



Republic v Administration & another; Onyango (Exparte); Commission of Administrative Justice (Interested Party) (Judicial Review E004 of 2024) [2024] KEELRC 2250 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2250 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW E004 OF 2024

CN BAARI, J

SEPTEMBER 23, 2024

IN THE MATTER OF ARTICLE 10, 47, 49, 50 & 159 OF THE CONSTITUTION

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT 2015

AND

IN THE MATTER OF ORDER 53 OF CIVIL PROCEDURES RULES 2010

AND

INTERDICTION LETTER DATED 9TH FEBRUARY 2024 BY ONE MOSES. K. LILAN OGW

BETWEEN

REPUBLIC APPLICANT

AND

OFFICE OF THE PRESIDENT MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION 1ST RESPONDENT

OFFICE OF THE COUNTY COMMISSIONER 2ND RESPONDENT

AND

CHRISPINE ONYANGO EXPARTE

AND

COMMISSION OF ADMINISTRATIVE JUSTICE INTERESTED PARTY



JUDGMENT

1. The *Ex Parte* Applicant lodged this proceeding vide a Notice of Motion dated 22nd February, 2024 pursuant to leave granted by this Court on even date. He seeks the following reliefs: -
 - i. That an order of Judicial Review by way of *certiorari* do issue to remove into court the interdiction letter Ref: C.2016027215/2 dated 9th February purporting to interdict him as Chief of Gem-Sori location and the decision be quashed.
 - ii. That an order of judicial review of Prohibition do issue barring the Respondents from interfering, further interfering with his office and position, salary, allowances, emoluments, privileges and other rights appurtenant to the Chief's office, appointing and installing any person as Chief of Sori location and/or commencing his replacement as chief.
 - iii. That the court do issue an order of *mandamus* compelling the Respondents to restore and provide him with unrestricted access to the office of the Chief Sori location, and provide him with all facilities that he is entitled to enable him discharge his duties and responsibilities as Chief.
 - iv. That the court be pleased to grant such further orders as it may deem just and expedient.
 - v. That costs of this application be provided for.
2. The motion is premised on the grounds that:
 - i. He was served with an interdiction letter dated 9th February, 2024 on 20th February, 2024.
 - ii. The interdiction was based on false allegations that he had been arrested and charged in court for concealment of a death.
 - iii. The said allegations were malicious, unverified, and evil as he has never been charged in court.
 - iv. He was not notified, provided with an opportunity to defend himself nor was he subjected to any disciplinary process.
 - v. The third Respondent failed to independently verify the information before taking the drastic step of interdicting him.
 - vi. Even if he had been charged with the offence, he is presumed innocent until proven guilty.
 - vii. There is a likelihood that a tiff he had with the area Member of Parliament Dr Lilian Gogo due to his unauthorized attendance of a village football tournament could have been the genesis of his woes.
 - viii. The area MP harassed and threatened him over the phone, and is most likely behind the third Respondent's move to have him replaced.
 - ix. The interdiction is contrary to public interest as he has no designated assistant chief to assume his responsibilities, a situation that could lead to a breakdown of peace in the area.
 - x. No established procedure was followed.
 - xi. The interdiction is geared towards eliminating him and appointing someone who will acquiesce to the area MP's political directives.



