



REPUBLIC OF KENYA



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**Maubi v Rural Electrification and Renewable Energy Corporation (REREC) & another
(Cause E672 of 2022) [2023] KEELRC 651 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 651 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E672 OF 2022
K OCHARO, J
FEBRUARY 21, 2023**

BETWEEN

COLLINS MAUBI APPLICANT

AND

**RURAL ELECTRIFICATION AND RENEWABLE ENERGY CORPORATION
(REREC) 1ST RESPONDENT**

FRED ISHUGAH 2ND RESPONDENT

RULING

1. Through a Notice of Motion Application dated October 3, 2022 the Applicant sought for the following orders:
 - a. Spent
 - b. Spent
 - c. The Honourable Court be pleased to exempt the Applicant from the Appellate procedure of the 1st Respondent.
 - d. Pending hearing and determination of the suit filed in this matter, this Honourable Court be pleased to compel the Respondent to reinstate the Claimant to the position of Senior Accountant group Rea 6.
 - e. The Honourable Court do issue any other orders it may deem just, fit and expedient to award in the interest of justice.
 - f. Cost of the application be provided for.
2. The application is grounded on the grounds obtaining on the face of the supporting affidavit sworn by the Applicant on the October 3, 2022.



3. The Respondent opposed the application upon basis of the grounds of opposition dated October 17, 2022.
4. On the 6th of October 2022 when the application came up for hearing, this court directed that it be canvassed by way of written submissions. The parties complied, their written submissions are on record.

The Application

5. The Claimant/Applicant stated that at all material times to this matter he was an employee of the Respondent in the position of Accountant Rea/Job Group 6. He was confirmed into the said employment on the October 6, 2016.
6. The Claimant/Applicant further stated that he was summarily dismissed from the said employment on the September 6, 2022 through a letter, of the same date.
7. The Claimant/Applicant confirmed that in accordance with the Respondent's Human Resource Manual Practice, and considering job group any disciplinary hearing against him was supposed to be conducted and a decision, thereof made, by the Chief Executive Office of the 1st Respondent.
8. Contrary to the stipulation of their own manual, clause 13.5.2, the 1st Respondent allowed the disciplinary process to be handled by its board instead of the Chief Executive Officer. He contends that the proceedings were conducted in a hasty manner and that the Board was skewed towards his dismissal.
9. The Claimant/Applicant further stated that under the manual, any appeal against the decision of the Chief Executive Officer would lie to the Board, yet the Board which is supposed to be the appellants forum for him has already handled the matter. He cannot appeal to same body that dismissed him.
10. It is further contended that this action by the Respondent has deprived him, the right to appeal. Consequently, it is clear that he will not get any justice through the Respondent's internal mechanism.
11. The application herein meets the conditions necessary, to attract an order exempting the Claimant/Applicant from the doctrine of exhaustion of internal mechanism by dint of section 9(4) of the *Fair Administrative Action Act*.

The Claimants/Applicant Submissions

12. The Claimant/Applicant identifies two issues for determination in the instant applications thus;
 - a. Whether the applicant should be exempted from the doctrine of exhaustion of internal remedy;
 - b. Who should bear the costs of this Application.
13. On the 1st proposed issue the Claimant/Applicant submitted, that Section 9(4), of the *Fair Administrative Action Act* bestows upon this court the authority to exempt a party from applicability of the doctrine of exhaustion.
14. To buttress the above stated submission reliance was placed on the holding in the matter of the *Mui Coal Basin Local Community* [2015] EKLRL, thus;

“The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution that of a matrix dispute resolution system in the country. Our Constitution



creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice JB Ojwang has felicitously called an "Ascendant Judiciary". The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases.”

15. As regards the power to exempt, the claimant/applicant cited the holding in *Republic v Kenya School of Law & 2 others exparte Kgaborone Tsholofelo Wekesa* [2019] eKLR thus;

“From the above jurisprudence at least two principles can be discerned. First, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests - including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies [23] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.”

