



Akolo v Board of Directors, Amatsi Water Services Company Limited & 2 others; Attorney General (Interested Party) (Judicial Review Application E002 of 2024) [2025] KEELRC 356 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 356 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
JUDICIAL REVIEW APPLICATION E002 OF 2024
DN NDERITU, J
FEBRUARY 13, 2025**

BETWEEN

TOM JOSHUA AKOLO EXPARTE APPLICANT

AND

BOARD OF DIRECTORS, AMATSI WATER SERVICES COMPANY LIMITED 1ST APPLICANT

CEC-MEMBER, WATER, ENVIRONMENT, ENERGY AND NATURAL RESOURCES 2ND APPLICANT

COUNTY SECRETARY – VIHIGA 3RD APPLICANT

AND

THE HON. ATTORNEY GENERAL INTERESTED PARTY

JUDGMENT

I. Introduction

1. On 4th June, 2024 the court (Keli J.) granted leave to the ex-parte applicant (the applicant) to file judicial review proceedings seeking orders for certiorari and prohibition.
2. Subsequently, the applicant filed a notice of motion (the application) dated 26th June, 2024 seeking the following orders –
 1. That an order of Certiorari be issued removing into this for the purpose of quashing the dismissal letter dated 22nd January 2024 sacking the exparte applicant from his position as the Head of Corporate and commercial services of Amatsi Water Services Ltd.



2. That an order of Prohibition do issue prohibiting the respondents from implementing the first respondent's letter of dismissal dated 22nd January 2024.
3. Costs
3. The application is expressed to be filed under Order 53 Rule 3 of the Civil Procedure Rules and Sections 8 & 9 of the *Law Reform Act*. It is based on the grounds on the face of it and supported with the affidavit of the applicant sworn on even date, the supporting affidavit sworn on 3rd June, 2024 that had been filed in support of the application for leave with several annexures thereto, and the statutory statement dated 3rd June, 2024 that was filed with the application for leave.
4. In response to the application the respondents filed a replying affidavit sworn by Edwin Bukweye, the managing director of Amatsi Water Services Company Limited, on 5th September, 2024 with several annexures thereto.
5. With the leave from the court the applicant filed a further affidavit sworn on 4th November, 2024 with annexures thereto.
6. The application was canvassed by way of written submissions. The applicant's counsel, Mr. Kiveu, filed his written submissions dated 16th September, 2024, while Miss Shijenje for the respondents filed submissions dated 4th November, 2024.
7. With the leave from the court counsel for the applicant filed supplementary written submissions dated 25th November, 2024.

II. The Evidence

8. As expressed and contained in the application, the supporting affidavit, the statutory statement, the further affidavit, and the written submissions by his counsel, the applicant's case is summarized as hereunder.
9. The applicant was engaged by Amatsi Water Services Company Ltd (the company or the employer) as commercial manager for a period of three years with effect from 28th March, 2022 to expire on 28th March, 2025. A copy of the letter of offer of employment is annexed and marked TA-1. Vide a letter dated 28th September, 2022 he was re-designated as head of cooperate services (TA-2).
10. It is deposed in the supporting affidavit that on 9th August, 2023 the applicant was served with a show-cause letter for alleged insubordination (TA-4) for purportedly failing to comply with a letter dated 5th July, 2023 requesting him to surrender cheque-books to the acting manager, finance.
11. It is deposed by the applicant that he explained his failure to surrender the cheque books as requested as such surrender would have exposed the company to fraudulent transactions and loss of money.
12. The applicant was suspended from work vide a letter issued on 23rd August, 2023 (TA-6). He was invited to appear before an ad hoc committee of the Board to deliberate on the issue vide a letter dated 25th August, 2023 (TA-7). He was further directed to handover all company properties vide a letter dated 5th September, 2023 (TA-8).
13. On 31st October, 2023 and again on 29th December, 2023 the applicant was invited to appear before a full-board to answer to charges related to the alleged misconduct (TA-9 & 10).
14. Eventually, the applicant was dismissed vide a letter dated 22nd January, 2024 (TA-11). The said dismissal was confirmed on 17th May, 2024 after his appeal and an application for review were dismissed (TA-12).



15. It is the applicant's position that he was denied a fair hearing as the process was driven by malice with one predetermined outcome of dismissing him. He deposes that he was denied adequate time to prepare his defence, that he was allegedly assaulted by a member of the Board during the disciplinary hearing, that he was denied an opportunity to cross-examine the witnesses, and that the conduct of entire disciplinary process was contrary to the laid down human resources policy and procedures manual of the company.
16. In the replying affidavit sworn by Edwin Bukweye, the Managing Director of the company, it is stated that besides managing the human resources the deponent is also the custodian of the records and properties of the company.
17. He deposed that after the applicant failed to surrender the cheque-books as directed by the then Acting Managing Director, Mr. Luvusi, the applicant was issued with a show-cause letter and subsequently suspended from duty.
18. It is deposed that the applicant was formally invited to a disciplinary hearing but he first appeared before an ad-hoc committee of the Board and subsequently before the full Board of the company.
19. It is deposed that the applicant deliberately and blatantly refused to surrender the company cheque-books as instructed and as such the disciplinary hearing proceeded before the full Board on 12th January, 2024 after the applicant had been given adequate and appropriate time to file and submit his response to the allegations against him.
20. It is deposed that upon deliberations the Board decided that the applicant be dismissed and he was thus issued with a letter of dismissal dated 22nd January, 2024.
21. It is further deposed that the applicant appealed the dismissal vide a letter dated 5th February, 2024. It is deposed that the applicant was invited for the hearing of the appeal on 27th February, 2024. It is deposed that the applicant deliberately failed and or refused to attend the hearing of his appeal but nonetheless the Board considered his appeal based on his written submission and found the same to be without merits. The dismissal was thus upheld.
22. It is further disposed that having not been satisfied with the outcome of the appeal the applicant applied for a review vide a letter dated 12th April, 2024. The application for review failed and the dismissal was upheld and that decision was communicated to the applicant vide a letter dated 17th May, 2024.
23. It is deposed that by alleging that he was denied fair hearing before dismissal, the applicant is being dishonest and untruthful. It is vehemently denied that the applicant was assaulted by a member of the Board or any other person or at all in the course of the disciplinary process. It is deposed that the applicant was fairly, procedurally, and lawfully dismissed as he was accorded both substantive and procedural fairness and justice.
24. In his further affidavit, the applicant deposed that he was only allowed seven days to respond to the show-cause letter as opposed to the 21 days as per the company's human resources policy and procedures manual, 2022. He stated that his suspension was not sanctioned by the Board but rather it was initiated by the acting Managing Director one Mr. Luvusi contrary to the company policy and procedure.
25. The applicant deposed that he was assaulted by one Mr. Tom Musungu who sat in the ad-hoc committee of the Board notwithstanding that he was not a member of the Board. He stated that he reported the assault to the police and issued with OB12/12/01/2024.



26. He deposed that his response to the show-cause letter, his appeal, and the application for review were not considered on merit as the employer approached the disciplinary process with a predetermined outcome of dismissing him.

III. Submissions By Counsel

27. In the submissions dated 16th September, 2024 counsel for the applicant summarized the applicant's case as contained in the affidavits alluded to above.
28. It is submitted that the dismissal of the applicant went against the rules of natural justice and fair administrative action. It is further submitted that the procedure adopted by the employer culminating in the dismissal of the applicant violated the company's human resources policy and procedure manual of 2022.
29. It is submitted that the company failed to comply with clause 13:21 of its human resources and procedures manual by giving the applicant seven days to respond to the show-cause letter instead of 21 days. It is further submitted that the company failed to investigate the allegations against the applicant before taking disciplinary action against him. It is also submitted that the disciplinary process ought to have been steered by the Board as opposed to an ad-hoc committee thereof as it happened.
30. In regard to the reliefs sought, it is submitted that the 1st respondent is a public body and was enjoined to apply rules of natural justice in taking the administrative action against the applicant. The court is urged to apply the reasoning and holding in Republic V Attorney General & 4 Others ex-parte Dismond Hashim Lalji and thus examine the process rather than the merits of the outcome. Likewise, the court is urged to apply Section 7(2) of the Fair Administrative Action Act and find that the employer was biased, that the process applied was un-procedural, that the action was based on malice and ulterior motives, and that the action was unreasonable.
31. It is urged that the applicant was not adequately notified of the action, that he was denied of an opportunity to defend himself, and that the nature of the administrative action was not disclosed to the him in advance. The court is urged to adopt the reasoning in Republic V Kenyatta University Ex-parte Martha Waihuini Ndung'u (2019) eKLR.
32. Counsel for the respondents identified the following issues for determination –
- i. Whether the exparte applicant was given an opportunity to be heard.
 - ii. Whether the exparte applicant was denied opportunity to cross examine the company's witnesses.
 - iii. Whether the exparte applicant was dismissed unfairly.
 - iv. Whether the exparte applicant is entitled to the judicial review orders.
33. On the first issue, it is submitted that the applicant was clearly and evidently given a fair hearing as per the documentary evidence availed by both parties on record. It is submitted that the applicant was issued with a show-cause letter, invited to a hearing, informed of the outcome of the hearing, given an opportunity to appeal and apply for a review of the decision, and at each stage informed of the outcome.
34. It is submitted that the applicant was the author of his dismissal for his deliberate, willful, and blatant refusal to obey lawful instructions by the employer to submit cheque-books to the acting manager, finance, as per the memo of 5th July, 2023.



35. It is further submitted that the applicant was suspended from duty to facilitate investigation and thereafter the applicant was invited to a disciplinary hearing wherein he fully participated as per the minutes availed in court. It is submitted that the applicant deliberately failed to turn up for the hearing of the appeal but nonetheless the employer considered his written submission. It is further submitted that his application for review was considered on merit but the same was found to hold no merits and the dismissal was affirmed.
36. It is submitted that the applicant was informed of the charges/allegations against him, afforded an opportunity to respond, invited for a hearing, allowed to appeal and apply for review, and at each stage he was informed of the outcome. It is submitted that the entire process was fair and just and in accord with the rules of natural justice.
37. On the second issue, it is submitted that the employer did not call any witnesses during the disciplinary hearing and as such there were no witnesses to be cross-examined by the applicant. It is further submitted that the applicant did not apply or request for any witnesses to be called for his cross-examination. The court is urged to follow the reasoning in *Albert Nyabuto Nyauntu V Kenya Accountants & Secretaries National Examination Board (KASNEB) (2020) eKLR* to the effect that if a party fails to make a request or an application for the calling of a witness or witnesses for cross-examination it cannot be heard to later on complain that it was denied an opportunity to cross-examine such witness or witnesses.
38. On the issue of alleged unfair dismissal by the applicant, it is submitted that it was upon the applicant to prove the same under Section 47(5) of the *Employment Act*. It is submitted that the employer complied with both the substantive and procedural requirements of the law in arriving at the decision of dismissing the applicant. It is submitted that the applicant failed to prove unfair dismissal as for the court to call upon the employer to justify the grounds and reasons for the dismissal. In any event, it is submitted that the dismissal was fair, lawful, and justified considering the entire circumstances of the matter. The court is urged to be persuaded by the reasoning and holding in *Odek V Cooperative Bank Limited (2022) eKLR* and find that the employer complied with Section 41 of the Act.
39. On remedies and orders sought by the applicant, it is submitted that the applicant was the author of his dismissal for his misconduct and insubordination. The court is urged to be cautious not to interfere with the employer's right to manage and regulate the discipline of employees at the workplace. It is further urged that since the dismissal was fair and justified, both in substance and procedure, the applicant is not entitled to the remedies sought. The court is urged to follow the reasoning of the Court of Appeal in *Bett Francis Barngetuny & Another V Teachers Service Commission & Another (2015) eKLR* and find that the sanction imposed by the employer was fair and justified in the circumstances of the case.
40. In the supplementary submissions, it is urged that Mr. Tom Musungu and Ms. Ann Chulude who sat in the ad-hoc committee of the Board were not such members of the employer and as such the decision arrived at was null and void ab initio. Further, it is submitted that the minutes of the disciplinary hearing as filed in court do not disclose how the decision to dismiss the applicant was arrived at. It is submitted that the only logical conclusion is that the decision to dismiss the applicant was arrived at upon consideration of irrelevant factors and with malice. It is submitted that the decision was illogical and irrational.
41. Further, it is submitted that there is no evidence that the decision to suspend the applicant was made by the Board. It is submitted that the said decision was solely made by the then acting managing director, Edward Luvusi, to pave way for recruitment of one Edwin Bukweya.



42. It is re-emphasized that the applicant was denied a fair hearing as envisaged in Articles 47 & 50 of *the Constitution* as read with Section 9(2) of the *Fair Administrative Action Act*. The court is urged to be persuaded by the holding in *Pashito Holdings Ltd & Another V Paul Nderitu Ndung'u* to the effect that where a decision maker in a quasi-judicial process fails to comply with the rules of natural justice the decision amounts to nothing and the same should be set aside.

IV. Issues For Determination

43. Upon due consideration of the application, the affidavits in support thereof, the affidavit in opposition, the annexures to all the affidavits, and the written submissions by counsel for both parties, the court finds that the following issues commend themselves for determination –
- a. Is the application and the proceedings herein properly before the court?
 - b. Was the dismissal of the applicant unfair and unlawful?
 - c. Is the applicant entitled to the reliefs sought?
 - d. What are the appropriate orders for the court to make based on the findings on the foregoing issues and on costs?

V. The Proceedings

44. Amatsi Water Services Limited is a limited liability company with its own corporate, legal, and juridical personality independent of its shareholders, directors, managers, officers, officials, employees, and or others howsoever. Essentially, the company has legal capacity to sue, be sued, own and deal in property, and do all that appertains to its legal personality – see *Salmon V Salmon & Co Ltd* on the nature and extent of legal personality of a duly registered limited liability company.
45. Therefore, it goes without saying that other than lack of the natural life, a limited liability company is for intents and purposes a legal or juridical personality with its own legal life. Of course, due to lack of that natural human life, a company acts, functions, and operates through human beings such as the directors, shareholders, managers, employees, agents, servants etc. However, the legal personality of a company remains and any legal action for or against a limited liability company shall be in the name of that company. Such legal action cannot be in the name of the board of directors, the directors, managing director, general manager, or any such other officer or office of the company.
46. It is the said company that employed the applicant as per the letter of offer of employment dated 28th March, 2022 that formed the basis of the employment relationship between the applicant and the company. In any dispute relating to that relationship, therefore, either party may sue the other and not a third party.
47. The applicant herein filed the proceedings against the board of directors of the said company and to that extent this action is incurably defective deserving dismissal in le mine.
48. The proceedings also fail to disclose any action against the 2nd and 3rd respondents. As stated above, and Keli J. found as such in a ruling dated 25th July, 2024, the employer is a duly registered limited liability company with its own legal and juridical personality. To that extent, whether all the respondents are directors, shareholders, officers, or officials of the company, they have no legal capacity to be sued for and or on behalf of the company.



49. Either, no explanation has been offered as to why the named interested party, the Attorney General of the Republic, the chief government legal advisor, was named in a dispute that is purely between two private legal entities, the applicant and the company.
50. There is also absolutely no reason offered as to why the applicant opted to file judicial review proceedings in a matter of a private employment dispute. The nature of the claim is an employment relationship dispute that is squarely in the realm of private law for remedies in personam as opposed to public law for remedies in rem.
51. Judicial review proceedings are in their very nature intended to check excesses, abuses, and violations by public officers and public institutions in performance of their public duties and authority as opposed to private officers or private institutions in execution of private duties and contracts.
52. Rule 10(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides that – Any person who wishes to institute judicial review proceedings shall do so in accordance with sections 8 and 9 of the [Law Reform Act](#) and Order 53 of the Civil Procedure Rules.
53. Order 53 of the Civil Procedure Rules provides for the procedural manner and style of filing and presenting judicial review proceedings. Sections 7 & 8 of the [Law Reform Act](#) is the substantive law on the prerogative writs of mandamus, certiorari, and prohibition.
54. It is evidently clear from the foregoing that the judicial review application and the proceedings herein are improperly before this court on at least three fronts. Firstly, there is a fatal misjoinder as the Board of Directors, Amatsi Water Services Company Limited, is neither a legal entity capable of being sued, and nor is it capable of being sued for and on behalf of the company, a legal entity with capacity to sue and be sued. Secondly, there is no cause of action disclosed against the other named respondents and the interested part. Thirdly, the subject matter of the dispute between the applicant and the company is in the nature of a private employment relationship dispute that has nothing to do with a public duty and or execution of such duty.
55. The court has said enough in demonstrating that the proceedings herein are fatally flawed and defective and the court hereby orders dismissal of the same.
56. Having found and held as above, it would have been of no use to deal with the other issues raised above for determination. However, for the sake of completeness, the court shall comment on the same as hereunder, just in case the court is faulted on the above decisive finding.

VI. Dismissal

57. This court (ELRC) as the ultimate arbiter in employment and labour relations disputes has to be very cautious not to enter into the management of the workplace. The court should only intervene in resolving a dispute when and where its jurisdiction is properly invoked. Employers and employees must appreciate that it is not every dispute that need come to the court. It is upon both parties to a contract of employment, including trade unions and employer organizations, to ensure that they work towards industrial peace and harmony. In that regard, employees should at all times obey lawful instructions from those placed in authority by the employers. Likewise, employers shall manage the employees and the workplace in accordance with the law.
58. Bearing the foregoing in mind, I have not enjoyed hearing this matter. The dispute herein, as alluded to in the analysis of the pleadings, the evidence, and the submissions by counsel for both parties, arose from a rather mundane instruction by the acting managing director of the company to the applicant



to surrender all cheque-books and other records to a new finance-manager. By then, the applicant had been designated as the head of corporate services.

59. The applicant flatly and adamantly failed and refused to obey and follow the said directions and instructions and the employer, who is not a party to the proceedings, took disciplinary action culminating in the dismissal of the applicant.
60. As noted above, the employer is not a party in these proceedings and as such no orders may be issued against it.
61. However, even if the employer had been joined in these proceedings, the court finds and holds that the steps taken in the disciplinary process against the applicant were fair both in substance and form/procedure. Firstly, the claimant was issued with a show-cause letter to which he responded. Although he claims to have been given seven days to respond instead of 21 days, there is no evidence that he sought for more time and or that he was denied such time. Secondly, the applicant was invited to a disciplinary hearing which he attended and presented his defence. There is no evidence that he requested to be allowed to call and or cross-examine any witness or witnesses and that such request was denied.
62. Further, the applicant filed an appeal but upon invitation he failed and or refused to attend the hearing thereof. Nonetheless, the employer went ahead to determine the appeal based on the filed written submission. Thereafter, the applicant filed an application for review which the employer considered and found to be without merits. All along, the applicant was kept informed by the employer till the end when the dismissal was ultimately upheld.
63. The court finds and holds that the dismissal of the claimant by the employer was fair and lawful. The allegations/charges against the applicant were disclosed to him at the earliest opportunity and he was accorded and afforded fair hearing all the way to review and final determination affirming the dismissal. The employer fairly complied with the rules of natural justice and the rights of the applicant were not infringed, breached, or violated.

VII. Remedies

64. As noted above, the applicant sued the wrong party, a non-legal entity. Obviously, no orders may be issued against any of the named respondents and the interested party for the reasons detailed above.
65. The orders sought by the applicant are intended to reinstate him to his employment with the company. For the umpteenth time, the employer is not a party in these proceedings and as such no orders may be issued against it. At no point was the corporate veil lifted.

VIII. Determination & Orders

66. As stated above, it is not within the jurisdiction of the court to manage the workplace. Employees must at all times obey all lawful directions and instructions as given and issued by the employer through those placed in authority. Likewise, employers have to be reasonable and fair as they issue such lawful directions.
67. The genesis of the dispute between the applicant and his employer was simple instructions that the applicant hands over some properties of the employer in his custody to another officer. The applicant adamantly refused to obey the said direction alleging that such surrender would open an avenue for fraudulent cheque transactions. The court finds the conduct of the applicant ridiculous. What on earth was his resistance about! The cheque-books belonged to the company, they were not his personal cheques, and if fraud was committed thereafter it was upon the employer to deal with the mess that it created.



68. The applicant was clearly the author of his own misfortune and this is a big lesson to employees. Employees must obey all lawful directions and instructions as issued by the employer at all times. Even when an employer does not like or enjoy taking the instructions he or she has to obey or just do the most honourable thing, resign.
69. As for the alleged assault, the applicant is still free to press for criminal charges against the alleged assailant. That aspect is not within the purview of this court.
70. The court has said enough in demonstrating that the application and the proceedings herein have no merits.

IX.Costs

71. As noted above, the application and the proceedings herein lack merits for the reasons disclosed in the foregoing parts of this judgment. One of the reasons for the foregoing finding and the holding of the court is that the applicant sued the wrong parties.
72. For the foregoing reason the court shall order that the application and the entire proceedings be dismissed with no order as to costs.

X.orders

73. The application and the proceedings herein are hereby dismissed in their entirety with no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 13TH DAY OF FEBRUARY, 2025.

DAVID NDERITU

JUDGE

