



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KERICHO

JUDICIAL REVIEW NO. E001 OF 2021

IN THE MATTER OF

AN APPLICATION BY EDITH CHERONO FOR THE JUDICIAL REVIEW

ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF

THE DECISION OF THE KERICHO PUBLIC SERVICE BOARD TO

EXCLUDE EDITH CHERONO FROM EMPLOYMENT AS AN ECDE TEACHER

AFTER SHE WAS LEADING IN THE INTERVIEW CONDUCTED BY THE BOARD

AND

IN THE MATTER OF

ARTICLE 23 (3) (F) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF

SECTIONS 8 (2) AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF

THE CONSTITUTION OF KENYA, 2010

-BETWEEN-

REPUBLIC.....APPLICANT

KERICHO COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

KERICHO COUNTY GOVERNMENT.....2ND RESPONDENT

BEATRICE CHERONO.....3RD RESPONDENT

AND

HON. NANCY CHEBET KIMETO.....INTERESTED PARTY

JUDGMENT

1. On 5th November, 2021, I granted the applicant leave to apply for orders of certiorari, mandamus and prohibition as sought in her chamber summons dated 3rd November 2021. I also directed the application for the leave to operate as stay pending the hearing and determination of the intended motion be heard inter partes on 18th November 2021.
2. On the said date the applicant told the court that she had filed the Notice of Motion dated 16th November 2021 and asked to have the Motion fixed for hearing. The court fixed the Motion for hearing on 7th December, 2021 and gave the respondent's leave to file reply to the Motion before the said date. The applicant was also given leave to respond to any new issues that may be raised by the respondents.
3. On 7th November, 2021, the applicant told the court that the respondents had not filed any response to the Motion. However, the defence counsel told the court that he had just received instructions the previous day. Therefore, he sought leave to file and serve response to the Motion. The court gave a last adjournment and leave to the respondent to file and serve the response. The applicant was also given 2 days of service by the respondent to file and serve further affidavit.
4. On 16th December 2021, the applicant confirmed that she had received respondent's response that morning and sought 3 days to file further affidavit. The court allowed the request but directed that each party had 14 days to file submissions to dispose of the Motion starting with the applicant.
5. The parties did not comply with the directions until 17th March 2022 when they appeared before **Wasilwa J** and fixed the matter for judgment on 21st April 2021. The above background is very important because after considering the replying affidavit filed by the respondents and the interested party and their written submissions, it is easy to notice that they relate to the application for leave which was granted and the applicant filed the Notice of Motion dated 16th December, 2021.

SUMMARY OF FACTS

6. The claimant is an ECDE teacher and has been performing her duties in Siwot ECDE Center, a Feeder of Kabusienduk Primary School in Kericho County, since 2018. In December 2020, the 1st respondent advertised vacancies of ECDE teachers in several Centers including the one where the applicant was teaching.
7. The applicant put in her application and she was called for interview on 20th January 2021 where she emerged the best candidate with 65.5 points. The 3rd respondent was the second with 62.5 points.
8. The applicant averred that as early as 4th January 2021, the interested party was interfering with recruitment process in order to have the 3rd respondent appointed as a reward to her husband who was the interested party's chief campaigner during the 2017 elections.
9. In February 2021, the applicant learned from a teacher in a neighbouring school that people had been called to collect appointment letters from the county offices. She had not received similar message in her phone and on 15th February 2021 she went to the county offices to enquire why she had not received the invitation to pick her appointment letter and that is when she was informed that the 3rd respondent was the preferred candidate. She was then advised to try her luck in the next interview on the 7th May, 2021.
10. The applicant served a demand letter on the 1st respondent and in response the 1st respondent's officials visited the school on 12th May 2021 and only found the 3rd respondent. Again, the 1st respondent sent other officers to Siwot ECDE Centre to investigate the issue but when the applicant sought to know their names, they told her that she was rude, annoying and wasting their time. They also told her that she could do nothing and even by sending lawyers since the county has an army of lawyers to defend it.
11. In view of the foregoing matters the applicant contends that she was not treated fairly in the said recruitment process because after emerging the top candidate the employer preferred another candidate. She contends that she was discriminated on the basis of political alignment.
12. She further averred that the respondents acted *ultra vires*, illegally and irrationally in the decision to deny her the opportunity despite leading in the interview for the ECDE teacher. Further, she averred that the respondent acted with unreasonableness, that is, the decision was outrageous and in defiance of logic and accepted moral standards.
13. In view of the foregoing matters, she seeks the following orders in the Notice of Motion dated 16th November 2021: -

1) That an order of certiorari do issue declaring that the whole process under which the 1st and 2nd respondents herein reached a decision to employ the 3rd respondents, Beatrice Cheron TSC No.728309, to the position of ECDE teacher at Siwot ECDE center a feeder school of Kabusienduk Primary School in Kericho County herein at the expense of exparte applicant be declared

as arbitrary procedural impropriety and according quashed.