16. On what constitutes exceptional circumstance the claimant/applicant placed reliance on the *Kenya School of Law & 2 others exparte Kgaborone Tsholofelo Wekesa* [2019] eKLR.
17. The claimant/applicant argues that the facts of the instant matter complained reveals that there obtains exceptional circumstances that should form the basis of a grant of the exemption.
18. The Respondent in its dismissal letter directs the Appellant to appeal to the same Board that dismissed him from employment, a thing that is contrary to the tenets of natural justice.
19. It is further submitted that Article 47(1) of the *Constitution of Kenya* Section 2 read together with Section 4(1) of the *Fair Administrative Act*, bestows upon every person a right to administrative action that is expeditious, efficient, lawful reasonable and procedurally fair. Without any justification, the Respondents breached the provision of its own Human Resource Manual and allowed a body that was not supposed to conduct a disciplinary hearing against the Claimant to. It is unreasonable and unfair to require the Claimant to appeal to the same body.
20. The Respondent asserts and rightfully so, that his Constitutional rights have been violated and redress thereon can only be secured in this court. The decision of *William Odhiambo Ramogi & 3 others Vs Attorney General & 4 others* [2020]eKLR, was cited to buttress this point.

The Respondent's Submissions

21. The Respondent argues that clause 13.5.1 of the manual bestows the power to exercise disciplinary control removal of an employee in its board. The manual enables the Board to delegate disciplinary powers where appropriate to the CEO and to the General Manager. As the body vested with disciplinary control over employees, the Board is entitled to deal any and all disciplinary cases, unless it delegates such authority. Consequently, the Board was entitled to deal with the Claimant's matter.
22. It is further argued that there is no stipulation in the manual that prohibits the Board from dealing with a disciplinary process of an employee in any grade.



23. It is not true that the Claimant/Applicant has been left with no chance of appeal. The decision by the Board is appealable to the Public Service Commission. He cannot therefore urge for an exemption from the doctrine successfully. To bolster their point the Respondent puts reliance on the Court of Appeal decision in Secretary County Public Service Board & another v Hulbhai Gedi Abdille [2017]eKLR.
24. The Respondent has extensively submitted on the prayer sought for reinstatement pending the hearing and determination of this suit. The court can only state that it has noted the submissions. Reasons for this approach shall emerge shortly thereafter.

Analysis and Determination

25. Considering the material placed before this court by the parties, I distil one broad issue for determination, whether the claimant/Applicant has made a case for the grant of the orders sought.
26. This Court will first render itself on the prayer for reinstatement pending the hearing and determination of the claim, herein. I have carefully considered the material placed before me; the grounds on the face of the notice of motion; the supporting affidavit and the submissions, and it strikes my mind that the Claimant/Applicant has not dwelt at all on the prayer, in his submissions. Clearly, the quest for reinstatement pending the suit was abandoned.
27. Interim reinstatement is only granted on exceptional circumstances. The duty is upon the employee seeking the reinstatement to demonstrate existence of the circumstances that can attract an order for reinstatement pending a suit. There cannot be any doubt that in the instant case the Claimant/Applicant did not place before this court any material where from the existence of the circumstance can be discerned.
28. By reason of the premises, I decline to grant the order for interim reinstatement.
29. I now turn to the doctrine of exhaustion and whether the Applicant can in the circumstance of this matter be exempted from being bound by it. Section 9(2) of the Fair Administrative Action Act provide for the foundation for applicability of the doctrine. The provision directs that the High Court under sub sections (1) shall not review an administrative action or decision under the Act, unless the mechanism including Internal mechanism for appeal or review and all remedies available under any other written law are fully exhausted. Connected to this provision is sub section (3) which provides;

“The High Court or the subordinate court shall if it is not satisfied that the remedies referred to in subsection 2 have been exhausted, direct the Applicant shall first exhaust such remedy before instituting proceedings under sub-sections (1).”

There provisions are obligatory. However, the law provides for an exemption to the command postulated in the above stated provisions. The exemption is found in sub sections (4) thus;

“Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”
30. The exemption saves the court’s power to do justice by overlooking the dictates of the doctrine, whenever the justice of a particular case demands. In order for the court to approach a matter as such, there must be demonstrated exceptional circumstances. In my view what constitutes exceptional circumstances depends on the facts of each case.



31. In the case of *Republic v Kenya School of Law & 2 others* (supra) the Court stated and I agree: -
40. In my view and with great respect, what constitutes exceptional circumstances depends on the facts of each case and it is not possible to have a closed list. Article 47 of the Constitution is heavily borrowed from South African equivalent legislation, jurisprudence from South Africa Courts interpreting similar circumstances and provisions are of greater value, relevance said may offer more useful guidance.
41.
42. Additionally, in yet another South African decision, the Court said the following about what constitutes exceptional circumstance: -
- “what constitutes exceptional circumstances depends on the facts and circumstance of the case, and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and for where its pursuit would be futile, a court may permit a litigant to approach the court directly. so too where an internal appellate mechanism has developed I rigid policy which renders the exhaustion futile.”
32. There is no dispute that the Claimant was subject to the provisions of the Respondent’s Human Resource practice manual. Too, that he was in the employment of the Respondent under job group Rea.6. Clause 13.5 of the manual provided for “Disciplinary power and Appeal.” The gravamen of the Claimant’s application herein is his contention that the Respondent deliberately violated its own manual to his prejudice, extinguishing the avenue of appeal that was otherwise available to him under the manual.
33. Owing to the above stated premise It is imperative therefore to bring forth in extenso, the stipulations of the clause: -
- 13.5.1 the power to exercise disciplinary control and removal of employee are vested in the Board. The Board shall delegate disciplinary powers to the CEO as appropriate. They may also delegate powers to the General Manager.
- 13.5.2. The CEO will handle and determine disciplinary matter of members of employees out of the purview of the Board who are in grades REREC6 to REREC 10 as guided in the disciplinary procedure. Appeals from these cases shall with the Board or appeals Committee who will submit the deliberation for direction and further guidance.
- 13.5.3 The discipline of employees in REREC 1 to REREC5 shall fall under the purview of the Board of Directors.
- 13.5.4 All appeals or disciplinary matters falling under the purview of the Board shall be to the Public Service Commission (PSC) or as otherwise delegated.
34. I have carefully considered the stipulations in the clauses, in my view the 1st Respondent’s Board’s authority to deal with disciplinary matters concerning employees who fall in grades REREC 6 to REREC 10, is fully delegated to the CEO. There appears not to be a retention of any residual power for the Board to pick a few disciplinary matters for some employees falling and these grades and handle them outside the authority as an appellate forum.
35. I have really agonized over the Respondent’s submission the Board has the authority to deal with any disciplinary matter of any employee, the job category of that employee notwithstanding. I find



considerable difficulty in understanding the rationale for this kind of reasoning, with great respect. What will be the criteria of picking the matter for dealing outside the Board's appellate authority? If such were to be allowed wouldn't it amount to treating employees differentially under same circumstances? Couldn't it breed diminishment of the purpose for the categorization brought forth in the clause, and stir abuse of authority?

36. The manual is clear, the only avenue of appeal for employees of the job group like the Claimant's is to the Board not to the Public Service Commission. There is no exception created under the manual. I doubt whether appeal by such as employee direct to the Public Service Commission will be well anchored.
37. Considering that the issue of the appeal process and how the 1st Respondent handled it is at the center of the Claimant's/applicant's case, and doing the best I would to be measured in my pronouncement to avoid an impression of pre-Judgment on the issue, the foregoing is all I can say for now on the issue.
38. The 1st Respondent seem to have pushed the Claimant/Applicant off the rail in respect of his right of appeal under the manual. Consequently, in the circumstances of this matter I hold that pursuit of the appeal before the Board would not be effective. It would be futile.
39. By reason of the premises, I am persuaded that the Claimant/Applicant has made a case for an exemption from being bound by the doctrine of exhaustion. He is allowed to approach this court directly. The suit herein is deemed duly filed. Costs of this application shall be in the cause.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2023.

OCHARO KEBIRA

JUDGE

In the presence of

Mr. Songori for the Respondent.

Mureithi for Wamboi for the Claimant.

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.

OCHARO KEBIRA

JUDGE