- xii. The removal is unlawful, malevolent, unprocedural and a violation of his right to due process with the likelihood of occasioning him suffering, disrespect, loss of dignity, loss of emoluments among others.
 - xiii. The interdiction letter stipulated that he would receive half salary beginning the 9th February 2024 in exchange for reporting to duty daily and obtaining permission for absenteeism from his supervisor.
 - xiv. He was not subjected to the provisions of Article 10 on national values and principles of governance that bind all state organs, state officers, public officers and all persons exercising public duty.
 - xv. Article 47 of the Constitution protects everyone's right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action.
 - xvi. Section 4 of the Fair Administrative Actions Act 2015 *inter alia*, highlights various rights to a fair hearing notice, right to be heard and to appear; which rights were grossly violated.
3. The Respondents opposed the motion vide grounds of opposition dated 18th March, 2024 and a Replying Affidavit dated 19th July, 2024 sworn by Mourine Imo, the Assistant County Commissioner Homa Bay.
 4. It is the Respondents' contention that the application is bad in law, misconceived and an abuse of the court process. They aver that the complaints raised by the *Ex-Parte* applicant are vague and generalized thus incapable of giving rise to any violation.
 5. The Respondents' further contention is that they are immunized from any suit initiated against them for actions done in good faith and in the performance of their obligations under Article 160 (5) of the Constitution of Kenya.
 6. Additionally, the Respondents assert that the application offends the exhaustion principle and hence is dead on arrival.
 7. In the Replying Affidavit, it is deposed for the Respondents that the Applicant was charged with wilfully neglecting to report a murder via Homa Bay law court CMCCR No. E130 of 2024.
 8. It is asserted for the Respondents that all steps were taken to independently verify the allegations against the *Ex-Parte* Applicant before the decision to interdict him. It is further averred that he was accorded an opportunity to present his case and taken through the laid down disciplinary process.

The *Ex-Parte* Applicant's Submissions

9. It is submitted for the *Ex-Parte* Applicant that the interdiction could only be done by the Public Service Commission and not the Respondents. He avers that the Commission is the only body charged with disciplinary control over public officers. He cites the Court of Appeal case in Geoffrey Kiragu Njogu v Public Service Commission & 2 others (2015) eKLR where the court held that the duty to discipline an officer by the Public Service Commission could not be delegated to the District Commissioner, and that the effect of such delegation would be to render the decision invalid.
10. In further support of the application, the *Ex-Parte* Applicant submits that the nature of this case does not require exhaustion of internal dispute resolution mechanisms. He avows that the court can intervene if there is breach of natural justice and malice. He sought to rely on the case of Robert Khamala Situma & 8 others v Acting Clerk Nairobi City Council Assembly (2022) eKLR where the



court cited the Court of Appeal in *Fleur Investment Limited v Commissioner of Domestic Taxes & another* (2018) eKLR for the holding that:

“The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

11. He further cites the case of *Kamau v Kenya v Accreditation Service* (2021) KEELRC 8 where the court held:

“The said intervention is not necessarily meant to stop the process altogether but to put things right so as to avoid violation of the employee’s rights and fundamental freedoms, and also to ensure procedural fairness to the employee.”

12. In the circumstances of this suit, it is the Applicant’s submission that the Respondent’s malice is compounded by the fact that no charge sheet, post-mortem report or death certificate was availed.

13. Additionally, the Applicant submits that the Respondent’s failure to undertake a comprehensive inquiry before interdicting him violated his right to a fair hearing. He relies in the case of *Grace. A. Omolo v A.G & 3 others* (2012) eKLR where it was held that for an interdiction to satisfy the requirements of Article 47 there must be reasonable basis for taking action and what is reasonable is reliant on the facts and circumstances of the case.

14. Further reliance is placed on *T.J Kajwang v Independent electoral and Boundaries Commission* (2017) eKLR where the court stated as follows:

“The greater and what concerns this court is to allow a process tainted with procedural impropriety and which infringes on the right to fair trial under Article 50 and Fair Administrative Action under Article 47 of the *Constitution*. Constitutional infringements is by far a worse wrong than alleged breach of a code of conduct. Nothing prevented the Respondent’s Committee from complying with the rules of natural justice and the constitutional rights to fair trial, fair hearing and fair administrative action. These are fundamental rights and even the mere threat to infringe them cannot be countenanced by the court.”

15. In conclusion the *Ex-Parte* Applicant reiterates the courts power to quash an administrative decision made without authority on the basis of the case of *Victoria Wanjiku Mahoro v Mary Wambui Gitbinji & 3 others* (2021) eKLR.

16. The Applicant urges the court to issue orders of *mandamus* compelling the Respondents to grant him access to his office.

The Respondents’ Submissions

17. It is submitted that the 3rd Respondent was well within his mandate to interdict the Applicant based on the provisions of Section 65 (2)(a) (i) of the *Public Service Commission Act*. It is the Respondents’ contention that the interdiction letter was clear that the interdiction was from the date of the letter pending finalization of his case.

18. The Respondents strongly submit that the grounds for the Applicant’s interdiction passed the reasonableness test as enunciated in the *Grace. A. Omolo v Attorney General & 3 others* [2012] eKLR



case where the court opined that for an interdiction to meet the requirements of Article 47, there must be reasonable basis for action. According to the Respondents, concealment of death was a serious allegation given the position held by the *Ex-Parte* applicant.

19. The Respondents' further submission is that the requirement to be heard before interdiction did not apply in this case as the interdiction was a preventive measure. The Respondents avow that a hearing before interdiction was not tenable given the Applicant's contractual relationship with the Respondents. They cite the case of *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* [2014] eKLR where a distinction was made between a preventive and a punitive interdiction in the following terms:

“It is important to note that there can be preventive interdicts or punitive interdicts. On the one part being an interdiction that is done in the context of allegations of misconduct prior to finding of guilt and the other interdict is implemented as a sanction after the finding of guilt. A punitive interdict can only issue in circumstances where the employment contract, the employer code of conduct, the Collective Bargaining Agreement or the law allows for it as a sanction, a good example being what would fall under the provisions of section 44 of the *Employment Act* in cases that warrant summary dismissal and are outlined therein. Whether it is preventative or punitive, the interdict, suspension, dismissal or a termination the same to be valid must meet the requirements of substantive and procedural fairness.”

20. In submitting against the reliefs sought, the Respondents urge the court to consider that judicial review is only concerned with the process and not the merits of the decision. They cite the case of *Republic v Isaack Kipyegon Koech & 4 others Ex-Parte Kipkirui Koech* [2020] eKLR where the court stated: -

“Judicial review is different from ordinary adversarial litigation between private parties as it does not entail examination of the evidence with a view to making a decision about the substantial merits of a case, but rather an examination as to whether there was compliance with the applicable constitutional, statutory and procedural requirements.”

21. Having followed the laid down procedure, the Respondents' submit that the Applicant has approached the court prematurely and quashing the interdiction would offend the rules of natural justice. They rely on the *Grace. A. Omolo case (supra)*, where the court having found that the interdiction was based on reasonable grounds declined to prohibit disciplinary proceedings stating that it would amount to granting the petitioner immunity.
22. The Respondents finally urge the court to award them costs based on the interdiction procedure being justified. They placed reliance in the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & anor* [2016] eKLR for the holding that costs follow the event and being the discretion of the court.

Analysis and Determination

23. I have carefully analysed the motion, the grounds of opposition, the replying affidavit and the rival submissions. The issues that arise for determination are:
- i. Whether the Respondents were authorized to interdict the *Ex-Parte* Applicant.
 - ii. Whether the interdiction was justified or reasonable.
 - iii. Whether the Applicant is entitled to the orders sought.



Whether the Respondents were Authorized to Interdict the *Ex-Parte* Applicant.

