



**Njoki v LPC Global Logistics (Judicial Review E041 of 2023)
[2024] KEELRC 679 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 679 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E041 OF 2023
AN MWAURE, J
MARCH 14, 2024**

BETWEEN

LAQUEEN NJOKI APPLICANT

AND

LPC GLOBAL LOGISTICS RESPONDENT

RULING

1. The Applicant filed Chamber Summons dated 14th November 2023 seeking orders that:
 1. spent
 2. the Applicant herein be granted leave to apply for Judicial Review orders of prohibition and mandamus against the Respondent in terms of the following:
 - a. An order of prohibition do issue restraining the Respondent from continuing to terminate the applicants' services as scheduled on 16th November 2023.
 - b. An order of mandamus to issue quashing the letter dated 2nd November 2023.
 3. the leave and or the order to act as a stay of the implementation of the notice of termination slated for 16th November 2023 pending hearing of the Substantive Judicial review motion.
 4. cost of this application be borne by the respondent.

Applicant's Case

2. The Applicant avers that the Respondent through its Finance and Administration Manager served her with a notice of termination dated 02.11.2023 effective 16.11.2023. The Applicant vide her letter of contract 26.05.2023, her probation period was for 3 months and she was serving her 5th month.



3. The Applicant avers that the termination letter dated 2nd November 2023 read in paragraph 3: “After review of your performance and subsequent evaluation report which was prepared by your immediate supervisor, the Finance and Administration Manager is regrettable that you flatly refused to sign as per policy provided, backed by Labor Law under these circumstances, your continued retention in service is untenable and we have determined that the separation becomes effective 16th November 2023.” It further required her to hand over all company property in her possession which she complied with within the set deadline.
4. The Applicant avers that she was due for confirmation between 21st and 26th September 2023 as per the terms and conditions contained in the contract, however, the Respondent has failed to do so without advancing to her any valid reason. The termination letter is an afterthought after the Respondent breached its terms by failing to confirm the Applicant after completion of the stipulated probationary period.
5. The Applicant avers that the Respondent’s action for refusing to confirm her employment has caused the applicant anguish and denied her peace and future expectations thereby disorganizing her future plans.
6. The Applicant avers that the Respondent’s action and or inaction was and is in violation her employment rights as enshrined in the *Employment Act* and Articles 41, 47 and 50 of the *Constitution* of Kenya which gives the Respondent the mandate to discharge its duties within a specific time, reasonably, efficiently, effectively, lawfully and in a procedurally fair manner whereas the Applicant was denied a fair administrative action.

Respondent’s Case

7. In opposition to the application, the Respondent filed an affidavit dated 22nd November 2023.
8. The Respondent avers that before termination of the Applicant’s employment, she was granted a hearing where she was evaluated and the results shared with her. She was subsequently terminated and the reasons shared with her.
9. The Respondent avers that the nature of relationship between the Applicant and Respondent is an employer-employee relationship involving a private entity as such judicial review orders are not available to the Applicant. Further, the Applicant has not satisfied the key ingredients to be granted leave to commence judicial review orders
10. The Respondent avers that the Applicant’s termination adhered to the terms of her contract employment dated 26.05.2023 which provided under clause 4: “the Applicant would be on 3 months’ probation period after which her performance would be assessed and confirmed based on satisfactory performance. During the probation the Applicant or the Organization would terminate the employment contract by giving at least 2 weeks’ notice or pay in lieu of notice.”
11. The Respondent avers that the Applicant breached her contract of employment and human resource policy during the probation period. The mistakes and omissions included:
 - a. Lateness- the Applicant was constantly late for work in breach of her contract of employment.
 - b. Gross errors and negligence – the Applicant awarded Allan Odhiambo extra pay for 10 days not worked for thereby causing the Respondent losses; paid a former employee, Beryl Ndiege, full benefits yet she served 2 months in lieu of notice instead of 3 months in lieu of notice and the Respondent had to engage her to return the funds; and sent an email to an interviewee



with a different interview date and no attachment of job description causing the candidate to miss the interview.

- c. Deliverables- the Applicant failed to develop and implement staff training development programs and continuous implementation of HR processes in areas such as recruitment, performance management and staff development. She similarly failed to prepare an induction program for all new employees as instructed by her superiors.
12. The Respondent avers that it was ready and willing to review the Applicant's probation period, however, she unlawfully sought for more time to attend the appraisal process.
13. The Respondent avers that the Applicant undertook the probation assessment, the results from her supervisor were that she should not be confirmed and surprisingly, the Applicant refused to sign the Probation Appraisal Form as required under policy.
14. The Respondent avers that upon receipt of the termination letter dated 02.11.2023, she wrote an email to all staff on 03.11.2023 appreciating the company and confirming her last working day will be 16.11.2023. The Applicant then voluntarily handed in her staff clearance form making it clear that she had agreed to separate with the Respondent.
15. The Respondent avers that having cleared and also represented to its staff and clients that her last working day would be 16.11.2023, the Applicant is undeserving of the orders sought.
16. The Respondent avers that the Applicant's cheque of KShs 38,842.19 being 2 weeks payment in lieu of notice as per her contract of employment is ready and available for collection.
17. The Respondent avers that the application does not meet the requirements of order 53, Rule 1,3 and 4 of the Civil Procedure Rules and thus should be dismissed with costs.

Applicant's Submissions

18. The Applicant submitted that the Respondent failed to discharge its obligations to provide a clear statement of the exact offence(s) and or whether it issued the Applicant with any letter on the alleged reasons prior to her termination and whether any disciplinary action was commenced and/or taken against the Applicant as contemplated under section 43 of *Employment Act*.
19. The Applicant submitted that no fair disciplinary hearing took place on or before 02.11.2023 as contemplated under Section 41 and 45 of *Employment Act*, Articles 35,41,47,50 159 and 236 of the *Constitution*.
20. The Applicant submitted that her contract of employment dated 26.05.2023 was effective for a period of 3 months' probation which lapsed on 20.07.2023 and continued for another 1 month and 16 days including 16.11.2023 when the Respondent purportedly terminated her services on such flimsy grounds. This manifests that the Applicant's termination was after the lapse of her probationary period as she was serving her 2nd month into the new employment relationship.
21. The Applicant submitted that she was given 2 weeks' notice in violation of the provisions section 7 of the employment contract 26.05.2023, hence, the Respondent failed to comply with its own procedure when effecting the Applicant's termination.
22. The Applicant submitted that the Respondent was bound to give reasons for an employee's termination, and justify the same, having not stated any reasons for her termination, the Respondent is at fault and the resultant termination was unfair within the meaning of sections 43 and 45 of the



Employment Act. Despite serving for less than 13 months, the Applicant had all right to challenge his termination for want of fairness.

Respondent's Submissions

23. The Respondent submitted that Order 53 Rule 1 of the Civil Procedure Rules sets the legal foundation which leave ought to be granted to institute judicial review proceedings
24. The Respondent submitted that besides the Applicant lacking locus to institute the instant judicial review proceedings, she has not satisfied the grounds upon which leave ought to be granted. Further, the Respondent is not a public body and should not be subjected to judicial review proceedings as commenced by the Applicant.
25. The Respondent submitted that the Applicant has failed to demonstrate that the decision to terminate her employment was illegal, unfair and irrational. The Applicant was required to undertake a probation assessment by her supervisor after her probation, when the time came, she unlawfully asked for more time. Upon undertaking the assessment, the supervisor results were that the Applicant should not be confirmed and the Applicant refused to sign the Probation Appraisal Form.
26. The Respondent submitted that the application does not meet the threshold for grant of leave to commence judicial review proceedings against the Respondent.
27. The Respondent submitted that it is a private company governed by its Memorandum and Articles of Association. It is trite law that orders of judicial review are issued against public bodies performing public functions and not private companies.
28. The Respondent submitted that the Applicant was employed as a Senior Human Resource and Administration Officer. The contractual relationship was of master and servant and the Applicant's remedy lie in a claim for damages for breach of contract, if any and not in judicial review. It relied on Consolata Kibara & 241 Others V Director Kenya Trypanosomiasis Research Institute 2003 KLR 232.
29. The Respondent submitted that judicial review is not applicable where there is an alternative remedy. Master-servant relationship falls within the province of private law and the alleged rights thereto are enforceable within the confines of private law.

Analysis and Determination

30. Having considered the Chamber Summons, Replying Affidavits and submissions by the parties, the main issue for determination is whether the Applicant is entitled to leave to apply for Judicial Review orders of prohibition and mandamus against the Respondent as sought.
31. In Republic v Registrar of Trade Marks Ex parte United Millers Limited; Kaab Investments Limited (Interested party) [2021] eKLR the court held:

“On the orders sought by the ex parte Applicant for leave to commence judicial review proceedings, the applicable law is Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.



It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in this respect in *Sharma vs Brown Antoine* (2007) 1 WLR 780, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success."

32. The Respondent submitted that the Applicant lack locus to institute the instant judicial review proceedings and the application has not met the threshold for judicial review as orders of judicial review are issued against public bodies performing public functions and not private companies.

33. In *Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others* Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 the court observed:

"The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus, the remedies of mandamus, prohibition or certiorari are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient, beneficial, or effectual."

34. However, the court in *Ernst & Young LLP v Capital Markets Authority & another* [2017] eKLR expressed that:

"Under the Constitution of Kenya, 2010 judicial review orders, in my view, are applicable against any private person, body or authority who exercises a judicial or quasi-judicial functions by which a right or fundamental freedom of a person has been or is likely to be adversely affected. The traditional jurisprudence of judicial review restricted the ambit of judicial supervision of procedures to situations where the functions classified as "judicial or quasi-judicial" had been performed by "a public authority." Presently, Article 165(6) gives the High Court the powers of judicial review over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution."

35. The Respondent though a private body which does not exercise any judicial or quasi-judicial function, judicial review proceedings may still be filed in such disputes but not necessary where there are other appropriate remedies.

36. In all fairness this is a case that would have been filed as a claim and a lot of time would have been saved not only for the court but also for the parties.



37. This is a case where the petitioner was terminated on 16th November 2023 and she acknowledged her separation to her other colleagues. She wrote to them as follows on 2nd November 2023.

“Dear Team

I am reaching out to let you know my last day with LPC will be on 16th November 2023. I wanted to take a moment to express my sincere gratitude and appreciation for the little time I spent here..... from the bottom of my heart I thank you for your support, encouragement and guidance throughout my journey here. I wish you all the very best in your endeavour. Keep your heads high”

38. She then filed in her clearance form and handed it to the respondent.

39. The orders she is seeking in her chamber summons are long overtaken by events and so are not capable of being implemented.

40. The claimant has other channels of coming to court in view of the fact that a lot has happened since she filed her chamber summons application which as said make it untenable for the honourable court to grant orders which would be in vain.

41. The court therefore rules that the chamber summon applicant dated 14th November 2023 is not merited and is dismissed.

42. Each party will meet their respective costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF MARCH, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE

