Kimathi v Kenya National Trading Corporation (Judicial Review Application E011 of 2023) [2024] KEELRC 813 (KLR) (28 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 813 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION E011 OF 2023

K OCHARO, J

MARCH 28, 2024

IN THE MATTER OF: AN APPLICATION BY PURITY NTIBUKA KIMATHI FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE DECISION OF THE KENYA NATIONAL TRADING CORPORATION LTD IN TERMINATION OF EMPLOYMENT ON THE 22ND OF FEBRUARY 2023

AND

IN THE MATTER OF: ARTICLES 10, 22, 23, 41, 47, 50, 162(2) AND 259(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 41 AND 44 OF THE EMPLOYMENT ACT, 2007

BETWEEN

PURITY NTIBUKA KIMATHI ..... APPLICANT

AND

KENYA NATIONAL TRADING CORPORATION ..... RESPONDENT

JUDGMENT

Introduction

1. Through a Chamber Summons application dated 24th February 2023, that was brought under the provisions of Article 23 of *the Constitution*, Order 53 Rule 1(2) of the Civil Procedure Rules and Section 9 of the *Law Reform Act* Cap 26 Laws of Kenya, Purity Ntibuka Kimathi, the Exparte Applicant sought for leave of this court to institute judicial review proceedings against the Respondent, Kenya National Trading Corporation Ltd, for orders of certiorari, Prohibition and mandamus, and that the leave if granted to operate as a stay of the Respondent's decision dismissing her from employment as General Manager, Corporate Services.

2. On the 24th of February 2023, this court considered the application, granted the leave, and granted the stay sought in the following terms.

> "(e) The leave to apply as a stay to an extent that pending the hearing and determination of the substantive motion to be filed, the Respondent should not advertise, shortlist, conduct interviews and selection, issue a letter of offer or, appoint any person in the place of the Applicant as General Manager Corporate Services.
>
> (f) The substantive motion be filed within 14 days.
>
> ....."

3. Flowing from the orders of the court hereinabove mentioned, the Applicant filed a Notice of Motion Application dated 6th March 2023, seeking;

    1. That an order of Certiorari be issued quashing the Respondent's decision terminating the Applicant's employment as General Manager, Corporate Services vide a letter dated the 22nd of February 2023.

    2. That the Honourable court do issue an order of Prohibition restraining the Respondent from advertising, shortlisting, conducting interviews and selection, issuing letters of offers and/or appointing any other persons in the place of the Applicant as General Manager, Corporate Services.

    3. That the Honourable Court do issue an order of Mandamus compelling the Respondent to accord and or ensure that the Applicant is accorded all the benefits accruing to her as the General Manager, Corporate Services as per the applicable Salaries and Remuneration Commission's Circulars.

    4. That in the alternative, the Honourable Court do issue an order of Mandamus compelling the Respondent to pay the Applicant for the remainder of her contract term together with all benefits that would have accrued to her for the five-year term.

    5. That this Honourable court be pleased to issue such further and other reliefs that it may deem just and expedient to grant in the circumstances.

    6. That the costs of this application and other incidental costs be provided for.

4. The application is anchored on the grounds set forth on the face of the application, the verifying affidavit and statutory statement dated 24th February 2024.

5. The application is resisted by the Respondent, through a replying affidavit sworn by Jeremiah Opata, its Human Resource and Administration Manager, sworn on the 18th day of April 2023.

6. The Applicant filed a further affidavit sworn on the 3rd of May 2023 in response to fresh factual issues that were raised in the replying affidavit.

7. Per the directions of this court, the parties have filed their respective submissions.

The Applicant's Case

8. The Applicant asserts that she came into the employment of the Respondent under the notice of appointment dated the 4th of August 2022. The appointment was expressed to take effect on the 1st of September 2022. The appointment flowed from a competitive recruitment process, that was carried out by the Respondent.

9. The Applicant further states that under the contract of employment, she was not to be subjected to a Probationary period. The contract of employment was a five-year fixed-term one.

10. The Applicant states that Clause 2.26.5 of the Respondent's Human Resource Policy and Procedures, provides that members of staff employed on contract terms are not subject to a probationary period but will be subjected to quarterly appraisals in the first year of the contract.

11. As her contract of employment took effect on the 1st of September 2022, her first appraisal fell due in November/December 2022. However, the appraisal was not conducted.

12. The Applicant states that the Respondent only sought to conduct the said appraisal in February 2023. She charges that the appraisal was abrupt. On the 14th of February 2023, her supervisor called her and intimated that there was an urgent need for him to evaluate her.

13. The Applicant contends that despite the fast-tracked and improperly conducted evaluation, she scored 75% based on the performance tooth that was l planned for the period commencing September 2022 to June 2023.

14. She further states that the performance tool relied upon embodied, objectives, performance indicators and targets for each of the departments, thus;

    a. Financial accounts – 40%

    b. Human Resource Management & Administration – 30%

    c. ICT Department – 20%

    d. Core mandate and other functions support – 10%

15. With a score of 75%, she surpassed the average target for the said period even though she was only halfway through the period meant for performance appraisal.

16. The Applicant contends that the supervisor single-handedly conducted the evaluation, prepared a report and submitted the appraisal form to the Board of Directors for review notwithstanding that she hadn't signed the report as required or at all.

17. The above-stated move by the supervisor was in breach of Clause 8.11 of the manual which dictates that the appraisee is required to have submitted a preliminary report prior, indicating the extent of the

targets met. Further, the supervisor and the appraisee are required to discuss the overall performance of the whole appraisal period. The appraisal form is required to be filled and signed by both the appraisee and the supervisor and forwarded to other persons for endorsement.

18. Her immediate supervisor did not hold any discussions with her prior to the evaluation and neither were the results explained to her.

19. The Applicant states that on 15th February 2023, while out of her station of work t on an official assignment, she was called and informed that the board wanted her to clarify some issues regarding her performance evaluation.

20. On the 18th of February 2023, she received a message from the Respondent, requiring her to prepare a preliminary report on her work achievements. In her view, this was improper as the report ought to have been asked for and prepared before the evaluation process began. The Respondent verily knew that at that moment she did not have access to her office and could not submit a comprehensive report with supporting documents.

21. She states that the Board meeting on the review of her performance was scheduled for the 20th of February 2023. The time was inadequate for her to return to the office and prepare for the representation.

22. On the 20th of February 2023, it dawned on her that she had been dismissed from employment. This realization came about when she noted that she had been removed from the staff WhatsApp group, and following calls from her colleagues. Later on, she received a termination letter dated the 22nd of February 2023 on WhatsApp from the Principal Human Resources Officer. The transmission of the letter to her suffered from destituteness in courtesy.

23. The Applicant contends that the termination was based on a performance appraisal that was conducted in gross variation of the provisions of the Respondent's manual.

24. The Respondent treated her as if she was on probation by seeking to appraise her at the sixth month whereas the manual expressly requires that such employees on contract terms are to be appraised quarterly.

25. The Respondent had never issued her with any warning letter, or notice to show cause and or held any preliminary hearing preceding the issuance of the termination letter. This she was entitled to as she was an employee on contract for five years.

26. She had diligently discharged her duties per her job description. There was no complaint from any quarter against her. The Respondent did not allow her an opportunity to be heard before the abrupt termination. The Respondent did not have any justification to dismiss her summarily as it did. The termination was high-handed, abrupt, drastic and without reasonable cause.

27. Lastly, the same was wrongful, illegal and unlawful, an infringement on her fundamental rights and freedoms, and an affront to the stipulations of the *Fair Administrative Action Act* (2015) which requires an efficient, lawful, reasonable and procedurally fair action by the administrator.

The Respondent's Response

28. The Respondent contends that the expert Applicant's employment was terminated procedurally and that at all material times due process was adhered to.

29. The Respondent states that in line with its Human Resource Policy and Procedures Manual Section 8.9.2, employees serving on contract terms are to be appraised every quarter during the first year of the contract. If the performance is unsatisfactory, the employee's contract will be terminated.

30. The Respondent contends that however, on the hiring of the applicant, the appraisal period was reviewed to every six months in the 1st year to provide ample time for her to acquaint herself with the corporation and be able to deliver on the assigned role. This was agreed upon by both the Respondent and the Applicant.

31. The Respondent asserts that under the letter of appointment dated 4th August 2022, her appointment was with effect from September 2022, she was therefore due for a performance appraisal in February 2023. Depending on the outcome of the appraisal, the Applicant's employment would be confirmed or terminated as the case may be.

32. The Respondent further asserts that the Managing Director undertook the appraisal of the Applicant in January 2023 in line with the terms of the contract of employment and submitted the same to the Board of Directors for deliberation and feedback.

33. It is alleged that the Managing Director had on various occasions within the Applicant's employment, had discussions with her about challenges and areas of improvement. This was done daily to ensure the Applicant was acquainted with the new role. The Applicant was at all material times given feedback.

34. It is further stated that despite the Applicant scoring 75% on her appraisal, the Board felt that her managing of the Finance and Accounts Division of the Corporation was not up to the expected standard, yet the function was one of those crucial to the corporation. as was noted in the Managing Director's report to the board on 2nd February 2023.

35. The Applicant was asked to prepare a report on her achievements on 15th February 2023, she prepared the same and handed it over on the 20th February 2023. It will not be available to her, therefore, to claim that she was not given adequate time to respond.

36. It was further alleged that during the Applicant's performance review meeting of 20th February 2023, the Applicant acknowledged that she had not been able to bring together the Finance and Accounts staff to work as a team hence why she faced challenges in her performance. This was indicative that her leadership skills to drive teamwork were below par, and this was costing the corporation.

37. While she scored fairly in the implementation of objectives in the Human Resource Administration and ICT divisions, the implementation of objectives in the Finance and Accounts Division was unsatisfactory.

38. The Respondent contends that its Human Resource Manual, paragraph 8.12 provides that an employee's performance will be rated by the prevailing Government Practice. The Public Service Human Resource Police and Procedures Manual (2016) Section 18 (ii) and section 20 allow for termination of service by payment of salary in lieu of notice.

39. It is further argued that the Human Resource Manual in section 8.13 provides for an appellate process that the Applicant ought to have invoked to challenge the decision on her appraisal if she was dissatisfied. She did not invoke the process.

40. The Applicant has sought prerogative orders in the instant matter. The onus lies on her to prove that she is entitled to the orders. The Applicant has not discharged the onus.

41. The proceedings herein as initiated are an abuse of the court process, they ought to have been by way of an ordinary claim.

The Rejoinder

42. The Applicant contends that the Board paper relied upon by the Board is dated the 31st of January 2023. This indicates that it was prepared two weeks before the actual performance appraisal was conducted. This demonstrates that the termination had nothing to do with her performance. The decision was premeditated for ulterior motives.

43. The first performance appraisal which was not finalized, was conducted on the 14th of February 2023 as opposed to the quarterly performance appraisal envisioned in the Respondent's Human Resource Procedures and Policy Manual. There was no appraisal in January 2023 as purported by the Respondent.

44. She asserts that the appraisal conducted on 14th February 2023 was incomplete since her supervisor and she were to finalize the scoring, have the results explained to her and sign off the appraisal form upon her return from the work assignment. The appraisal relied upon was only a draft hurriedly prepared and in any event, she had scored well.

45. The Applicant contends that the board paper dated the 31st of January 2023, indicated that the only pending issue was the review of the financial manual, and for it, she had already planned a meeting.

46. The Applicant further contends that the appraisal report shows that her performance in the Finance Accounts was the highest at 85.5% compared to ICT and Human Resources & Administration Performance and it is thus not true that there was an underperformance.

47. In the draft appraisal, she had scored an overall mark of 75% with departmental average breakdowns as:Finance & Accounts – 29.1/34-/85.5%Human Resource & Administration – 22/30 as percentage – (73.3%)ICT 10/20 as a percentage (50%)Other core mandates support 10/10 as a percentage (100%)

48. The Applicant states that she travelled for a work assignment in Mombasa on the 16th of February 2023 and only received directions to prepare a preliminary report on the 18th of February 2023. Nevertheless, she submitted the preliminary report on the morning of the 20th of February 2023.

49. The Applicant is adamant that she was neither invited nor did she attend the performance review meeting since she was out of the station on work assignment. Therefore, it is not true that she acknowledged any failure to bring together the Accounts and Finance staff to work as a team.

50. For her supervisor to send her on duty in Mombasa while she was fully aware that there was a scheduled meeting to deliberate on her performance was motivated to deny her an opportunity to defend herself and accord her fair administrative justice.

51. A certificate of service was issued on the very day of termination without any opportunity for clearance, exit meeting or opportunity to appeal as should be the practice. The termination letter did not indicate that she had a right of appeal.

52. The instant matter is against actions that should be considered malicious, arbitrary and disrespectful of the tenets of natural justice. The court has the requisite jurisdiction to intervene. The appraisal process and subsequent termination were beset with illegalities, procedural impropriety and irrationality, hence the invocation of this court's jurisdiction.

53. Lastly, the affidavit sworn on behalf of the Respondent was sworn by a person who was not part of the appraisal Board deliberations and decision-making, therefore his averments are hearsay and full of falsehoods.

The Applicant's Submissions

54. The Applicant identifies two issues for determination in this matter, thus; -

    i. Whether judicial review is a tenable remedy for the applicant.

    ii. Whether the application meets the threshold for the grant of judicial review orders.

55. The Applicant submits that *the Constitution* of Kenya, particularly the Bill of Rights, applies to and binds all state organs and persons. Every person must respect, uphold and safeguard, the same.

56. Article 22 of *the Constitution* provides the right of every person to institute court proceedings claiming a violation or infringement of rights. Further, under Article 23, this Court is clothed with the jurisdiction to grant judicial review orders.

57. The Applicant's Counsel further submits that *the Constitution* overrides the common law principles applicable to judicial review and thus widens the scope of judicial review even to the private space. Further, KNTC is a public body as it is a parastatal under the Government of Kenya.

58. To buttress the foregoing submissions on this Court's jurisdiction, Counsel cites the decision in the case of Abdikadir Suleiman –Versus-County Government of Isiolo and Another [2015] eKLR where it was held that; -

> "As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of *the Constitution*; Articles 22(1) and 258(1) of *the Constitution*, and the provisions of the Employment and *Labour Relations Act*, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of *the Constitution* and enforcement of *the Constitution* under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of *the Constitution* and as amplified in the Employment and *Labour Relations Act*, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant."

59. The applicant herein approached this Court on the premises that the Respondent had violated certain constitutional provisions, inter alia, Article 47. The Applicant's right to fair administrative action was breached.

60. The Court is urged to note that Section 2 of the *Fair Administrative Action Act* defines the term administrative action to include: -

    (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;'

Accordingly, in determining whether an action is an administrative action, one has to look at its effect on the legal rights and interests of the recipient of the action.

61. In support of this point, Counsel placed reliance on the holding in the case of Republic v Governor Nyamira County & 2 others Ex parte Clive Nyaaga Ogwora [2022] eKLR where the court faced a judicial review application in an employment matter held that; -

> 28. Article 47 of *the Constitution* provides for the right to a fair Administrative Action. The *Fair Administrative Action Act*, in its Section 2, defines an "administrative action" to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
>
> 29. By dint of the foregoing definition, the acts or decisions and even omissions of a body or authority that affects the rights and interests of a party is covered under the Act.
>
> 33. *The Constitution* recognizes a duty to accord a person procedural fairness when a decision is made that affects his rights, interests or legitimate expectations...'

62. Section 7 of the Fair Administrative Actions Act, provides review proceedings as the avenue to be followed, where a person seeks to challenge another's administrative action.

63. The Applicant further submitted that his case is founded on the grounds of illegality, unreasonableness and procedural unfairness on the part of the Respondent. The Court was therefore properly moved by way of judicial review proceedings. To buttress these submissions, reliance was placed on the case of Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR where the court elaborated on judicial review as follows; -

> 'The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. [17]
>
> 31. In Council of Civil Service Unions v. Minister for the Civil Service [18] Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action in concern, ultra vires. These grounds are; illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; proportionality. [19] What Lord Diplock meant by "Illegality" as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term "Irrationality" by succinctly referring it to as "unreasonableness" in the Wednesbury Case. [20] By "Procedural Impropriety" His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.'

64. Counsel for the Applicant submits that with the legislation of the Fair Administration Act, and particularly Section 7 thereof, a court called upon to review an administrative action will be enjoined to conduct a merit review of the action, and urges this Court to approach the instant matter as such. To support this submission, reliance was placed on the holding by the Court of Appeal in the case of Suchan Investment Limited –Versus- Ministry of National Heritage & Culture & 3 Others [2016] KLR, thus;

> "…. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7(2)(i) require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly requires assessment of facts and to that extent merits of the decision. It must be noted that even if a review of the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The Court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act…"

65. In the same limb, the court in the case of George Maina Kamau –Versus- The County Assembly of Murang'a and 2 others [2016] eKLR expressed itself thus; -

> "Nevertheless, the court is not setting a hard rule that its jurisdiction is limited to only an inquiry into procedural matters. The rule the court is setting is that it will consider all cases where illegality is alleged both in matters of substance and procedure. The court says that it would have to look into the merits of the grounds for removal in an appropriate case where a petitioner may seek to show illegality founded upon the county assembly moving against the petitioner under the said section 40 upon illegal grounds; such that illegality would be founded upon the principle of unreasonableness per Lord Greene in Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683 thus, "It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonableness' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense, it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."

66. The Applicant submits that her application is grounded inter alia on the ground of illegality. She urges the Court to adopt the definition of illegality set up in the case of Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR and conclude that the Respondent's action was plagued by illegality. In the cited case, the Court elaborately set forth

what a court charged with the task of ascertaining whether the action assailed was illegal or not, must consider. The Court stated;

> 'The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the "four corners" of their powers or duties.'

67. Clause 2.26.5 of the Respondent's Human Resource Policy and Procedures Manual expressly indicates that the members of staff employed on contractual terms are not subject to a probationary period but will be subjected to quarterly appraisals in the first year of their contract.

68. The Applicant's Counsel further submits that time and again, the courts have expressed and upheld the supremacy of Human Resource manuals. In the case of Oyatsi v Judicial Service Commission (Petition E111 of 2021) [2022] KEELRC 3 (KLR) (10 March 2022) (Judgment), the court held that: -

> 'The manual therefore is an internal mandatory guide, with statutory underpinnings and is in the court's judgment a kingpin of good corporate governance in any organization worth its salt. The court finds without any hesitation that the respondent is bound by its own Human Resource Policies and Procedures Manual, the same way, the employees are bound to abide by its terms in their daily work disposition and behavior... It cannot be gainsaid therefore, that the provisions of the Judiciary Human Resource Policies and Procedures Manual are impliedly incorporated in the contractual terms and conditions of service of all Judiciary staff, including the petitioner.'

69. It is further submitted that the Respondent without any reasonable justification departed from the stipulations of its own Human Resource Manual, more specifically as regards the performance appraisal process. By so departing, the Respondent breached the terms of the employment contract between it and the Applicant.

70. Contrary to the stipulations of the Manual, it was only until February 2023 that the Respondent abruptly decided to conduct an appraisal. This was outside the period that the Manual provided. In that regard, the Respondent lacked any statutory underpinning to conduct an appraisal at that point.

71. It is submitted that the Respondent's actions were devoid of rationality, a ground among those identified under Section 7(2)(i) of the *Fair Administrative Action Act*, which can be the basis for an order for review. The Applicant urges this Court to apply the test set out in Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR, to determine that the action by the Respondent was irrational. Thus;

> 'In applying the test of rationality, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?[52]'

72. The Applicant further submits that the Respondent's action was destitute of reasonableness. On or about 14th February 2023, her supervisor hurriedly conducted a performance evaluation and single-handedly arrived at the results that she presented to the board. The applicant scored 85.5% in the Finance department, being her highest score of the three departments that she supervised. Strangely, in a meeting that was held in her absence, it was held that her performance in the Finance Department was the lowest and that she had poorly performed in this function.

73. The Applicant was terminated on account of poor performance in the matters Finance Division, notwithstanding the rating by her immediate supervisor as hereinabove mentioned. This move can only fit the description of unreasonableness, as elaborated in the Public Procurement Administrative Review Board [Supra] case, thus; -

> 83. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the *Fair Administrative Action Act*.[53] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.'

74. The Respondent's decision to terminate the Applicant's employment in the manner it did, suffered from procedural impropriety. Clause 8.11 of its manual elaborately explains the procedure for appraisal. The Respondent failed to adhere to the procedure to the prejudice of the Applicant.

75. Section 41 of the *Employment Act* provides a mandatory procedure to be adhered to by an employer contemplating terminating an employee's employment. Contrary to the procedural fairness cannons embodied in this provision, the Applicant was not notified that the Respondent intended to terminate her employment and the grounds on which the action was intended. She was not given a chance to be heard on the ground [s]. The Court is urged to take note that though the Respondent asserted that there was a hearing that took place, it has not displayed any minutes or document from which it can be deduced that there was a hearing.

76. Section 4(3) of the *Fair Administrative Action Act* coupled with Article 50 of *the Constitution* of Kenya provides the irreducible minimums to be upheld in carrying out an administrative action as follows: -

> 'Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
>
> a. prior and adequate notice of the nature and reasons for the proposed administrative action;
>
> b. an opportunity to be heard and to make representations in that regard;
>
> c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
>
> d. a statement of reasons pursuant to section 6;
>
> e. notice of the right to legal representation, where applicable;
>
> f. notice of the right to cross-examine or where applicable; or
>
> g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
>
> Section (4) The administrator shall accord the person against whom administrative action is taken an opportunity to–
>
> a. attend proceedings, in person or in the company of an expert of his choice;
>
> b. be heard;

c. cross-examine persons who give adverse evidence against him; and

d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.'

The respondent blatantly neglected and/or refused to comply with these mandatory provisions.

77. Submitting on the relief of reinstatement sought, the Applicant states that it should be availed to her. To support this plea, she placed reliance on the Court of Appeal decision in Civil Appeal No. 229 OF 2017 Between the Ethics and Anti-Corruption Commission and Others and Henry Morara Angwenyi And Others.

Respondent's Submissions

78. Counsel for the Respondent first submits on the question of whether the Applicant is entitled to the reliefs sought herein. He states that the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. Further, the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which one has been subjected.

79. It is further submitted that the subject matter of the Judicial Review application herein is the termination of the Applicant's employment. An employer-employee relationship falls under the purview of private law. Disputes emanating therefrom cannot be adjudicated under judicial review, as judicial review orders are a mechanism through which courts supervise the lawfulness of an act or decision concerning an exercise of public duty or act. To buttress these submissions, Counsel placed reliance case of Staff, Disciplinary Committee of Maseno University & 2 others v Ochonga Okello [2012] eKLR, where it held ;

> "I concur with the above proposition and find that the breach or threatened breach of the appellants' contract of employment was not a public act or matter of public law but was a matter of the contractual relationship between the respondent and the appellants, governed by private law. It was not therefore an appropriate action justifying the granting of orders of judicial review. The respondent may well have had a genuine grievance. His remedy, however, lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of judicial review as Prof. Ochong' did not have public law right capable of protection under the supervisory jurisdiction of the Court."

80. In the case of Republic vs. Mwangi S. Kimenyi Ex parte Kenya Institute for Public Policy and Research Analysis (KIPPRA), this Court held that judicial review is exceptionally available in a "contractual relationship of master and servant" where for instance the employment contract has statutory underpinning. The Court expressed that:

> "This is not to say that judicial review remedies cannot be available in contracts of employment. There are instances when such remedies are available. One such instance is when the contract of employment has statutory underpinning and where there is a gross

and clear violation of fundamental rights. In the case of Chief Constable Of North Wales Police – V-evans (1982) I WLR 1155, Lord Hailsham pronounced himself thus:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according to fair treatment reached on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court" (See also Commissioner of Lands – V-Kunste Hotel Limited 1995-1998 1E.A. 1 (CAK))".

81. It is further submitted that the Applicant hasn't demonstrated that her employment had a statutory underpinning. As what amounts to statutory underpinning, this Court is urged to adopt the definition by the Court of Appeal in Eric V J Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No. Nai. 20 of 1994, thus;

> "..To underpin is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean that employee removal was forbidden by statute unless the record met certain formal laid down requirements. It means some employees in public positions may have their employment contract guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed."

82. It is further submitted that granting the orders sought could be tantamount to granting specific performance of the employment contract. The cause of action sought to be advanced by the Applicant purely falls under the realm of the *Employment Act*. She ought to have initiated litigation thereunder. To successfully litigate for an order of Certiorari, the Applicant must with specificity identify and establish the order he or she seeks to have quashed. The Applicant in the instant matter has not discharged the onus. In Republic v Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR held;

> A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed. We hold that the learned judge erred and it was not appropriate to issue the judicial review orders in this matter. The respondent may well have a grievance. His remedy lies in private law which covers disputes relating to contractual relationships. The High Court erred in granting the orders of judicial review as the respondent did not have public law rights and statutory underpinning capable of protection under the supervisory jurisdiction of the Court.

83. The Applicant's employment was terminated procedurally and at all times due process was accorded to her, before the termination via the letter dated 22nd February 2023.

84. The Respondent's Human Resource Manual, paragraph 8.12 provides that an employee's performance will be rated by prevailing Government practice. The Public Service HR Policy and Procedures Manual (2016) Section D18 (ii) and D20 allow for termination of service by the letter of appointment and payment of salary in lieu of notice. The Applicant's employment was terminated due to poor performance, the Managing Director's report, marked JO-2, evinces the underlying issues with her performance. Secondly, the board resolution confirms that the Applicant's response was considered before the final decision was made.

