278.**

The court in dismissing the appellant's application faulted the appellant for instituting his claim through a judicial review application on what was purely a private law matter between an employer and employee. According to the court, to move the determination of employment matters by public bodies from the realm of private law to one of public law is an unnecessary maneuver which would lead to confusion. This is not only in light of the clear provisions of the Constitution but also in light of the robust employment law now in place. Parliament has already established the Employment &Labour Relations Court pursuant to Article **162 (2)** of the Constitution as a specialized court mandated to deal principally with disputes relating to or arising out of employment between an employer and an employee. Judges appointed to the said court possess requisite knowledge and experience to deal with employment matters as observed in **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR**. In that case, the Court of Appeal stated as follows;

> ***"To our mind therefore it is clear that the drafters of the Constitution envisaged that there would be Superior Court judges who would possess different professional experience. As for the specialised courts, Parliament envisaged that the judges in those courts would have additional qualifications in terms of experience which judges of the High Court do not necessarily need to have. The law is that these courts need judges with measurable experience in the specific mandate of the Court. This is due to the special and peculiar nature of the disputes handled by the said courts."***

In so far as the appellant's claim was employment claim governed by the Employment Act, the court best suited to interpret the provisions thereof was the Employment & Labour Relations Court in a claim instituted in the normal manner as opposed to judicial review proceedings. This is especially since the appellant was also seeking other reliefs such as salary arrears which transcend the reliefs available in judicial review proceedings. Whether the circumstances in a case allow reinstatement would also be best determined by the same court taking into account the provisions of the Employment Act, *viva voce* evidence to test the veracity of competing claims as opposed to affidavit evidence

which is synonymous or associated with judicial review proceedings. In **Bluesea Shopping Mall Limited v City Council of Nairobi & 3 Others [2015] eKLR,** this Court quoted with approval **Sanghani Investment Ltd v Officer in Charge Nairobi Remand & Allocation Prion (2007) 1 EA 354** where the High Court stated as follows;

> *"Judicial review, on the other hand, is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application."*

In determining the salary arrears and whether the circumstances in this case would allow reinstatement of the appellant back to his position the reasons and circumstances leading to the appellant's termination would need to be interrogated. As rightly found by the Judge, salary arrears are in the nature of special damages requiring to be specifically proved where they have been pleaded. Allowing the appellant's claim as it is would be to muddy the waters and further cause uncertainty in the law. In **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR**, the respondent's (Shollei) employment had been terminated by her employer, the Judicial Service Commission. She instituted judicial review proceedings before the High Court seeking enforcement of her fundamental rights and freedoms, compensation and damages as would be assessed. The appellant, is a public body amenable to judicial review but this Court observed as follows,

> ***"……the Notice of Motion, which had been certified urgent, came up for hearing before M. Ngugi, J. who transferred the suit to the Industrial Court for hearing and determination. This was upon indication by the parties that the Industrial Court would be best suited to deal with the matter as the dispute was basically between an employee and an employer."***

The same position obtains here. In an attempt to justify why he resorted to judicial review proceedings, the appellant submitted that the respondent was a public body amenable to judicial review. He further contended that he was challenging the merits of the process rather than the outcome or the decision and he was not required to resort to some other procedure other than judicial review if that other procedure was less convenient or otherwise less appropriate. The appellant has also pointed out that judicial review proceedings were now applicable in employment cases by virtue of the Employment & Labour Relations Court (Procedure) Rules. Those arguments may well be true. Infact, the Judge was alive to rule **7** of the said rules which provide for judicial review proceedings in employment matters. However the court refused to exercise its discretion in the appellant's favour since in the court's opinion, it would mar the line between the exercise of statutory power by a public body and an employer's action pursuant to a contract of employment.

In **R v East Berkshire Health Authority, ex p. Walsh [1984]0 APP.L.R. 05/14,** Mr. Walsh, a UK resident, had been employed by a public authority. Action was taken against him in September 1982 with a view to terminating his employment and he sought relief by way of judicial review. The authority raised, as a preliminary point, the question of whether such proceedings were appropriate and court ruled against the authority. On appeal, the main issue became whether Mr. Walsh's complaints gave rise to any right to judicial review. His complaints all related to his employment by the authority, the purported termination of his contract of employment. The Court of Appeal unanimously held that judicial review was not available to Mr. Walsh and observed as follows;

> *"The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for re-instatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedies. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring "private law" rights under the terms of the contract of employment. If the authority fails or refuses to thus create "private law" rights for the employee, the employee will have "public law" rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of "public law" and gives rise to no administrative law remedies."*

It also ought to be borne in mind that judicial review reliefs are discretionary and will only issue in the most deserving of cases. In the **Sanghani (**supra) case, the court delivered itself thus;

> *"Judicial review being a discretionary remedy will only issue if it will serve some purpose. Halsbury's Law of England (4ed) Volume II page 805 paragraph 1505, says of the order of certiorari:*
>
> *"certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles."*
>
> *So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands. It will still require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts."*

We do not think given the circumstances of this case that the judicial review orders sought were the most efficacious remedies.

Furthermore, this Court has in several decisions held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. See for instance **Speaker of the National Assembly v Karume** (supra). The appellant's claim was based on a contract of employment. A specialized court exists to deal with employment matters and it would cause jurisdictional rivalry and/or confusion if courts would allow litigants to shuffle between any courts, even if they are of equal status. Accordingly, we cannot fault the Judge for determining the application on that narrow issue. It was sufficient to dispose of the application. Indeed, the learned Judge exercised her jurisdiction properly and judiciously.

The appellant, in any event, has not challenged the learned Judge's exercise of her discretion and we find no reason why we should interfere with the same. In conclusion, we reiterate that an employer's action within a contract of employment should ordinarily be governed by private law.

The upshot is that the appeal fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 4th day of May, 2018.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR