



Republic v Ministry of Water, Sanitation and Irrigation & 2 others; Quadrant Engineering Consultants Limited & 2 others (Interested Parties); Gathii (Exparte) (Judicial Review 037 of 2021) [2024] KEELRC 929 (KLR) (17 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 929 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW 037 OF 2021**

B ONGAYA, J

APRIL 17, 2024

**IN THE MATTER OF ARTICLES 22, 23, 27, 28, 41, 47,
50, 60 AND 75 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 37, 43, 45, 46
AND 49 OF THE EMPLOYMENT ACT, CAP 160**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

**IN THE MATTER OF SECTIONS 7, 8 & 9 OF THE FAIR
ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, MANDAMUS AND INJUNCTION**

BETWEEN

REPUBLIC APPLICANT

AND

MINISTRY OF WATER, SANITATION AND IRRIGATION .. 1ST RESPONDENT

NATIONAL IRRIGATION AUTHORITY 2ND RESPONDENT



**NATIONAL WATER HARVESTING AND STORAGE AUTHORITY 3RD
RESPONDENT**

AND

**QUADRANT ENGINEERING CONSULTANTS LIMITED INTERESTED
PARTY**

TRACTEBEL ENGINEERING INTERESTED PARTY

THE WORLD BANK INTERESTED PARTY

AND

JOSEPH GATHII EXPARTE

JUDGMENT

1. The ex parte applicant filed the notice of motion dated 08.12.2021 through Tawo & Company Advocates. It was under Articles 22, 23, 27, 28, 41, 47, 50, 75 of *the Constitution* of Kenya; Section 37, 43, 45 and 46 of the *Employment Act*, Sections 7, 8 & 9 of the *Fair Administrative Action Act*, No. 4 of 2015 of the Laws of Kenya; Rules 2(2) (a), 3 (1), & 3(2) of High Court Practice Rules of Laws of Kenya; Order 53 of the Civil Procedure Rules, 2010 of the Laws of Kenya; and all other enabling provisions of the law. The applicant prayed for the following orders:
 - i. That the Honourable Court be pleased to grant an order of Certiorari to remove and bring before this Honourable Court, the decision of the 1st, 2nd and 3rd respondents to require absolutely the termination of the ex parte applicant's employment contract.
 - ii. That the Honourable Court be pleased to grant an order of Mandamus to compel the 1st, 2nd and 3rd respondent to reverse their decision to require the termination of the ex-parte applicant's employment.
 - iii. That the Honourable Court be pleased to grant Prohibitory Orders restraining the 1st and 2nd interested parties from ever effecting that, or any other unlawful decision to terminate the ex parte applicant's contract of the employment.
 - iv. That in the alternative, the Honourable Court be pleased to grant an order of Mandamus to compel the 1st and 2nd interested parties to pay the ex parte applicant for the remainder of the contract period being 28 months seeing as the 1st, 2nd and 3rd respondent's reluctance to comply with the orders issued by the Honourable Court by Hon. Lady Justice Maureen Onyango on 2nd December, 2021 despite effective service thereof.
 - v. That the costs of this suit be provided for.
2. The application was based upon the grounds set out in the statutory statement of facts filed under order 53, rule (1)(2) of the Civil Procedures Rules and the verifying affidavit of the ex parte applicant and annexures thereto (filed together with the application) and sworn on 08.12.2021. The applicant's case is as follows:
 - a. That the 1st interested party abruptly, unlawfully and unprocedurally terminated employment of the ex-parte applicant's vide a letter dated 31st October, 2021 effective 1st December, 2021,



which letter discloses no reasons thereof, save for exercise of discretion by his employers following a decision by the 1st, 2nd and 3rd respondents as explained hereunder;