85. The Respondent argues that the law requires that parties should exhaust the available mechanisms before resorting to court. The Respondent's Human resource manual at 8.13, provides for an appellate process which the Applicant ought to have invoked immediately after she received the outcome of her six-month performance appraisal and she disagreed with it. The Applicant ought to have exhausted all available appellate mechanisms, before approaching this Court. The Applicant breached the doctrine of exhaustion, therefore. To fortify these submissions, the holding in the Court of Appeal case of Speaker of National Assembly v Karume [1992] KLR 21 was cited, thus;

> Where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such a special procedure.

86. The Respondent concludes by stating that the Applicant has not met the threshold for the grant of the judicial review orders sought, and urges this Court to dismiss the application with costs.

Analysis and Determination

87. I have carefully considered the material, inclusive of the submissions placed before this Court, by the parties and distil the following issues for determination;

    i. Whether the Jurisdiction of this Court has been properly invoked by the Applicant.

    ii. Whether the Applicant is entitled to the orders sought in her Notice of Motion Application.

Whether the Jurisdiction of this Court has been properly invoked.

88. The Respondent contended that the jurisdiction of this Court has been improperly invoked by the Applicant. The attack is based on two principal grounds; the instant application seeks a merit review of the Respondent's decision and or action[s], yet judicial review proceedings are only meant to be concerned with the decision-making process; secondly, the decision and or action complained of by the Applicant, is in respect of a contractual relationship [employer-employee], falling in the realm of private law and not public law. The decision was not made by the Respondent in the exercise of its public duty. In my view, this position taken by the Respondent is only true to the extent that it looks at judicial review from a traditional point of view. Traditional view, which I hold no ring true in the Kenyan situation.

89. While the traditional thinking in many legal systems is that judicial review only applies to check the exercise of public power, in some cases its application has been extended to the exercise of non-public power, outside matters of public law therefore. As shall come out hereinafter shortly, the court's jurisdiction is exercisable even though the body exercising power or making the decision may not fall within the definition of a public body or that it is acting in terms of a consensual scheme through which they have bound themselves.

90. I am not hesitant to state that post the inauguration of *the Constitution* of Kenya, in 2010, the traditional [common law] view on the reviewability of decisions has undergone a radical process of transformation. The common law has now largely been supplanted by a legislative regime whose genesis is the 2010 Constitution as complemented by the Fair Administrative Actions Act, more specifically as regards administrative action taken by any organ of state, or any other public body or any person.

91. No doubt, the interpretive section of the *Fair Administrative Action Act*, defines administrative action [as herein above brought forth] in a manner that clearly suggests that even actions and decisions that fall under the private law space are reviewable under the statutory framework thereunder. My thinking is based on the fact that all that I garner from the provisions of the Act is that in applications for judicial review, it is the subject of the decision and its implications rather than the nature of the body and its functions that determine the basis for the court's intervention.

92. With the Constitutional order as is ours where judicial review reliefs have been constitutionalized, and the statutory framework alluded to hereinabove, there cannot be any basis for this Court to lament as Edmount Davis LJ did in Breen v AEU [1971] QB 175 while declining to grant orders of judicial review, thus;

> " I entertain substantial doubts that the judgment I am about to deliver will serve the ends of justice. That is, to say the least, a most regrettable situation for any judge, but I see no escape from it. Its effect is to throw away empty-handed from this court an appellant who, in any way view, has been grossly abused. It is therefore a judgment which gives me no satisfaction to deliver."

Or feel under gag as Staurt-Smith LJ did in R v Jockey Club exparte RAM Recourses Ltd [1993] 2 All ER 225.

93. But feel reminded of Lord Denning's noble words in Breen v AEU [1971] QB 175, at page 194, thus;

> " These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies. They can make or mar a man by their decisions. Not only by expelling him from membership but also by refusing to grant him a license or give their approval.

94. In the case of Suchan Investment Limited v Ministry of National Heritage & Culture &3 others [2016] eKLR, the Court of Appeal aptly stated and I agree;

> " 54. The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of Article 47 of *the Constitution* as read with the *Fair Administrative Action Act* 2015. The Act establishes statutory judicial review with jurisdictional error in section 2[a] as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial; the act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and account decision making process in Articles 47 and 10[2][c] of *the Constitution*. The extent to which the common law principles remain relevant to the administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the *Fair Administrative Action Act* and Constitution. As correctly stated by the High Court in Martin Nyaga Wambora v Speaker of the Speaker of the Senate [2014] eKLR it is clear that Articles 47 and 50[1] have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases."

95. Where an administrative action or decision has a prejudicial implication[s] on an individual, and it is alleged that the action or decision was made irregularly, or in breach of the rules of natural justice, or is illegally or is unreasonable or in bad faith, the Court should not concern itself with the kind of power or discretion exercised but must assume jurisdiction to determine whether or not the allegation has some foundation. If it has, they should grant appropriate judicial review remedies.

96. It is here that I must say that the Respondent's position does not persuade me. Employer-employee disputes and more specifically those that revolve around an administrative action or decision of the employer can rightly be litigated under judicial review proceedings. As a result, I find that the invocation of this

Court's jurisdiction, as did the Applicant herein, is faultless.

