



**Mbugua v National Cohesion and Integration Commission (Judicial Review Application E003 of 2023) [2024] KEELRC 2853 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2853 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
JUDICIAL REVIEW APPLICATION E003 OF 2023**

**J RIKA, J  
NOVEMBER 19, 2024**

**BETWEEN  
DR. SKITTER WANGECI MBUGUA ..... APPLICANT  
AND  
NATIONAL COHESION AND INTEGRATION COMMISSION . RESPONDENT**

**JUDGMENT**

**Representation:**

Hamilton Harrison & Mathews, Advocates for the Applicant

Kaloki Ilia & Mbugua Advocates for the Respondent

1. The Applicant filed this application for judicial review, dated 28<sup>th</sup> February February 2023.
2. She relies on her statement of facts dated 19<sup>th</sup> February 2023, and affidavits sworn on 19<sup>th</sup> February 2023, 5<sup>th</sup> April 2023 and 30<sup>th</sup> August 2024.
3. She summarizes her case, in submissions filed before the Court, dated 13<sup>th</sup> September 2024.
4. She states that she was employed by the Respondent Commission, as the Chief Executive Officer, for a period of 5 years, through a letter dated 6<sup>th</sup> November 2020.
5. The dispute herein, arose on 10<sup>th</sup> November 2022, when the Respondent issued the Applicant a letter to show cause why disciplinary action should not be taken against her.
6. She challenges the letter to show cause and the decision to commence disciplinary proceedings against her.
7. The charges against her were that: she acted contrary to instructions given by the Respondent, that all staff were to attend a retreat from 9<sup>th</sup> October 2022 to 15<sup>th</sup> October 2022; she used



the Respondent's vehicle to Mombasa, contrary to a decision made by the Respondent on 8<sup>th</sup> October 2022; she recruited 3 Employees without Respondent's approval; she failed to implement budgets approved by the Respondent, in the sum of Kshs. 100 million; she failed to provide Employees and Commissioners with working calendars; she failed to follow up on the grant promised by COMESA, during the Respondent's visit to Zambia; and she failed to follow up on the projects discussed by the Respondent's delegation to the USA.

8. The Applicant states that she responded to the letter to show cause, but she did not hear from the Respondent further, and continued to discharge her role. She believed that the disciplinary proceedings had concluded.
9. She was surprised when the Respondent revived the proceedings, 3 months later, during quarterly meetings held on 14<sup>th</sup> September 2023, and 16<sup>th</sup> September 2023.
10. She approached the Court through an application for leave, to initiate these review proceedings. She was granted leave by the Court, on 20<sup>th</sup> February 2023. Leave so granted, was to operate as stay of the letter to show cause, and stay of the decision made by the Respondent, to commence disciplinary proceedings against the Applicant.
11. The Respondent's Chair and leadership, were said to have disobeyed the orders of the Court on stay of the letter to show cause, and stay of the disciplinary proceedings, and were convicted by the Court, for contempt of Court.
12. The Chair and his team successfully applied for an order of stay of execution of the contempt conviction, at the Court of Appeal. They were therefore not sentenced. The Appeal on contempt conviction, apparently is still pending at the Court of Appeal.
13. The Applicant submits that the letter to show cause, was unlawful and in contravention of legal principles governing disciplinary proceedings, stated in *Jonathan Chepkwony v. George Makateto, Acting Chief Executive Officer, Export Processing Zone Authority [EPZA] & 2 Others [2021] e-KRL*. The principles, [which appear to be repetitious], are that, the letter must be in clear and dispassionate language; issued as soon as practicable; identify the workplace issues giving rise to the disciplinary action; identify relevant workplace history; address with sufficient particularity the factual allegations; give circumstances of each allegation; be accurate; and afford fair time for the Employee make sufficient response.
14. The Applicant submits that the Respondent was prejudiced in the letter to show cause. The outcome of the disciplinary process had already been determined.
15. She pleads that the Respondent acted in bad faith, and contrary to Section 41 of the *Employment Act*; Sections 69 [4] & [7] of the *Public Service Commission Act*; the Public Service Disciplinary Manual; and Article 47 of *the Constitution*.
16. She prays the Court to find that the letter to show cause, and the entire disciplinary proceedings initiated by the Respondent are illegal, unreasonable and contrary to the rules of natural justice. She prays the Court to uphold the application dated 20<sup>th</sup> February 2023.
17. The Respondent opposes the application, through its replying affidavit dated 10<sup>th</sup> March 2023 and supplementary affidavit dated 29<sup>th</sup> July 2024. The affidavits are sworn by the Respondent's Chair, the Rev. Dr Samuel Kobia. The Respondent sums up its position, in its submissions dated 2<sup>nd</sup> October 2024.



18. It is conceded that the Applicant was issued a letter to show cause by the Respondent, dated 19<sup>th</sup> November 2022. This followed preliminary investigations on the issues raised in the letter. She was afforded 21 days to respond. She responded on 30<sup>th</sup> November 2022.
19. Before the Respondent could deliberate on her response, the Applicant moved the Court, and obtained the orders staying the disciplinary process.
20. Her contract lapsed on 30<sup>th</sup> November 2023. She was notified on 9<sup>th</sup> October 2023, that her contract would not be renewed.
21. The Respondent submits that as her contract lapsed, the dispute before the Court was rendered moot. The employer-employee relationship has ceased to exist. There is no claim before the Court, alleging that termination or non-renewal of the Applicant's contract, was unfair or unlawful. The Respondent relies on the Supreme Court decision in *Institute for Social Accountability & Another v. National Assembly & 3 Others* [2022] KESC 39 [KLR], in submitting that, a matter is rendered moot, when it has no practical significance, or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it.
22. The Respondent submits further, that it lawfully invited the Applicant to show cause, why disciplinary action should not be taken against her. The Court ought not to interfere with Respondent's internal disciplinary processes and the managerial prerogative, as held in *Professor Gitile Naituli v. Multimedia University College & Another* [2013]e-KLR. Courts ought to be fora of last resort, and not the first port of call, the moment a storm brews.
23. The Respondent submits that the Applicant acted against the doctrine of exhaustion, by presenting the application herein. Section 74 of the [Public Service Commission Act](#), requires that any person who is dissatisfied with the decision of an authorized officer, to file an appeal with the Public Service Commission. A person who is not satisfied with the decision of the Commission may apply for review. The Applicant did not comply with the doctrine of exhaustion, underlined in Section 9[2] of the [Fair Administrative Action Act](#).
24. Lastly the Rev. Dr Samuel Kobia depones that, the Applicant did not raise any objection when she was served a notice of non-renewal of her contract, and further, that she secured an alternative job as the Executive Director of Women Peace Climate Resilience Justice Association.
25. The Respondent therefore urges the Court to find, that the application has been overtaken by events, and decline the orders sought.

**The Court Finds: -**

26. The Respondent Commission advertised for a vacancy in the position of CEO, pursuant to Section 20 of the [National Cohesion and Integration Act](#) No. 12 of 2008.
27. The advertisement states that the contract would be for 3 years.
28. The Applicant was appointed as the CEO for a period of 3 years, commencing 1<sup>st</sup> December 2020.
29. She executed the contract on 1<sup>st</sup> December 2020.
30. The contract was to expire on 30<sup>th</sup> November 2023.



31. The Respondent issued the Applicant a notice of non-renewal of the contract, dated 9<sup>th</sup> October 2023.
32. She responded through her Advocates, on 16<sup>th</sup> October 2023, informing the Respondent that its notice of non-renewal of the contract, issued after the Respondent's Chair and his team, had been convicted of contempt of Court, and that the decision to terminate the contract was in further contempt of the Court. The Applicant reserved her right to take out appropriate proceedings for unlawful termination of her contract.
33. She does not seem to have filed a Claim for unfair and unlawful termination, as intimated.
34. She told the Respondent that she was in a 5-year term contract, not 3 years, and termination was therefore premature, unfair and unlawful.
35. Her own copy of the contract appointing her, indicates the commencement date was 1<sup>st</sup> December 2020, but contrary to the letter exhibited by the Respondent, indicates that the term was 5 years, not 3 years.
36. It is not clear to the Court, in the absence of oral evidence by the Parties, why a different contractual period was stated in the letter of appointment exhibited by the Applicant, and that exhibited by the Respondent. Both letters appear to have been signed by both parties. It is not clear why the term, in the letter exhibited by the Applicant, diverges from the term on 3 years, contained in the advertisement for the position.
37. In his further affidavit sworn on 23<sup>rd</sup> October 2023, the Rev. Dr Samuel Kobia, states that the letter of appointment exhibited by the Applicant is a forgery, and that the contractual period was 3 years.
38. The issue concerning the term of service, is not before this Court, and would properly have been canvassed through oral evidence, and in a proper Claim for unfair and unlawful termination.
39. The disputed employment records, appear to have interested the Ethics and Anti-Corruption Commission [EACC], which kept writing letters to the Deputy Registrar of the Court, asking him to provide all the supporting documents in this application, and on other occasions, asking the Deputy Registrar to supply the EACC with a case 'status report.'
40. The EACC should not interfere with judicial proceedings, and ask for status reports, of pending litigation, from Judicial Officers. The litigation before the Court was not under investigation. Documents, proceedings, and pleadings in Court, belong to the Court, and cannot be released to any person or institution, without an order of the Court. If any information is required, concerning parties who are before the Court, such information should be obtained from the parties themselves, or through an order made by the Judge, upon an application made before the Judge, involving all the parties.
41. The letters from the EACC on record, asking for documents and status reports, are inconsistent with the independence of the Judiciary, and are deprecated. It is difficult to understand why the EACC would be advising the Hon. Deputy Registrar of the Court, that EACC Officers would be available on a specific date, at the Court to collect documents, and if necessary, record a statement from the Deputy Registrar. Should not the EACC have made a formal application before the Judge presiding over the Review, instead of making unilateral communications to the Deputy Registrar?



42. Back to the substantive issue, it is common evidence that before the Respondent communicated its decision not to renew the Applicant's contract, she was issued a letter to show cause why disciplinary action, should not be taken against her.
43. The implementation of the letter, was stayed by the Court upon granting the Applicant leave to bring these proceedings, on 20<sup>th</sup> February 2023. The orders were subject matter of contempt proceedings which found their way up to the Court of Appeal, thereby delaying hearing and finalization of the substantive dispute.
44. The Court has looked at the letter to show cause issued to the Applicant, and finds no reason to agree with her, that it was in breach of any statutory provision, human resource instrument or *the Constitution*.
45. The letter to show cause merely contained allegations, which the Applicant was called upon to answer. She answered the allegations, but before she could be called to any disciplinary hearing, or otherwise advised on the next course of action, obtained the orders of the Court, which pre-empted any ventilation of the substantive accusations made against her, through a disciplinary hearing.
46. At paragraph 44 of her closing submissions, the Applicant goes into the merits of the allegations made against her in the letter to show cause, giving evidence to rebut the accusations, which in the view of the Court she ought to have done, after submitting to the proposed disciplinary hearing.
47. She appears to have made it impossible for the facts to be interrogated at a disciplinary platform, through the orders made in her favour, for stay of the disciplinary proceedings. She placed blame unfairly on the Respondent, for initiating a disciplinary process which she characterized as lacking in legitimate concerns of misconduct. She gave the Respondent no room, to exercise its managerial prerogative of disciplinary control, over its officers.
48. According to the Respondent, the Applicant's contract expired on 30<sup>th</sup> November 2023. The Applicant did not initiate any action, relating to the decision not to renew her contract. She did not initiate action, to affirm her position, that she held a contract for a 5-year term, and that her contract was therefore terminated prematurely, unfairly and unlawfully.
49. Quashing a letter to show cause, issued to a former Employee, would be purposeless. Courts do not act in vain. Granting the prerogative orders sought, would be a futile gesture. There is no longer an actual controversy between the parties. Any orders made by the Court on the disputed letter to show cause, and proposed disciplinary proceedings, would have no practical legal impact. The decision to issue the letter to show cause, and commence disciplinary proceedings against the Applicant, became moot, after her contract expired.
50. There is evidence that the Applicant's contract was not renewed, and that she moved on, and works for another Employer, Women Peace Climate Resilience Justice Association. The letter to show cause issued by the Respondent is water under the bridge, which has no practical significance, after the Applicant left employment on 30<sup>th</sup> November 2023.
51. The Court is bound by the Supreme Court decision, Institute for Social Accountability & Another v. National Assembly & 3 Others [citation above] that, a matter is moot, when it has no practical significance, or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. There has to be a live controversy between the parties at all stages of the case, when a Court is rendering its decision.



52. It is still open to the Applicant to present a Claim for unfair and unlawful termination, if aggrieved by the decision by the Respondent to terminate, or not to renew her contract. The dispute on the letter to show cause, is still capable of being litigated, as part of a procedural breach, in a full Claim for unfair and unlawful termination. The prerogative orders sought serve no purpose.

**It Is Ordered: -**

- a. The Application for Judicial Review herein, is declined.
- b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAKURU, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 19<sup>TH</sup> DAY OF NOVEMBER 2024.**

**JAMES RIKA  
JUDGE**