2) That an order of prohibition do issue prohibiting Kericho County Public Service Board and Kericho County from proceeding with the Employment of the said Beatrice Cheron in place of the ex-parte applicant in the position of ECDE Teachers at Siwot ECDE Center a feeder school for Kabusienduk Primary School in Kericho County and accordingly set aside and/or vacate employment of the 3rd respondent, Beatrice Cheron as ECDE Teacher at Siwot ECDE Center a feeder school of Kabusienduk Primary School in Kericho County.

3) That an order of mandamus do issue commanding and/or directing the 1st and 2nd respondents to act in accordance to the constitution, to the fair labour practices and the law and appoint the ex-parte applicant to the position that she interviewed and qualified for as an ECDE teacher at Siwot ECDE center, feeder school of Kabusienduk Primary School in Kericho County.

4) That an order of mandamus do issue commanding and/or directing the 1st and 2nd respondents to act in accordance to the constitution and fair labour practices and the law and back date the appointment of the ex-parte applicant to the day she emerged the best candidate of the position that she interviewed and qualified for as an ECDE teacher at Siwot ECDE center, feeder school of Kabusienduk Primary School in Kericho County.

14. The 1st and 2nd respondent filed replying affidavit sworn on 15th December 2021 by their County Attorney, **Mr. Gideon Mutai**. The affidavit states that the affidavit is in opposition to the application which he refers as the chamber summons dated 3rd November 2021. He deposes that the application is incompetent, misleading and abuse of the court process.

15. He denies that the claimant garnered 65.5 points in the interview done on 20th January 2021 and averred that the said assertion was false. He also dismissed as hearsay the allegation that the applicant received information that the interested party was interfering with the recruitment process.

16. Finally, he denied that successful candidates have been issued with appointment letters and averred that the 1st respondent suspended the whole process of recruitment until the matter is concluded. The affidavit annexed copy of letter from the 1st respondent dated 15th December 2021 to that effect.

17. The interested party filed replying affidavit sworn by herself on 14th February 2022 to oppose the application dated 3rd November, 2021. In brief she avers that the application is incompetent in law and an abuse of the court process.

18. She further denies that the applicant emerged the best candidate in the interview held on 20th January 2021 with 65.5 points. She further denied the allegation that she interfered with the recruitment process and averred such allegation was false.

19. She further averred that recruitment of ECDE teachers is a function for the 1st respondent and does not fall under her role in the County Assembly, that is, oversight, representation and legislation. However, she acknowledged that the position in issue was advertised but later withdrawn vide a memo dated 15th December 2021.

20. On 16th February 2022 the applicant filed a supplementary affidavit sworn on 21st January 2022. In brief, the applicant dismissed the Replying Affidavit by **Mr. Mutai** as general denials which do not go to the root of the application for review. She contended that the respondents are in possession of the original score sheet and they have failed to annex to the affidavit. They have also not disputed the copy of the score sheets which she had annexed to her verifying affidavit of 3rd November, 2021 as "ES2 "1".

21. She maintained that the 3rd respondent was hired through a process that was illegal and irrational because she was not the best candidate. Finally, she averred that she was never served with any letter informing that the recruitment process was suspended.

22. The application was canvassed by written submissions.

SUBMISSIONS

23. The applicant based her submission on the case of **R v Law Society Disciplinary Tribunal & Another, Exparte Muema Kitulu (2018) eKLR** where the court held that the applicant in a judicial review must show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

24. On illegality, the applicant submitted that a public body vested with statutory power must not exceed or abuse its powers and it must act in good faith. She contended that the 1st respondent herein, not only exceeded its powers but also abused the powers, acted in bad faith and unreasonably.

25. In the circumstances, she urged the court to intervene to ensure that the respondents comply with the law. She maintained that the 1st and 2nd respondent act of sending messages to the successful candidates to pick appointment letters while skipping her was illegal and contrary to the provisions of the law or its principles.

26. As regards the issue of irrationality, the applicant submitted that the 1st and 3rd respondent have acted with unreasonableness by denying her a deserving appointment letter after emerging the best candidate and purporting to appoint a candidate who scored lower points at the interview. She further argued that the 1st and 2nd respondent did not act impartially in their decision but with bias towards the 3rd

respondent, who is wife to the interested party's chief campaigner in the 2017 elections.

27. She also faulted the conduct of the county officers who went to investigate the matter on the ground because they instead focused on harassing and intimidating her contrary to the dictates of **Article 10 (2) and 27 of the Constitution of Kenya**. She also faulted the appointment of the 3rd respondent because the 1st and 2nd respondent denied her equal opportunity of being awarded employment on merit like other successful candidates. She urged that the respondents have acted contrary to **Section 5 (2) of the Employment Act** which enjoins employer to promote equal opportunity to employment and strive to eliminate discrimination in employment policy or practice.

28. On the issue of procedural impropriety, the applicant submitted that his complaint was not treated fairly and due process was not followed to resolve the matter. She was not accorded any hearing on her complaint considering that she emerged the best candidate in the interview for the advertised position.

29. In conclusion, the applicant submitted that the decision by the 1st and 2nd respondent where they left out the best candidate and appointed another was a clear departure from the Rules of Natural Justice, arbitrary and unconstitutional. For emphasis she relied on **R v Commission on Administrative Justice Ex parte Stephen Gathuita Mwangi (2017) eKLR** where the court held that it is a principle of Natural Justice that a person shall not be condemned unheard but must be first accorded a hearing in the complaint made against him.

30. The applicant submitted that annexure 2"h" to the interested party's Replying Affidavit confirms that she indeed lodged a complaint to the 1st respondent on 15th February 2021 and the Board verbally promised to look into the matter. However, no response was given.

31. Finally, she submitted that Exhibit "GM-1" annexed to the Replying Affidavit of **Mr. Mutai**, 1st respondent's secretary admits that there was canvassing by the parties during the recruitment process. The applicant maintained that the respondents cannot deny there was interference with the process through canvassing. She urged that since the respondents have not named the parties who were canvassing then she is right to say that the canvassing was done by the interested party.

RESPONDENTS & INTERESTED PARTY'S SUBMISSIONS

32. The respondents and the interested party submitted on two issues, namely; First whether leave to institute judicial review should be granted and secondly whether the interested party was involved in the recruitment process.

33. On the first issue, they submitted that the applicant did not file with the leave application, the decision which is being challenged on this application. They submitted that in an application for leave, the applicant must demonstrate a *prima facie* case by showing that there exists an administrative decision that was unfair to the applicant.

34. For emphasis, they relied on the case of **Republic v Tongareri Land Disputes Tribunal** comprising **Basil Mukosi Makokha & 3 others (2008) eKLR**. Consequently, the respondents and the interested parties are of the view that the applicant has not established a *prima facie* case to warrant granting of leave to institute judicial review proceedings against them.

35. In addition, they submitted that the interested party has role in the appointment of ECDE Teachers to the County Public Service. Therefore, there is no way she could influence the decision of the 1st respondent as alleged by the applicant.

36. In view of the foregoing matters, they urged that the application herein is an abuse of the court process and should be dismissed with costs.

ANALYSIS AND DETERMINATION

37. There is no dispute that the 1st respondent advertised vacancies for ECDE Teacher in various centers in Kericho County. It is also a fact that the applicant applied for the vacancy at Siwot ECDE Center where she had earlier been teaching since 2018. The issues for determination are:-

- i. Whether an administrative decision or decisions have been made against the applicant.
- ii. Whether the decision warrants judicial review.
- iii. Whether the reliefs sought should be issued.

ADMINISTRATIVE DECISION(S)

38. The applicant alleges that she emerged the best candidate for the advertised position of ECDE teacher for Siwot Center with 65.5 points but her competitor was appointed despite scoring 62.5 points. The petitioner did not produce any letter of appointment that was issued to the 3rd respondent or any other documentary evidence to prove that indeed the 3rd respondent was appointed and she was sidelined.

39. **Mr. Mutai**, the County Attorney for the respondents in his Replying Affidavit confirmed that no letter of appointment was any candidate and annexed a letter by the Secretary/CEO of the 1st respondent indicating that the processing of application for Siwot ECDE was suspended after parties started canvassing for the position.

40. However, the letter did not talk about appointment for the other ECDE Centers. The respondents did not rebut the allegation that the top

candidate for the other centers were appointed. It follows that the respondents have indeed made two administrative decisions against the applicant.