- i. Without following laid down procedures in the contract of engagement between the Government of Kenya, and the 2nd interested party at clause 12.
 - ii. Without giving the ex parte applicant fair hearing in line with *the Constitution* 2010, *Employment Act* 2007, contract of employment and all applicable laws.
 - iii. Out of open biasness coupled both racial and ethnic discrimination, from certain factions within his employment.
 - iv. By persons who had conflict of interest, personal vendetta to settle and in bad faith.
 - v. Was illegitimate, far-fetched, unreasonable and unwarranted in the circumstances.
- b. Further in his statutory statement, he gave a background of the circumstances that led to his terminal as follows:
- i. That the Government of Kenya, through the 1st respondent, under the World Bank/ Kreditanstalt fur Wiederaufbau funded Kenya Water Security & Climate Resilience Project (KWSCRIP). The project is currently undertaking the Improvement of Flood Mitigation Structures (hereinafter IFMS) project to mitigate the effects of flooding in the lower reaches of River Nzoia and the Lower Nzoia Irrigation Project (hereinafter LNIP) through the 3rd and 2nd respondents as implementing agencies respectively, through Contract Ref Mwoi/KWSRP-1/010/2014-2015.
 - ii. That the Government of Kenya contracted the 2nd interested party and GFA Consulting GmbH, a joint venture with the 2nd interested party as Lead Partner to implement the Project as the Implementation Support Consultant (hereinafter ISC). The 2nd interested party contracted the 1st interested party to provide local key and non-key technical staff for the implementation of the Project.
 - iii. That oversight is undertaken on behalf of the government of Kenya by the 1st respondent's Project Management Unit (hereinafter PMU) under the leadership of a Project Manager of the KWSCRIP, one Eng. Simon G. Mwangi while implementation is by the 2nd and the 3rd respondents.
 - iv. That the Contract of engagement between the Government of Kenya, and the 2nd interested party at Clause 32, relating to the removal of experts or sub-consultants stipulates among other things thus:
 - 32.1. If the Client finds that any of the Experts or Sub-Consultants has committed a serious misconduct or has been charged with having committed a criminal action, or shall the Client determine that fraudulent, collusive, coercive or obstructive practice while performing the services, the Consultant shall, at the client's written request provide a replacement.
 - 32.2. In the event that any Key Experts, Non-Key Experts or Sub-Consultants is found by the Client to be incompetent or incapable in discharging assigned duties, the Client, specifying the grounds therefore may request the Consultant to provide a replacement.



- v. That the ex-parte applicant herein is an employee of 1st Interested Party in the capacity of a Monitoring and Evaluation (M&E) Specialist, and reports to the Project Manager of the Implementation Support Consultant - Mr. Alex Hamming, who is an employee of the 2nd Interested Party and who then communicates directly with Eng. Simon G. Mwangi, the PMU project Manager of the 1st respondent and Boaz Akelo of the 2nd respondent.
- vi. That the ex-parte applicant's employment with 1st interested party was abruptly and un-procedurally terminated vide a letter dated 31st October, 2021, effective 1st December, 2021, which letter discloses no reasons thereof, save for exercise of discretion by his employers.
- vii. That the ex-parte applicant has been in 1st interested party's employment since January 2018, which fact infers that the ex-Parte applicant's employment is on permanent basis. Hence, there are procedures in labour laws in Kenya and beyond that demand to be undertaken before termination of employment, failing, the termination was unlawful and unprocedural. That as a Monitoring & Evaluation Specialist, some of the duties of the ex-parte applicant included among other things; The execution of design and establishment of GIS/MIS for effective monitoring and evaluation. Developing a monitoring and evaluation plan for the project activities, along with the performance monitoring indicators. Conduct monitoring and evaluation of project activities, their outputs and reporting the same to the project manager. Reporting of Evaluation findings to the Project Manager. Developing a data collection and analysis instruments and procedures.
- viii. That in order for the ex-parte applicant to dispense with the above stipulated duties and responsibilities as a Monitoring and Evaluation Specialist to the required standard the ex-parte applicant must conduct a workshop wherein key stakeholders including the beneficiaries of the project such as farmers and officers of the Client must participate.
- ix. That the ex-parte applicant is merely a non-key staff member under the employment of 1st interested party. In other words, the ex-parte applicant has no direct contact with the Client except through the Implementation Support Consultant Project Manager. Moreover, the applicant does not control any resources, financial or otherwise and relies on the Project Management of the Implementation Support Consultant or the 1st respondent through the Project Management Unit to avail the resources and facilities required to conduct the said workshop. Without the support of Implementation Support Consultant Management and the 1st respondent in facilitating acquisition of these resources, there is no way that the ex-parte applicant can achieve the needful.
- x. Since the employment of the ex-parte applicant sometime in 2018, he has endeavoured to impress upon the Implementation Support Consultant, the Client and his employer of the need to conduct the said workshop but the same has never been heeded, until sometime in January 2021, when the Project Manager of the Implementation Support Consultant, Mr. Alex Hamming to whom he reports, wrote to Eng. Simon G. Mwangi, the KWSCR Project Manager, to acquaint him of the indispensable need for the workshop.



- xi. That later on 19th April 2021, the Project Manager of the Implementation Support Consultant, Alex Hamming, to whom the ex-parte applicant reports, wrote to the Client through the oversight offices outlining the parameters of the workshop that needed to be held and even reiterated that it is only after the workshop has been conducted, that the Ex-Parte Applicant could undertake to the required standard, responsibilities and functions bestowed upon him under his contract. Throughout his employment, the ex-parte applicant kept badgering the 1st respondent through the Implementation Support Consultant to conduct the workshop in futility. The Project Manager of the KWSCRIP, Eng. Simon Mwangi agreed to instruct the Monitoring & Evaluation Specialist at the Project Management Unit within the 1st respondent to facilitate the said Workshop for the Implementation Support Consultant but the same has never been done. In fact, as it turned out later, the 1st Respondent never had any intentions whatsoever, of having the inexplicably needed Workshop.
- xii. That later on between 21st - 24th September, 2021 the Client through the 2nd respondent conducted a progress meeting in Siaya, wherein the M&E specialist of the 1st respondent, one Dr. Mulongo, made it clear that the Project Management Unit had no intentions of ever facilitating the very much needed Workshop; the very one that all stakeholders concede is absolutely mandatory for the Applicant to undertake his duties and responsibilities under the contract of employment.
- xiii. That on 12th October 2021, one Boaz Akello, acting with authority of the office of the Head of the Project Implementation Unit (PIU), of the 2nd respondent wrote to Alex Hamming, the Implementation Support Consultant. In that email of 12th October, 2021, Mr. Boaz Akello discerns that there are certain functions that had not been undertaken, the very functions within the ex-parte applicant's purview of duties and responsibilities and the same functions that all stakeholders, including Boaz Akello, are aware cannot be met by the Ex-Applicant before the Workshop is conducted.
- xiv. That also, in that email of 12th October 2021, Mr. Boaz Akello listed M&E issues that were allegedly agreed upon for consideration during that Progress Review meeting and requested action on the same. As the proceeding correspondences between the Project Manager, Implementation Support Consultant and the Agricultural Operations Coordinator who was present throughout all sessions of that meeting would reveal, there was neither discussion nor agreement on the issues raised by Boaz Akello, and the latter fabricated them merely to lay the ground for his dubious scheme to have the ex parte applicant's contract terminated.
- xv. That on 27th October 2021, barely two weeks after Mr. Boaz Akello's inflammatory email to the Implementation Support Consultant, the 1st respondent's Project Manager, Eng. Simon G. Mwangi, acting on the melee created by Mr. Boaz Akello, and pursuant to the aforementioned Sub-Clause 32 which in any case does not apply to the ex-parte applicant, wrote to the Project Director of the 2nd interested party, Dr. Beau Freedman recommending replacement of the Ex- Parte Applicant from Employment within 21 days. It is worth noting that Dr. Freedman is represented by the Implementation Support Consultant Project Manager, Alex Hamming, and he was briefed on a daily basis about the project.
- xvi. That in that letter of 27th October 2021, Eng. Simon G. Mwangi conveniently cited a few of the issues raised by Mr. Boaz Akello in his email to the ISC as basis



for demanding replacement of the ex parte applicant from the project. The 2nd interested party's project director, Dr. Beau Freedman wrote back explaining that the predicament was occasioned by the 1st respondent's laxity to do the needful.

- xvii. On 31st October 2021, Eng. Stephen Auma, Principal Consultant at 1st interested party wrote to the ex-parte applicant terminating his contract of employment effective 1st December 2021, upon recommendation by Eng. Simon G. Mwangi to the 2nd interested party.
- xviii. That it is clear from the facts herein that the ex-parte applicant's performance of his duties and responsibilities was deliberately frustrated and sabotaged by forces within 1st, 2nd and 3rd respondent's quarters, particularly Mr. Boaz Akello, to make way for the applicant's exit (likely to create way for his preferred candidate) from the project necessitating the present application.
- xix. That the ex-parte applicant's termination was unprocedural and unlawful as it contravened all the provisions of the [Employment Act](#), 2007 given that he was not notified of his impending termination, and neither was he afforded an opportunity to respond to the allegations levelled against him therein.
- xx. That on the face of it, it may seem as though it is a dispute that ought to be referred to the Employment & Labour Relations Court by way of a statement of claim, however, the nature of the terms of the contract, the working relationship shared between the stakeholders herein and the fact that Eng. Simon G. Mwangi "irrevocably" recommended the termination of the applicant's contract of employment from a point of ignorance necessitate the instant application, for an order of Mandamus, Certiorari as well as Prohibitive orders against the termination thereof.
- xxi. That it is clear from the facts herein that although the complaints raised by Eng. Simon G. Mwangi are legitimate in the circumstances, they do not justify termination of the ex-parte applicant's contract seeing as the non-performance or underperformance by the ex-parte applicant of these duties was occasioned by oversight on the part of the respondents' failure to deliver the necessary facilitation. Further, the contract has a list of deliverables such as the monthly progress report that has to be submitted seven days after end of every month among other things. None of the issues listed in Eng. Simon G. Mwangi's email is a contractual deliverable. Consequently, the onus of prioritizing what is urgent lies with TSC Project Manager, whom the ex-parte applicant reported to.
- xxii. That Boaz Akello, while executing duties in a public office, has harboured personal vendetta against the ex-parte applicant for a while. The vendetta has guided him to influence the manner of his dealings with the ex-parte applicant. Prior to the present dispute, sometime in October 2020, Mr. Boaz Akello had recommended termination of the ex- parte applicant's contract, which termination was effected and communicated to the ex- parte applicant vide a letter dated 29th November, 2020, and effective 1st January, 2021. The termination was later found to be baseless and unsubstantiated and was overturned, only for Mr. Boaz Akello to plot yet another scheme against the ex-parte Applicant a few months thereafter.



- xxiii. That it is clear from the facts that the ex parte applicant is facing some discrimination, both racial and ethnic from certain fractions within his employment and deliberate sabotage.
3. The ex parte applicant in his verifying affidavit reiterated his case as is in the statutory statement as captured above.
4. The 1st interested party filed the replying affidavit of Stephen Auma, the Chief Executive officer to the 1st interested party, sworn on 06.06.2022. It was stated and urged as follows:
- a. The 1st interested party confirmed that the ex-parte applicant executed a contract with the 1st interested party with effect from January 2018.
 - b. That the ex parte applicant was hired as a freelance consultant and was never an employee of the company. The services to be rendered, and the deliverables to be achieved by the consultant were well defined. The documents defining the duties were exhibited.
 - c. That the ex parte applicant was to give a gross time input of 23 person-months, which was to be spread over a period of time and subject to staff task schedule drawn by the company.
 - d. That the ex parte applicant was allowed to work elsewhere during the contract and by the time of termination of the Freelance Consultancy Agreement, the ex parte applicant had exhausted his contractual 23 man months and was only entitled to outstanding fees, if at all.
 - e. That towards the end of 2020, the 1st interested party received a letter from the Ministry of Water, Sanitation and Irrigation -the 1st respondent- to the effect that they were not satisfied with the ex parte applicant's performance and requiring his immediate replacement.
 - f. That the ex parte applicant was unable to render some of the services he was hired for and they had to engage the services of another consultant to render the said services.
 - g. That in the view of the foregoing, the 1st interested party terminated the ex parte applicant's contract on 31st October 2021 strictly in accordance with Clause 9.2 of the Contract and the ex parte applicant readily accepted the termination whereupon he was immediately replaced by Mr. Silas Ochieng'.
 - h. That Mr. Ochieng' terminated his services after about two weeks prompting the 1st interested to plead with the 1st respondent to allow them to re-engage the ex parte applicant with the undertaking that he would improve and the 1st respondent acceded.
 - i. That towards the end of 2021 the 1st interested party received a letter from the 1st respondent that the ex parte applicant had not improved and he was terminated in accordance to clause 9.2 of the contract.
 - j. That this court does not have jurisdiction to hear this matter as the alternative dispute resolution mechanism as set out in clause 10.0 of the Freelance Consultancy Agreement.
 - k. That the applicant has not been replaced yet.
5. The other parties did not file any documents.

Final submissions were filed by the ex-parte applicant and the 1st interested party. The Court has considered all the material on record. The Court returns that the judicial review application must fail because of the following findings:



- a. The evidence is that the ex-parte applicant was in a work relationship with the 1st interested party. The relationship and the impugned decisions appear to have been purely contractual without a statutory or constitutional underpinning. It is that the applicant is seeking to unsettle the merits of termination of the work relationship. The Court finds that the judicial review application was most unsuited proceeding to consider the merits of the termination and re-evaluate the impact of the layers of the contracts and sub-contracts involved.
- b. The 1st interested party has shown that the termination letter dated 29.11.2020 is the one the applicant is seeking to quash. As submitted for the 1st interested party, such considerations of the contractual relationship on merits would best go to an ordinary suit. It is that if it was a consultancy or employment is also an issue not for consideration in judicial review proceedings. In the instant case the issues are purely contractual and it has not been shown how judicial review remedies as contemplated in order 53 of the Civil Procedure Rules would be available.
- c. The 1st interested party has shown that there was a valid reason for termination being that the respondents became dissatisfied with the applicant's performance. Whether the applicant performed satisfactorily or not does not impact and diminish the position that the 1st interested party had a valid reason to terminate the applicant's service or contract as the reason related to the 1st interested party's operational requirements namely the clients' demands. The reason appears to have been fair per the provisions of section 45 of the *Employment Act*.
- d. The Court finds that as submitted for the 1st interested party, issues of compliance with the stay orders would go to an application for contempt or such other appropriate proceedings as is outside the scope of the Judicial Review orders. In any event, the 1st interested party has shown that he was entitled to comply with the client's demands per the binding contract.
- e. The application will collapse. The Court has considered all circumstances and each party to bear own costs.

In conclusion the application by the notice of motion is hereby dismissed and each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 17TH APRIL 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

