



Republic v Oxfam GB; Bobson (Exparte Applicant) (Judicial Review E001 of 2024) [2024] KEELRC 13359 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13359 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E001 OF 2024
MN NDUMA, J
DECEMBER 5, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

OXFAM GB RESPONDENT

AND

BLANDINA IJECHA BOBSON EXPARTE APPLICANT

RULING

1. The Ex-parte applicant in the substantive notice of motion dated 1/7/2024 seeks the following orders:-
 - a. An order of certiorari do and is hereby issued to bring into this court and quash the Respondent’s appeal decision dated 28/7/2023 and the entire disciplinary proceedings that led to the said decision.
 - b. An order of mandamus do and is hereby issued compelling the Respondent to expunge from the Respondent’s employee records and Ex-parte applicant’s employee filing the warning letter issued to the Ex-parte applicant dated 13/04/2023.
 - c. Costs of the suit
2. The application is supported by sworn affidavit of the Ex-parte Applicant dated 22/1/2024 and statutory statement dated 22/1/2024 and written submissions.
3. The application is brought under Order 53 Rule 1(1) (2) (3) and (4) of the *Civil Procedure Rules* and section 8 and 9 of the *Law Reform Act*, Cap 26 Laws of Kenya together with section 5(2) and 12(1) (a) (b) and (c) of the *Employment Act*, 2007.
4. The Ex-parte Applicant has also invoked Article 41 and 47 of the Constitution of Kenya 2010.



Facts of the Applicant

5. The Ex-parte Applicant is an employee of the Respondent in the position of Kenya Programmes Director under a contract dated 16/10/2020.
6. The Respondent is a Non-Governmental Organization regulated by the [Non-Governmental Organization Act](#), No. 19 of 1990 of the Laws of Kenya.
7. That on 28/4/2023 the Ex-parte Applicant was reprimanded vide a warning letter dated 13/4/2023 by the Respondent.
8. The Ex-parte Applicant disputes the content of the warning letter stating that the charges are frivolous as listed as:-
 - a. “Allegedly circulating WhatsApp messages criticize the performance of the Gender Justice and Women’s Rights Strategies in the development team with the aim of encouraging them to criticize her work.
 - b. Allegedly giving instructions to staff who report to the Gender Justice and Women’s Rights Strategist to formally decline to report to her because of her incompetence.”
9. That the said allegations were not proven against the applicant to warrant the sanction.
10. That investigations conducted on the matter confirmed that the said messages were a private conversation between the applicant and the funding manager and was not intended to be circulated for the alleged purpose of criticizing the complainant’s work and encouraging others to do the same. That the investigation concluded that the accusation was not proven.
11. That with respect to the second allegation the finding from the investigation contained in the minutes of the Employee Relations meeting held on 6/4/2023 found that the allegation that the Director of Programmes instructed the GJ and XR staff not to report to the Strategist was investigated and the applicant is not at fault in the matter.
12. The applicant submits that despite the exoneration by the investigations and as per the report submitted the officials of the respondent maliciously proceeded to sanction the applicant by issuing her with a warning letter dated 13/4/2023 unlawfully.
13. That an appeal by the applicant was also dismissed for no good reasons. That the decision to warn the applicant was irrational because it was not based on proven facts.
14. That the applicant was wrongly blamed for matters beyond the said messages since the decision extended to matters that were ultimately overruled and not implemented by the County Director and HR business partner concerning extending the probation period to be served by the strategist and placing her on performance improvement plan (PIP). That the applicant was not responsible for those decisions. That the recommendation by the applicant rejected at the time was later ratified by the then Country Director, HR Business Partner and Acting Regional Director January 2023.
15. That the Appeal Committee acknowledged that the whole process was flawed and did not follow Oxfam policies and procedures but still upheld the sanction against the applicant when it said,

“Despite the fact that the process have not been followed in full by the investigation team and by yourself in logging your appeal, it is the finding of this panel that there were valid



allegations leveled against you. The panel therefore believing that the warning letter is still valid and therefore making your appeal unsuccessful.”

16. The applicant states that the entire process constituted unfair labour practice in violation of Article 41 of the Constitution and also the action did not constitute a fair administrative action and so violated the applicant’s right under Article 47 of the Constitution of Kenya 2010.

17. The respondent filed Notice of Preliminary Objection and grounds of opposition to wit:-

1. The leave granted by the honourable court on 6th June 2024 to the Ex-parte applicant to institute judicial review proceedings lapsed on 27th June 2024 while the application was filed on 1st July 2024 out of time. The leave cannot be extended as to do so would amount to violation of Order 53 Rule 3 of the Civil Procedure Rules 2012 and the spirit of the Law Reform Act Chapter 26 of the Laws of Kenya.
2. Judicial review proceedings cannot be sustained against the respondent because it is a private charitable non-governmental organization and is neither an administrative branch of the government, a subordinate court, a tribunal nor an executive member of a public authority responsible for executive and/or administrative actions.
3. Judicial review is not a relief which can be sought to quash, compel, or prohibit internal corporate decisions or transactions made between private individuals.
4. The alleged disciplinary proceedings forming the subject of the applicant’s application for judicial review does not fall within the regime of public administrative actions that can be subjected to judicial review.
5. The application for order of certiorari is not tenable because the same would require the honourable court to interfere with the management and internal structures and decisions of a private entity.
6. The application for order of mandamus is also untenable for the reason that the same would amount to the honourable court assuming a managerial role in the internal affairs of the respondent.
7. The entire application for judicial review is misconceived, incurably defective, bad in law and an abuse of the process of the court and should be dismissed with costs.

18. The court shall proceed to consider the grounds first in line with the Court of Appeal decision in Owners of Motor Vessel “Lilian s” –vs- Caltex Oil (Kenya) Limited 1989] where the Court held thus: -

Jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Order 53 Rule 3(1) reads: -

When leave has been prayed to apply for an order of mandamus prohibition or certiorari, the application shall be made within twenty-one days by Notice of Motion to the High Court and there shall, until the judge granting leave has otherwise directed by at least eight clear days between the service of the notice of motion and the day named therein for hearing.”

19. The respondent submits that the timelines for filing of the substantive motion are couched in mandatory terms.



20. That in this matter, the 21 days dictated by the law expired on 27th June 2024 but the Ex-parte applicant filed the substantive notice of motion on 1st July 2024 out of the statutory timing. This late filing breached the statute and express direction in the court order of the court.
21. In the case of *Ado versus Special District Commissioner Kisumu & Another* [1983] KLR 163 and in the case of *Nyaga versus Republic* [1990] KLR 291 it was observed as in the present case that the Ex-parte applicant filed the Notice of Motion having not applied for extension of time to do so. The courts went on to state however, the time prayed under statute and dictated by the court to be applicable lapsed before the application was filed. That the same cannot be extended by the court either on application by the Ex-parte applicant or on the court's own motion. The respondent submits that the present application is therefore null and void.
22. The respondent submitted further that as was stated by the Supreme Court in *Raila Odinga versus IEBC and others* [2013] *Zacharia Okoth Obado versus Edward Akongo Oyugi and 2 others*: -

“Article 159(2)(d) of the Constitution was never meant to oust the obligation of litigants to comply with procedures imperative as they seek justice from the courts.”
23. That the notice of motion be struck out for breach of express statutory provisions of Order 53 Rule 3(1) of the *Civil Procedure Rule* 2010.
24. The Applicant counters this objection by citing the Supreme Court decision in *Prexidis Namoni Saisi and 7 others versus Director of Public Prosecution and 2 others* (Petition 39 & 40 of 2019 Consolidation) [2023] KESC eKLR, in which the court held that post the *Constitution* of Kenya 2010, judicial review was no longer a common law prerogative, but was entrenched in the Constitution to safeguard the constitutional principles, values and purpose. That Article 23(3)(f) provided orders of judicial review as one of the available remedies concerning the enforcement of the Bill of Rights. That Article 47(1) of the *Constitution* guaranteed every person the right to administrative action that was expeditious, effective, lawful, reasonable and procedurally fair and the court under Article 165(6) had supervisory jurisdiction over all persons, human and corporate with regard to all administrative actions done by them that may adversely affect the rights of others. That the *Fair Administrative Action Act* No. 4 of 2014, was enacted to ensure better enforcement of the rights protected under Article 47 of the *Constitution* and the restriction under the section 53 of *Civil Procedure Rules* does not oust the jurisdiction of this court to adjudicate and enforce the stated rights.
25. That Article 162(2) of the *Constitution* vests this court with jurisdiction to entertain and determine judicial review application of this nature to protect and enforce the rights of individuals and organizations of whatever nature that do or refrain from doing acts to the loss and detriment of others. That section 4(3) of the *FAA Act* allows this application to be brought as did the Ex-parte applicant herein to protect the rights of the Ex-parte applicant from being violated by the respondent.
26. The court notes that judicial review remedies envisaged under Article 23(1) of the *Constitution* of Kenya 2010 are specifically to be litigated before courts including this one by way of petitions under the ‘Mutunga’ Rules.
27. Where a litigant chose specifically to bring a judicial review application under Order 53 of the *Civil Procedure Rules* and section 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya, the litigant is bound by the express and mandatory provisions under Order 53 Rule 1 and section 8 and 9 of the *Law Reform Act*, Cap 26 Laws of Kenya.



28. The applicant has not provided any authority which states the contrary to the strict adherence to the provided statutory time lines as in which leave is sought, substantive motion filed and matter adjudicated and determined.
29. This preliminary objection is valid and is upheld by the court and the judicial review application which was filed outside the 21 days period provided by statute upon grant of leave is void and is struck out accordingly.
30. The 2nd preliminary objection that judicial review proceedings cannot be sustained against a non-governmental organization such as the Respondent is clearly without merit. Any person or legal entity capable of taking or refraining from taking action that may adversely violate the right of another is subject to judicial review proceedings and the orders of mandamus, certiorari and mandamus that may issue pursuant to such litigation. This objection is accordingly, misconceived and is dismissed.
31. The court however, hopes that the Oxfam Human Resource Policy has set reasonable timelines upon which warnings issued to employees expire and become non-applicable to any future conduct on matters affecting the specific employee.
32. The court observes that the parties herein are still in mutual work relationship and it is in the interest of justice that each party bears their own costs of the suit.

DATED AT NAIROBI THIS 5TH DAY OF DECEMBER 2024

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Tole for Ex-parte Applicant

Mr. Obura for respondent

Mr. Kemboi – Court Assistant