41. First the board decided not to appointment the applicant alongside other candidates for the other ECDE Centers who emerged top during the interviews. In this case there is evidence filed by the applicant to show that she scored 65.5 points while her competitor scored 62.5 during the interviews held on 20th January 2021. The respondents did not dispute the copy of the score sheet and as such I treat it as authentic.

42. The second decision the respondents have made against the applicant is that after she complained about the failure to get her appointment letter and later filed this suit, the 1st respondent decided to suspend the processing of the appointment citing canvassing by parties as the reason. The said decision was essentially made to disadvantage the applicant because she was the only one due for the appointment after emerging the top candidate in the interviews. She had no reason to canvass.

43. In view of the foregoing matters, I find and hold that there exist administrative decisions made by the 1st respondent against the applicant. However, having considered the Replying Affidavit by the 1st and 2nd respondent, the court is satisfied that there is no administrative decision by the 1st and 2nd respondent by which the 3rd respondent was appointed the ECDE Teacher for Siwot ECDE Center.

REVIEW OF THE DECISIONS

44. The applicant contends that the failure to issue her with appointment letter as the top candidate for Siwot ECDE Center was discriminatory since the top candidates for the other centers were appointed. As already observed above, the respondents did not deny that allegation or even the 3rd respondent who did not oppose the application.

45. The applicant further faults the respondents' decision of failing to fairly consider her complaint that she was denied appointment due to canvassing by the interested party. Instead the 1st and 2nd respondents focused on harassing and intimidating her for instructing a lawyer to serve a demand letter. It has not been denied that the officers went to the ground and met the applicant after she served a demand letter.

46. What is not clear to the court is why the 1st respondent failed to issue the applicant with an appointment letter and opened room for the unspecified parties to canvass for the position which the Board had already declared the applicant winner by awarding her more points than the candidates.

47. I would say that the decision to suspend the process of appointing the applicant on ground that there were unspecified parties canvassing was unfair, unreasonable and contrary to **Section 5 (2) of the Employment Act** and the provisions of the constitution that deal with the principles of good governance and appointments in the public service.

48. **Section 5** of the said Act Provides that: -

“An employee shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.”

49. On the other hand, **Article 10 of the Constitution** provides that: -

“(1) The national values and principles of governance in this Article binds all state organs, state officers, public officers whenever any of them -

- a) **Applies...**
- b) **...**
- c) **Makes or implements public policy decisions.**

(2) The national values and principles of governance include: -

- a) **Patriotism.....**
- b) **Human dignity...Non-discrimination...”**

50. The court agrees with the applicant that she is a victim of discrimination in the hands of the 1st respondent. She has also not been treated fairly. She won in the interview which no one challenged. Other top candidates in other centers were appointed but her appointment process was suspended after what the 1st respondent calls canvassing by parties.

51. The foregoing decision was not only illegal but also irrational and unreasonable considering the facts set out by the parties. In the case of **R v Law Society of Kenya Disciplinary Tribunal, exparte Muema Kitulu, supra**, the court cited the case of **Pastoli v Kabale District Local Government Council & Others (2008), E.A. 300** where it was held that: -

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality: -

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi...Vs... Secretary of State for the Housing Department (1990) AC 876.”

52. I have already made a finding of fact that the decisions made by the respondents were illegal, irrational and unreasonable. Therefore, I proceed to hold that the said decisions warrant judicial review.

RELIEFS

53. In view of the foregoing, I enter judgment for the applicant granting her: -

a) Order of certiorari quashing the decision of the 1st respondent not to issue the applicant with an appointment letter as the top candidate in the interview made on 20th January 2021 for Siwot ECDE Center as it did to the other top candidates in various ECDE Centers. I further quash by order of certiorari the decision of the 1st respondent to suspend the appointment process for Siwot ECDE Center.

b) I further grant a prohibitory order prohibiting the 1st respondent from appointing or contemplating to employ the 3rd respondent as the ECDE teacher at Siwot Center, a feeder school of Kabusienduk Primary School in Kericho.

c) In view of the finding that the applicant was the top candidate in the interviews, I grant an order of mandamus compelling the 1st and 2nd respondent to issue appointment letter to the applicant forthwith as the ECDE Teacher Siwot Center, feeder school of Kabusienduk Primary School Kericho County.

d) The applicant is also granted costs and interest at Court rates.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF APRIL, 2022.

ONESMUS N MAKAU

JUDGE

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE