



Republic v Lake Basin Development Authority; Chere (Exparte Applicant) (Judicial Review E015 of 2022) [2023] KEELRC 675 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 675 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E015 OF 2022
CN BAARI, J
MARCH 16, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

LAKE BASIN DEVELOPMENT AUTHORITY RESPONDENT

AND

FREDRICK ONYANGO CHERE EXPARTE APPLICANT

JUDGMENT

1. This judgment relates to the *ex-parte* applicant's notice of motion application dated October 27, 2022. The applicant seeks the following reliefs;
 - a. That the honourable court be pleased to grant an order of judicial review by way of *certiorari*, to bring before this court the respondent's decision dated September 9, 2022, and proceedings leading to the decision, for purposes of having it quashed and annulled together with all consequential orders, if any, made thereon by the respondent pursuant to the said decision.
 - b. That the honourable court be pleased to grant an order of judicial review by way of *mandamus* compelling the respondent, its agents or any one such person acting pursuant to that decision, to reinstate the applicant to his previous position held before the letter dismissing him from employment and to compute and release the ex parte applicant's salary which was unlawfully withheld between March 15, 2022, being the date he was placed on suspension with no pay and September 9, 2022, being the date of termination.



- c. That the honourable court be pleased to grant an order of judicial review by way of prohibition restraining the respondent from purporting to hear, review and determine the disciplinary proceedings involving the parties herein in the manner that it was heard, as complained of by the applicant, unless it complies with all the applicable laws and principles relating to such an exercise, if at all, it should be found necessary to hear and determine the same after these proceedings.
 - d. That the costs of this application be provided for.
2. The application is supported by grounds on the face of the motion. The crux of the application is that until September 9, 2022, the applicant worked as the Chief Manager-Human Resources and Administration in the respondent's establishment, but was terminated from service vide a letter signed by the respondent's managing director, who purported to rely on the recommendations of the disciplinary committee to summarily dismiss the applicant.
3. The ex parte applicant further avers that the Managing Director purported to terminate him from employment, when the said decision is a preserve of the respondent's board, whose term had expired having been appointed on February 7, 2019.
4. The respondent opposed the motion *vide* a replying affidavit dated November 29, 2022, and a supplementary affidavit sworn on December 1, 2022.
5. The respondent avers that despite communication to the ex parte applicant that he was to remain on leave until his leave days were over, he misconducted himself and disrupted the normal operations of the respondent by forcefully occupying a seat at the accounts section and thereby displacing the occupants of the office, appropriating himself a computer allocated to accounts section and threatening to break open the doors to the office occupied by the Acting Director of Corporate services.
6. The respondent avers that the ex parte applicant was issued with a show cause letter for his said conduct, but that he failed to show cause, leading to his suspension pending disciplinary action.
7. The respondent further avers that due to the ex parte applicant's job group, the respondent requested its parent ministry to nominate senior officers from the ministry to sit in the disciplinary committee. It is the respondent's position that the disciplinary committee conducted disciplinary action against the ex parte applicant and recommended his summary dismissal, following which a letter of dismissal was issued upon seeking the concurrence of the Ministry.
8. Parties canvassed the application through written submissions.

The Ex Parte Applicant's submissions.

9. The ex partes applicant submits that the law as contained in order 53 rules 3 and 4 of the [*Civil Procedure Rules*](#) is that copies of the statement accompanying the application for leave, shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.
10. It is the ex parte applicant's submission that a supporting affidavit is not a requirement when filing the notice of motion, when leave has been granted. It is his further submission that the court by law may allow further affidavits to be used, if they deal with new matters arising out of the affidavits of



any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits.

11. The applicant submits that for the reason foregone, the motion is not in any way defective as submitted by the respondent. The applicant sought to rely in the position taken by Honourable Justice G V Odunga in *Republic v Chief Magistrates Court Thika & another ex-parte applicant Joseph Kamunya Kinuthia* [2016] eKLR, where he held thus:

“It is trite that there is no place for a supporting affidavit in the substantive application for judicial review and the only affidavit provided for is the affidavit verifying the facts which ought to be detailed and contain all the facts relied upon by the application which is filed with the application for leave.”
12. The ex parte applicant further submits that the objection raised by the respondent is unmerited and unsubstantiated, and the instant application is properly before this court having been supported by the very facts as presented and contained in the ex-parte applicant’s chamber summons, statement of facts and verifying affidavit filed at the leave stage.
13. It is the applicant’s submission that the orders sought in the instant notice of motion are anchored on section 8 and 9 of the *Law Reform Act*, as read with order 53 of the *Civil Procedure Rules*, which sections, allow a party who is aggrieved by the decision-making process of a public body, such as the respondent, to institute similar proceedings to challenge that process leading to the decision that he complains of.
14. It is the *ex-parte* applicant’s position that the decision of the respondent is tainted with illegality and procedural impropriety warranting the orders sought of *certiorari*, *mandamus* and prohibition.
15. It is the *ex-parte* applicant’s submission that his grievance is with the manner in which the respondent has violated its own Human Resource Policy and the *Public Service Commission Act*, in purporting to subject him to a disciplinary process, through a body which lacked the jurisdiction to do so in the first place, since there was no board in place.
16. It is the applicants further submission that the respondent’s decision to suspend the *ex-parte* applicant is illegal and procedurally improper, since it failed to follow the elaborate procedure contained in its own policy.

The Respondent’s Submissions

17. It is submitted for the respondent that the *ex-parte* applicant failed to serve the statement of facts as required by law, and neither have they sought time to serve the same upon the respondent. The respondent had reliance in *Patricia Cherotich Sawe v IEBC & others* (2015) eKLR, for the holding that gaps in judicial review applications cannot be cured by article 159 of the *Constitution*.
18. The respondent submits that the Managing Director carried out investigations pursuant to clause 12.2.26(i) of the Human Resource Manual, where the relevant staff made written internal memos indicating that they were prevented from carrying out their duties by the ex parte applicant when he came back from leave before his leave was over, and sat on people’s offices and desks and allocated himself computers preventing others from working.
19. The respondent submits that the process on whether or not to initiate investigations on the alleged violation of contract of employment by the ex parte applicant, does not need the approval of the board.



20. The respondent further submits that under the *Interpretations and General Provisions Act* cap 2 of the Laws of Kenya, the appointing authority has the power to also dismiss as it is the parent Ministry that appoints the board and with that power, it is clear that in the absence of the board, the Ministry has the power to carry out the functions of the board.
21. The respondent submits that the whole disciplinary process was not wrong, but only where the board's input on the HRMAC report is required.

Determination

22. Order 53 rule 4 of the *Civil Procedure Rules* states: -

“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

23. The respondent's contention that the ex parte applicant's motion is fatally defective on the basis that it is not supported/accompanied by a statement of facts and a supporting affidavit is not supported by the provisions of the law. The statement of facts envisaged under order 53 rule 4, is in respect of the application for leave and not the substantive notice of motion.

24. In *Republic v Land Disputes Tribunal Court Central Division and another ex-parte Nzioka* [2006] 1 EA 321 the court held thus:

“There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the notice of motion, and indeed there is no requirement that the motion be filed simultaneously with any other document.”

25. Under order 53, rule 4, it is required that the motion be served with the documents filed with the application for leave, and the grounds to be relied on in support of the motion, are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement.
26. As correctly submitted by the ex parte applicant, no other documents need be to be filed with the motion. However, order 53, rule 4 (2) allows an applicant to file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the respondent.
27. I find and hold that order 53 has no legal requirement for filing a statement of facts and/or supporting affidavits, and the ex parte applicant's case is complete at leave stage. I further find that the ex parte applicant's motion is not defective by the mere reason that it is not accompanied by a statement of facts or supporting affidavit for the reasons set out above.
28. On whether the ex parte applicant merits grant of judicial review orders, the question is whether the decision to summarily dismiss him is tainted with illegality, irrationality and procedural impropriety (See *Pastoli v Kabala District Local Government Canal & others* (2008) 2EA 300 at pages 300-304).
29. In *Republic v National Land Commission and another; Ex parte Farmers Choice Limited* [2020] eKLR, also cited by the applicant, the court explained the concept of judicial review, whilst relying on the case



of *Municipal Council of Mombasa v Republic Umoja Consultants Ltd*, Nairobi civil appeal No 185 of 2007 (2002) eKLR, where the Court of Appeal held that: -

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review.”

30. The applicant’s position is that the decision to dismiss him was made by the disciplinary committee, and not the board of the respondent having been an employee of the board by virtue of his job group at the time of dismissal.
31. Although the respondent relies on the provisions of the *Interpretations and General Provisions Act* cap 2 of the Laws of Kenya, and proceeding to conclude that for reason that the board was not in place, the ministry could dismiss employees of the respondent on the basis that it appoints the board, nothing could be farther from the truth. The ex parte applicant is not an employee of the ministry, but that of the board of the respondent. The Ministry cannot in my view, take that which it did not give.
32. Further, the respondent has in its submission alluded to the fact that the disciplinary process was not done wrongly, save that the input of the respondent’s board was not obtained. This clearly points to the fact that the respondent/Managing Director was aware that the board needed to approve the recommendation of the disciplinary committee before he could issue the dismissal letter.
33. The Court of Appeal in *Pastoli v Kabala District Local Government Canal & others* (2008) 2EA 300 at pages 300-304, stated that a court must examine how the decision was arrived at, whether those who made the decision had the power to make it, whether the persons affected by the decision were heard before it was made, and whether the decision-making body took into account relevant or irrelevant matters/factors.
34. Even assuming that the respondent’s parent ministry had the power to act in the absence of a board, no authority or approval whatsoever, was given by the ministry in respect of the recommendations of the disciplinary committee, as to allow the Managing Director to issue a letter of dismissal to the ex parte applicant.
35. Consequently, I hold that the respondent’s Managing Director usurped the power of its Board of Directors, rendering the decision to summarily dismiss the ex parte applicant a nullity.
36. In the upshot the court orders as follows: -
 - a. That an order of judicial review by way of certiorari, be and is hereby issued to bring before this court the respondent’s decision dated September 9, 2022, and proceedings leading to the decision, for purposes of being quashed, and annulled together with all consequential orders made thereon, by the respondent pursuant to the that decision.
 - b. That an order of judicial review by way of *mandamus* be and is hereby issued compelling the respondent, its agents or any other person acting pursuant



to the decision to dismiss the applicant, to reinstate the applicant to the previous position held before the letter dismissing him from employment was issued, and to compute and release the ex parte applicant's salary which was unlawfully withheld between March 15, 2022, being the date he was placed on suspension with no pay and September 9, 2022, being the date of his summary dismissal.

- c. That an order of judicial review by way of prohibition be and is hereby issued restraining the respondent from purporting to hear, review and determine the disciplinary proceedings involving the parties herein, in the manner that it did, and as complained of by the applicant, unless it complies with all the applicable laws and principles relating to such an exercise, if at all, it should be found necessary to hear and determine the same after these proceedings.
- d. That the costs of this application shall be borne by the respondent.

Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16TH DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