24. It is now settled that Judicial Review is concerned with the decision-making process and not the merit of the decision. In essence, the court mainly looks at how the decision was arrived at, that is whether those who made the decision had/have the power or jurisdiction to make it, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or whether they took into account irrelevant matters. (See the Court of Appeal case of *Mombasa v Republic, Umoja Consultants ltd* Nairobi Civil Appeal No. 185 of 2007 [2002] eKLR).
25. The Applicant's contention is that the power to interdict him, solely falls within the purview of the Public Service Commission and not the Respondents. He sought to rely in the Court of Appeal decision in the case of *Geoffrey Kiragu Njogu v Public Service Commission & 2 others* [2015] eKLR where it was held that the powers of the PSC to discipline could not be delegated.
26. The Applicant further contends that he was not afforded an opportunity to present his case before the decision he impugns herein was made.
27. On their part, the Respondents reiterate that the 3rd Respondent had delegated authority to interdict pursuant to Section 65 (2)(a) (i) of the *Public Service Commission Act*, and that the requirement to be heard prior to interdiction was not absolute.
28. The *Ex-Parte* Applicant specifically cites Regulation 25(2) of the Public Service Commission Regulations 2005 (*Legal Notice 28 of 2005*) on the disciplinary process being the preserve of the PSC. The Court notes that these Regulations were repealed by *Legal Notice No. 3 of 2020*, hence the Applicant's assertion in this respect does not hold.
29. On the flipside, Section 65 (2) (a) (i) of the *Public Service Commission Act*, 2017, as correctly submitted by the Respondents, allows delegation of powers to interdict to an 'authorized officer'.
30. Under Section 2 of the same *Act*, an 'authorized officer' is defined as any officer, body or authority appointed by the Commission to perform its delegated functions in a ministry or state department or any member of the Commission.
31. The question that arises then, is whether the Respondents or any of the Respondents was an 'authorized agents' for purposes of disciplinary action against the Applicant. The evidence on record suggests that they were. For instance, the promotion letter provided by the *Ex-Parte* Applicant from the Office of the President, Ministry of Interior and Co-ordination of National Government, shows that it was sent through the Deputy County Commissioner. The letter conveys the PSC's decision to promote the *Ex-Parte* Applicant to the position of Assistant Chief.
32. This clearly shows that the third Respondent as the Applicant's immediate supervisor was authorized to act on behalf of the PSC.
33. In light of the foregoing the court returns the finding that the Respondents were authorized to issue the interdiction letter and indeed to discipline the Applicant.

Whether the Interdiction was Justifiable or Reasonable

34. The reason for the Applicant's interdiction was stated as concealment of a death. The Respondents produced in evidence a charge sheet confirming that the *Ex-Parte* Applicant was actually charged with concealment of a death in his area of operation.



35. The general rule is that discipline of employees at the work place is the employer's prerogative and which should be exercised without interference by third parties.
36. Given the *Ex-Parte* Applicant's position, this allegation could in my view form a valid basis for the interdiction and disciplinary action. Further, the fact that the Applicant is facing criminal charges does not stop an employer from taking administrative action against an employee.
37. Additionally, it was the Respondents' contention that the interdiction was preventive as opposed to punitive. Meaning therefore that it was undertaken pending finalization of his case. In the case of *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* [2014] eKLR a preventive interdict was categorised as the one done in the context of allegations of misconduct prior to a finding of guilt.
38. The interdiction letter states in part that the Applicant failed to report the death of one Jenipher Auma Ogongo to the nearest police station or to his superior, and was thus being sent on Interdiction pending finalization of his case.
39. It is quite evident that the Interdiction herein was preventive. The question that follows therefore is whether the Applicant was entitled to a hearing before the Interdiction.
40. In *Lamu County Government & another v Muhammed Ali Shee* [2021] eKLR, the learned Judge refers to the book '*Employment Law Guide for Employers*' wherein it is stated:

"The Kenyan employment law does not have specific provisions requiring a pre-suspension/ interdiction hearing before the decision to interdict is rendered. one has to turn to either the contract of service between the parties or some other specific statute regulating the relationship between the disputants to determine whether a pre- suspension/interdiction hearing must be held before one is placed on suspension."
41. In the circumstances of this case, no evidence has been led to show that a hearing was a prerequisite to interdiction.
42. This court therefore finds that the interdiction was justifiable and reasonable and nothing warrants the intervention of this court.

Whether the *Ex-Parte* Applicant is Entitled to the Orders Sought.

43. Having found that the Respondents were authorised to interdict the *Ex-Parte* Applicant, and that the reason for interdiction was justifiable, the motion lacks merit and is dismissed with costs to the Respondents.
44. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Obiero present for the Applicant

N/A for the Respondents



Ms. Anjeline Wanjofu - CAs.