Whether the Applicant is entitled to the reliefs sought.

97. The Applicant contended that the decision to terminate her employment suffered from procedural impropriety, in the sense that the process leading to the decision to have her dismissed from employment didn't adhere to the mandatory dictates of section 41 of the Employment, tenets of natural justice, and the stipulations of Article 47 of *the Constitution* of Kenya, and the provisions of the Fair Administrative Actions Act.

98. Section 41 of the *Employment Act*, 2007, provides in mandatory terms that an employer shall before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity, notify the employee of its intention and the grounds spurring the contemplation. Further, the employer must accord the employee an opportunity to prepare and make a representation on the grounds. Conjoined with the right to be heard is the right for the employee to be accompanied by a colleague or a shop floor union representative of his choice during the representation. Lastly, the employer must consider the representation made, before making a decision.

99. The Applicant contended that the Respondent didn't at any time intimate to her that it was intended that her employment be dismissed from employment. Further, it wasn't expressed to her at any time that her employment could be terminated on account of poor performance. She was not given an opportunity to make representation against the alleged poor performance. On the other hand, the Respondent contended that in the meeting of 20th February 2023, the Applicant was heard.

100. I have carefully considered the material placed before me, without hesitation but with concern, I must conclude that the Respondent has not been candid to this Court. It is worrying that the Respondent's witness without care and with some sort of impunity decided to present untrue facts through his affidavit, with the sole purpose of trying to mislead this Court. Maybe he needs to be reminded that there exists an offence of perjury.

101. Contrary to his allegation, the minutes of the 20th February 2023; clearly show that the Applicant was not among those who attended the meeting; the minutes do not at all reflect that the Applicant had been invited to the meeting and that the Applicant was heard and admitted to have performed unsatisfactorily in matters Finance and accounts.

102. In the upshot, I am persuaded that the process leading to the Applicant's dismissal wasn't preceded by a process that adhered to procedural fairness as contemplated under section 41 of the *Employment Act*, the stipulations section 4[3] of the Fair Administrative Actions Act, Article 47 and 50 of *the Constitution*, and embodied in the tenets of natural justice.

103. It is common cause that the Applicant was employed on contract and per the Respondent's Human Resource Policy and Procedures Manual, thus, she was not subject to probationary, however, her performance was to be appraised quarterly in her first year of the contract.

104. The question that springs up then is, could the Respondent procedurally under its manual terminate the Applicant's employment upon the basis of the single appraisal, done in the course of the one year? The straight answer could be no. Section 8.1 provides for an appraisal period, thus;

> " The appraisal period will cover one [1] year with effect from 1st July to 30th June of the following year. The performance appraisal reflects the summation of the year's performance including quarterly and mid-year reviews."

105. Section 8.11 provides for the year appraisal process. Section 8.11.1 provides;

> " The End Year Appraisal will take place at the end of the reporting period.
>
> a. The supervisor and the appraisee are required to meet at the end of the year to discuss the overall performance for the whole appraisal period.
>
> b. Prior to the meeting, the Appraisee should prepare a preliminary report on the extent to which set targets were achieved as agreed at the beginning of the extent to which set targets were achieved as agreed at the beginning of the Performance Year with clear performance indicators.
>
> c. After the meeting, an evaluation form will be signed and dated by both the appraisee and the appraiser and forwarded to the respective Head of Functional Area and to the MD for endorsement."

106. From the foregoing stipulations, I am of a clear view, that the Applicant's employment could only be terminated at the end of the performance year [1st year of her contract], and upon her performance appraisals for the periods contemplated in the manual being summed up and weighted, and found to be below standard. Further, the tone of the manual is that should an employee fail to hit the targets set for any of the interval periods within the performance year, she will be placed under a programme to help her improve. Indeed, this is in accord with the accepted good practices in the Human Resource Management space.

107. In my view, the only employee who could be terminated before the end of one year is one under a probationary contract. The Applicant wasn't.

108. To terminate the Applicant's employment mid of the Performance Year, was a grave procedural impropriety, and unfairness.

109. A decision to terminate an employee on account of poor performance could only be procedurally reached if the procedure elaborated under section 8.11.1 is adhered to. I agree with the Applicant that there was no adherence.

110. The Respondent asserted that the Applicant's supervisor regularly had discussions with her and gave feedback to her on her performance. In my view, this was just that bald assertion that was unsupported. I note that section 8.9.1 of the Manual provides that performance appraisal in the Respondent entity is an ongoing process throughout the performance period. Millstones over the review period should be documented and maintained in the Appraisee's personal file. If indeed there were discussions and

feedback as alleged, nothing could have been easier than for the Respondent to present the documented information before this court.

111. Present in the Respondent's impugned decision are aspects that one cannot struggle to conclude that they are plagued by unreasonableness and irrationality. Reasonableness as a ground for judicial review in our statutory framework is anchored on the provisions of section 7[2][k] of the Fair Administrative Act. A decision or an administrative action shall be said to be unreasonable if the same is so unreasonable that no reasonable person could have so decided or acted in the performance of his or her or its function. See. Republic v Public Procurement Administrative Board & 2 others Exparte Rongo University [2018] eKLR.

112. In Bito Star Fishing [Pty] Ltd v Minister of Environment Affairs and Others [2004]; ZACC 2004 [4] SA 490 CC at 512, para.44, the court approved the reasonableness test which was expressed by Lord Cook in Chief Constable of Sussex, exparte International Trader's Ferry Ltd [1995] 1 ALL ER [HL] at 157, as follows;

> " The simple test used throughout was whether the decision was one which a reasonable authority could reach. The converse was described by Lord Diplock [[1976] UKHL6; [1976] 3 ALL ER 665 at 697..... as a conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers ..... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him."

113. In R v Public Procurement Administrative Review Board[supra], Mativo J [as he then was stated on the reasonableness test, that;

> " 49. The ex-parte applicant invites this court to annul the impugned decision on grounds of unreasonableness and irrationality. The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be 'objectively so devoid of plausible justification that no reasonable body of persons could have reached it[34] and that the impugned decision had to be " verging on absurdity" in order for it to be vitiated."

114. The Applicant vehemently asserts that contrary to its own Manual, and her contractual terms, the Respondent treated her, and arrived at the decision to terminate her services as though she was an employee under probation. There is no denying that she was an employee under contract, and no subject to probation. I have carefully considered the Board Paper dated 31st January 2023, and note that under the item 4.0 Recommendation to Board, it was stated;

> " The Board Committee is invited to:
>
> a. Note the contents of this Paper for information purposes;
>
> b. MAKE any recommendation for confirmation, extension of probation or termination based on the MD's review." [emphasis mine]

115. I have further and keenly considered the minutes of the 20th February 2023 and discovered that they are of the same tone as the Board Paper, relevant to this matter the minutes read in part;

> " The Board was presented with the performance review of the managers recruited by the board of Directors in September 2022. It was noted that the six months' probation is to expire end of February 2023. [emphasis mine].
>
> Upon deliberation, the board resolved that;
>
> 1. Termination of the services of the GM-Corporate services for non-performance of the finance function.
> 2. Confirm the appointment of the following manager:
>   a. Amos Juma Sikuku- Supply Chain & Logistics Manager
>   b. Kevin Murithi Micheni- Internal Audit Manager

116. It is my view, that the above-set forth contents of the two documents do not in any way disabuse the Applicant's assertion, but fortify the same. To treat and dismiss an employee other than as expressly provided for in an organization's manual, as the Respondent did, therefore, is a thing that no reasonable employer shall do. This is especially true considering the vitality of the Human Resources Practice and Procedures Manuals in employment relationships and places of work. They provide and enhance predictability and consistency in decision-making and action-taking throughout the relationship and within the workplace, they diminish the chances of capricious and whimsical actions by the employer[s], thereby promoting the employees' right to fair labour practices and workplace harmony, and ensure non-discriminative practices and tendencies at the workplace or against some employees, inter alia.

117. The Respondent asserted and it can be discerned from the tendered minutes of the 20th February 2023, that the Applicant was dismissed on account of unsatisfactory performance in the Finance and Accounts function, and that of all the functions for which she was appraised, the score here was the lowest. How reasonable and rational this assertion is, I have failed to I am completely unable to fathom. The Applicant contended, and it was not denied that she scored 85.5% under this function, and this was the highest score.

118. The Respondent besides making general assertions that her performance was below standard, didn't explain how a score of 85.5% could translate to poor performance.

119. Without hesitation, I conclude that to untransparently dismiss Applicant on an allegation of poor performance, yet the appraisal report does not support the allegation, but conversely reveals a superb performance, amounts to nothing other than absurdity.

120. I consider it imperative to state that in my view, the Respondent was in a hurry and not in good faith to dismiss the Applicant from employment. Maybe the Respondent needs to take note and heed the wise statements in Johnson v Unisys Ltd[2003] 1 AC 518 of Lord Hoffman thus,

> " It has been recognized that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of esteem. The law has changed to recognize the social reality.

And Lord Miller's, thus;

> "Contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents. It is generally recognized today that "work is one defining features of the people's lives" that "loss of one's job is always a traumatic event" and that "it can be especially devastating" when dismissal is accompanied by bad faith."

121. In conclusion, the Applicant has sufficiently demonstrated that the Respondent's decision to terminate her employment in the circumstances and manner it did, was bedeviled by procedural impropriety, unreasonableness, irrationality, and bad faith. The reliefs sought by her in the Notice of Motion Application must be availed to her now.

122. In the upshot;

i. An Order of certiorari is hereby issued quashing the Respondent's decision to dismiss the Applicant from employment as General Manager, Corporate Services, as expressed in the termination letter dated 22nd February 2023.

ii. The Respondent is prohibited from advertising, shortlisting, conducting interviews and selecting, issuing a letter of offer and appointing any other person in the place of the Applicant as its General Manager Corporate Services, on the basis that the position fell vacant following her now quashed termination of employment.

iii. An order of mandamus is hereby issued against the Respondent, requiring it to immediately reinstate the Applicant to her position as the General Manager, Corporate Services, without loss of salary and benefits.

iv. The Respondent is to bear the costs of this Application.

READ, DELIVERED AND SIGNED THIS 28th DAY OF MARCH, 2024.

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OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. Malenya for Applicant

Ms Muthie for the Respondent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE