



**Republic v County Government of Kilifi; Dena (Exparte) (Judicial Review E001 of 2021) [2022] KEELRC 1575 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1575 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
JUDICIAL REVIEW E001 OF 2021**

**BOM MANANI, J**

**JULY 29, 2022**

**IN THE MATTER OF AN APPLICATION BY ALFRED SIFA FOR  
ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF ARTICLES 24 AND 47 OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS  
ACT NO 4 OF 2015**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO 17  
OF 2012**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT NO 11 OF 2017**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF KILIFI ..... RESPONDENT**

**AND**

**ALFRED SIFA DENA ..... EXPARTE**



## JUDGMENT

1. The application before me is filed pursuant to the leave granted to the Ex-parte Applicant on December 2, 2021 to commence Judicial Review proceedings against the Respondent. By these proceedings, the Ex-Parte Applicant challenges the lawfulness of the suspension handed to him on January 9, 2020 by the Respondent through its Chief Officer department of finance. The Ex-Parte Applicant also challenges the lawfulness of the prolonged disciplinary process by the Respondent against him.
2. The Ex-parte Applicant contends that the suspension and subsequent disciplinary process against him are in violation of article 47 of *the Constitution* and legislation applicable to the dispute. Further, it is the Ex-Parte Applicant's case that the Respondent has failed to process and conclude the disciplinary case to the detriment of the Ex-parte Applicant as the disciplinary matter has stood in the way of his career progression.
3. The Ex-parte Applicant prays that the court issues him with the following reliefs: -
  - a) An order of certiorari to bring forth and quash the Respondent's suspension of the Ex-Parte Applicant on January 9, 2020.
  - b) An order of certiorari to bring forth and quash the disciplinary proceedings by the Respondent against the Ex-Parte Applicant for being illegal, unprocedural, brought in bad faith and therefore null and void.
  - c) An order of mandamus to compel the Respondent to unconditionally terminate the disciplinary proceedings based on the suspension letter of 9<sup>th</sup> January 2020 against the Ex-Parte Applicant.
  - d) An order of certiorari to bring forth and quash the Respondent's decision to re-deploy the Ex-Parte Applicant to the position of Head of Statistics, Economic Planning Division.
  - e) An order of mandamus to compel the Respondent to pay the Ex-Parte Applicant outstanding salary and allowances.
  - f) An order of prohibition against the Respondent barring the Respondent from instituting fresh disciplinary proceedings against the Ex-Parte Applicant on the basis of the same set of facts informing the current dispute.
  - g) Costs of the motion.
4. The Respondent has opposed the application. This is through the replying affidavit by one Henry Faraji Chipinde dated April 1, 2022.

### Brief Facts

5. According to the Statement of Facts filed by the Ex-Parte Applicant dated June 27, 2021, he was engaged by the Respondent sometime in April 2016 as a Director of Revenue Management. This appointment of the Ex-Parte Applicant is evidenced by the letter of appointment dated 5<sup>th</sup> April 2016 issued by the County Public Service Board, County Government of Kilifi (see annexure HFC-1 on the Replying Affidavit of Henry Faraji Chipinde dated 1<sup>st</sup> April 2022). The letter is signed by the secretary of the Respondent's County Public Service Board.



6. On 9<sup>th</sup> January 2020, the Ex-Parte Applicant was served with a letter of suspension of even date. The letter is also produced in evidence (see annexure HFC- 2 on the Replying Affidavit of Henry Faraji Chipinde). From the content of the letter, it was issued by the Chief Officer, Finance of the Respondent. By this letter, the Ex-Parte Applicant was suspended from executing his duties with the Respondent with immediate effect pending conducting of an internal disciplinary process.
7. From the letter of suspension, it is indicated that the Ex-Parte Applicant was suspected of attempted diversion of county revenue for his personal use. It is alleged that the Ex-Parte Applicant had instructed a revenue collection officer at the Respondent's Kaloleni Sub-County to illegally remit to the Ex-Parte Applicant some Ksh. 100,000/= every month from the revenue collected on behalf of the Respondent.
8. Apparently, the letter of suspension was followed by a notice dated 23<sup>rd</sup> January 2020 addressed to the Ex-Parte Applicant requiring him to show cause why he should not be punished for the alleged transgression. This notice was again issued by the Respondent's Chief Officer, Finance (see annexure HFC- 3 on the Replying Affidavit of Henry Faraji Chipinde). In response, the Ex-Parte Applicant wrote to the Respondent on 14<sup>th</sup> January 2020 denying the accusations leveled against him.
9. This letter of response was then followed by a series of correspondence between the parties. In the meanwhile and as the record shows, the Ex-Parte Applicant sought the court's intervention in the dispute but this did not bear much fruit as the first Petition filed in court was pronounced incompetent for want of compliance with the exhaustion principle. A latter suit by the Ex-Parte Applicant was withdrawn.
10. Eventually, through its County Secretary and County Executive Committee Member for finance and economic planning, the Respondent lifted the suspension imposed on the Ex-Parte Applicant and allowed him to resume duty but re-deployed him to another department (see annexures HFC 9 and 12 on the Replying Affidavit of Henry Faraji Chipinde). Meanwhile, there was no communication on the fate of the pending disciplinary proceedings commenced against the Ex-Parte Applicant. It is this state of affairs that triggered the current proceedings.
11. In response to the motion for Judicial Review, the Respondent has filed the replying affidavit dated April 1, 2022. In the affidavit, it is the respondent's contention that: -
  - a) The court lacks jurisdiction to hear the application in view of section 77 of the [County Governments Act](#) which requires disputes between employees of County Governments and the Counties that touch on human resource and which arise from decisions of the respective County Public Service Boards (CPSBs) to be handled by the Public Service Commission in the first instance.
  - b) The case before this court is res-judicata in view of the previous cases that had been filed by the Ex-Parte Applicant arising from the same facts.
  - c) In any event, the Ex-Parte Applicant was suspected of involvement in the alleged fraud following which he was lawfully suspended to enable further investigations into the matter.
  - d) The Respondent processed the Ex-Parte Applicant's disciplinary case in line with the law and allowed him to resume duty after the impugned suspension was lifted.
  - e) The Respondent lawfully re-deployed the Ex-Parte Applicant to another department and the court has no jurisdiction to meddle in the process.
  - f) The Respondent has paid the Ex-Parte Applicant all the back salary and allowances and hence the orders sought for payment of back salary and allowances, will if issued, be in vain.



- g) The lifting of the suspension and re-deployment of the Ex-Parte Applicant necessarily means that the disciplinary proceedings against the Ex-Parte Applicant were terminated. The orders sought to compel the Respondent to terminate these proceedings are therefore in vain.
  - h) Some of the prayers in the Ex-Parte Applicant's motion such as the prayer asking that the Respondent's decision to re-deploy the Ex-Parte Applicant to another department be recalled and quashed fall outside the court's Judicial Review mandate.
12. The questions whether the court has jurisdiction to entertain the matter in view of the principles of exhaustion and res-judicata was addressed and settled at the preliminary stage of these proceedings. Hence, they are closed.

### **Conduct of the Proceedings**

13. At the stage of directions, the parties agreed to have the cause heard through written submissions. Accordingly, the parties filed their respective submissions. The court has considered these submissions together with the pleadings as filed in reaching its determination in the cause.

### **Analysis**

14. Article 47 (1) of *the Constitution* of Kenya 2010 on the basis of which the Ex-Parte Applicant has moved the court provides as follows: -

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

15. Pursuant to the dictates of article 47(3) of *the Constitution*, Parliament has enacted the *Fair Administrative Action Act*, 2015 (FAA). The Act is intended to operationalize article 47 of *the Constitution*. Section 3 of this Act indicates the extent of its application. It provides as follows: -

“This Act applies to all state and non-state agencies, including any person: -

- a) exercising administrative authority;
  - b) performing a judicial or quasi-judicial function under *the Constitution* or any written law; or
  - c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.”
16. Section 4(1) of the FAA reiterates article 47(1) of *the Constitution* aforesaid. Under section 7 of the FAA, any person that is aggrieved by an administrative decision is entitled to file Judicial Review proceedings to challenge the decision. The grounds for review are set out under the section. They include that the person who made the decision was not authorized or acted in excess of jurisdiction or powers conferred under the law. As well, the decision may be reviewed if: a mandatory and material procedure or condition prescribed by law is not complied with; the action or decision was procedurally unfair; the action or decision was materially influenced by an error of law; the administrator failed to take into account relevant considerations; the administrator's decision was made in bad faith; or the decision was rendered in abuse of power.
17. As indicated in the ruling dated June 23, 2022 on the preliminary objection in this cause, County Public Service Board (CPSBs) are established under section 57 of the *County Governments Act* (CGA)



to assist County Governments to manage their county public service. In this respect, CPSBs are agents of County Governments on the human resource issues that are specifically entrusted to them.

18. Although the public servants under the management of CPSBs are in law employees of the respective County Governments in respect of which the CPSBs have been established, the two County Government bodies (County Executive and County Assembly) do not exercise direct disciplinary control over most of these servants. This role is by law left to the respective CPSBs. Indeed, this position is clear from section 59 of the CGA which, inter alia, specifies that CPSBs shall on behalf of the County Government: establish and abolish offices in the county public service; appoint persons to hold or act in the offices so established; and exercise disciplinary control over county public servants.
19. On April 5, 2016 and in exercise of the mandate aforesaid, the County Public Service Board of the Respondent appointed the Ex-Parte to work for the Respondent in the position of Director/ Revenue Management. This appointment is evidenced in the letter of appointment of even date and appearing as annexure HFC-1 on the affidavit of Henry Faraji Chipinde. As is clear from the letter of appointment, it was signed by one Rosalia S Nyalle, the Secretary, County Public Service Board, Kilifi County.
20. On January 9, 2020, the County Chief Officer, Finance of the Respondent County wrote to the Ex-Parte Applicant suspending him from duty for alleged fraud. The letter of suspension is annexed to the Respondent's replying affidavit and marked HFC-2. From the averments at paragraphs 5 and 6 of the affidavit of Henry Faraji Chipinde, it is clear to me that the decision to suspend the Ex-Parte Applicant was by the Respondent but executed by one Benjamin Kai Chilumo, the Respondent's County Chief Officer, Finance.
21. What emerges from the above scenario is that the suspension of the Ex-Parte Applicant was not by the Respondent's County Public Service Board exercising its delegated mandate under section 59 of the CGA. Rather, it was by the Respondent acting through its County Chief Officer, Finance housed at the Respondent's Treasury Department.
22. There is nowhere in the CGA or indeed any other law where the power to hire and fire county employees is delegated to the office of the County Chief Officer, Finance. To this extent therefore, the purported suspension of the Ex-Parte Applicant by the said County Chief Officer, Finance was illegal in so far as the County Chief Officer, Finance usurped the powers of the Kilifi County Public Service Board. The County Chief Officer, Finance was exercising powers that are not donated to him by law. Put differently, he was acting in excess and abuse of his powers.
23. Both the constitutional and statutory provisions quoted in the earlier part of this ruling entitle the Ex-Parte Applicant to administrative action that is lawful and procedurally fair. The Ex-Parte Applicant has asked that the Respondent's decision that was effected by its County Chief Officer, Finance be pronounced as unprocedural and unlawful. Having regard to the totality of the foregoing, I have no hesitation in finding that the suspension of the Ex-Parte Applicant in so far as it was issued by the Respondent's County Chief Finance Officer as opposed to the County Public Service Board, was unlawful and procedurally unfair.
24. It is noteworthy that the entire disciplinary proceedings by the Respondent against the Ex-Parte Applicant were premised on a disciplinary process instigated and run by the Respondent's County Chief Officer, Finance at the Respondent's Treasury as opposed to the County Public Service Board. Thus, the whole disciplinary process was premised on a legally defective and false premise (see annexures HFC-2, 3, 6, 7 and 8 on the Respondent's affidavit dated 1st April 2022 sworn by Henry Faraji Chipinde).



25. Further, it is not in doubt that the disciplinary process instigated by the Respondent against the Ex-Parte Applicant through its said officer was never pursued to its logical conclusion. Besides lifting the suspension, the Ex-Parte Applicant was not told what became of the flawed disciplinary process. Indeed, the letter by the County Secretary and Head of Public Service dated August 31, 2020 purporting to lift the suspension states as follows regarding the pending disciplinary process: -
- “Other disciplinary recommendations as made by your department against yourself will be forwarded to the County Public Service Board for consideration and/or implementation. In the meantime you are as from 1<sup>st</sup> September 2020 to resume your services.” (See annexure HFC-9 on Chipinde’s affidavit).
26. This excerpt is sufficient evidence that on the date of lifting the Ex-Parte Applicant’s suspension, the Respondent was still keen to pursue the balance of the recommendations made in relation to the Ex-Parte Applicant’s case. However, there is no indication that the Ex-Parte Applicant was told what the recommendations were and neither is there evidence that he was advised on the outcome of the futuristic process suggested in the letter.
27. As seen above, article 47 of *the Constitution* obligates the Respondent as a public body to ensure expedition and efficiency in processing all its administrative decisions that affect other persons including the Respondent’s employees. I do not think that by handling the disciplinary process in the manner alluded to above the Respondent was acting expeditiously and efficiently or even in good faith. To my mind, the mere lifting of the suspension was not synonymous with the termination of the disciplinary case against the Ex-Parte Applicant. The Respondent was by law obligated to process the proceedings to their conclusion or formally drop them under advice to the Ex-Parte Applicant. There is no evidence that this was done.
28. But more importantly, it is to be noted that the letter purporting to lift the Ex-Parte Applicant’s suspension was authored by the Respondent’s County Secretary and Head of Public Service (see annexure HFC-9 on Chipinde’s affidavit). The County Secretary is an office established under section 44 of the CGA. The holder of the office is the secretary to the County Executive Committee. He also serves as the head of county public service under section 44(3) of the CGA. However and as is clear from section 58 of the CGA, he is not a member of the County Public Service Board.
29. Not being a member of the County Public Service Board, what mandate did the County Secretary have to lift the Ex-Parte Applicant’s illegal suspension? These powers are the preserve of the County Public Service Board under section 59 of the CGA.
30. In relation to the Ex-Parte Applicant’s redeployment, it is noted from annexure HFC-12 on Henry Faraji Chipinde’s affidavit that the same was executed by the County Executive Committee Member, Finance and Economic Planning (CECM, Finance and Economic Planning). As CECM, Finance and Economic Planning this officer has no power in law to re-deploy staff as this mandate vests either in Chief Officers or the Head of County Public Service depending on whether the deployment is internal or external to the department where the employee has been working (see section 72 of the CGA). The purported redeployment of the Ex-Parte Applicant by the CECM, Finance and Economic Planning was therefore a nullity.
31. It is noteworthy that the tribulations of the Ex-Parte Applicant in the hands of the Respondent’s officers begun in January 2020 when he was irregularly suspended from duty. This development was to later be followed by the irregular lifting of the unlawful suspension before the Ex-Parte Applicant was unlawfully re-deployed. Meanwhile, the burden of the pending disciplinary case against the Ex-Parte



Applicant has remained around his shoulders with nobody from the Respondent institution showing desire to meaningfully address the issue.

32. It is not lost to me that the court ELRC No. 3 of 2020 ordered the Respondent to finalize the disciplinary matter against the Ex-Parte Applicant within forty (40) days from August 6, 2020. As it does appear, the Respondent never adhered to the order in full as it left the discipline case in abeyance without plausible justification. The Respondent's conduct in relation to the Ex-Parte Applicant's case has been anything but satisfactory. It suggests ill will on the part of the Respondent that should stand in the way of the Respondent being allowed a window to revisit the cause through a fresh process. With this past conduct, there is no guarantee that the Respondent will pursue fresh proceedings on the same facts in good faith.
33. Before I make my final orders, I wish to revisit the question of whether it was the Respondent or its County Public Service Board to be sued in this matter. From the facts of this case, it is clear that although the County Public Service Board is entrusted with the management of a County Government's human resource, the Kilifi County Public Service Board was not involved in the activities resulting in the cause of action in the matter. At best, the Board's only involvement is perhaps that the several letters on the matter were copied to it.
34. It is clear that the offending acts against the Ex-Parte Applicant were by officials of the Respondent outside the County Public Service Board. In law, the Respondent carries the burden of the omissions and commissions of its staff and officers. Based on the facts aforesaid, there is no cause of action against the Kilifi County Public Service Board to warrant proceedings against it. In my view, the suit is properly brought against the Respondent.
35. Another matter that I should perhaps comment on relates to the Respondent's view that Judicial Review proceedings should be confined to an inquiry into the propriety of the process leading to the impugned decision and not the merits of the decision. This is the traditionally accepted view of Judicial Review (see *Zachariah Wagunza & another v Office of the Registrar Academic Kenyatta University & 2 others* [2013] eKLR). As a matter of fact, a number of judicial pronouncements still advocate for strict adherence to this approach (see *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited* [2018] eKLR).
36. However and as is recognized in the Zachariah Wagunza case, this area of law has kept growing in a bid to respond to the ever growing demands of justice. As a result, the tentacles of Judicial Review have tended to go beyond its traditional boundaries. In some cases, courts have been prepared to undertake a certain level of merit based review in a bid to meet the tenets of justice. However, this latter approach must only be resorted to very sparingly and in exceptional cases to be determined on a case by case basis (see *Republic v Judicial Service Commissions & 2 others Exparte Erastus M Gitinji* [2019] eKLR). And even then as was observed in the *Suchan Investment Limited –Versus- Ministry of National Heritage & Culture & 3 Others* [2016] KLR case in relation to the FAA: -

“It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in section 7(2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in section 11 of the Act.”

37. In the current case, I note that the issues that present for review are founded on the legality of: the process of suspension of the Ex-Parte Applicant; the lifting of the suspension; his re-deployment to another department; and the delayed determination of the disciplinary process against him. As has been seen from the evaluation in the decision, the process was flawed and contrary to statute the merits



of the impugned decisions notwithstanding. The determination in the case is therefore founded on the traditional view on the scope of the Judicial Review remedy.

### **Determination**

38. Having regard to the analysis in the preceding sections of this decision, it is clear to me that the process resulting in the purported suspension, discipline, lifting of the suspension and redeployment of the Ex-Parte Applicant is afflicted by illegality and cannot stand the test of article 47 of *the Constitution* as read with the provisions of the FAA. It stands to be declared a nullity in its entirety. Accordingly and in terms of section 11 of the FAA, I issue the following orders in favour of the Ex-Parte Applicant: -
- a) An order of certiorari to bring forth and quash the Respondent's decision of 9<sup>th</sup> January 2020 purporting to suspend the Ex-Parte Applicant from work.
  - b) An order of certiorari to bring forth and quash the disciplinary proceedings by the Respondent against the Ex-Parte Applicant for being illegal, unprocedural and therefore null and void.
  - c) An order of mandamus to compel the Respondent to unconditionally terminate the disciplinary proceedings against the Ex-Parte Applicant based on the suspension letter of January 9, 2020.
  - d) An order of certiorari to bring forth and quash the Respondent's decision to re-deploy the Ex-Parte Applicant to the position of Head of Statistics, Economic Planning Division. The consequence of this order is that the Ex-Parte Applicant is restored to the position he occupied prior to the irregular deployment.
  - e) An order to compel the Respondent to pay the Ex-Parte Applicant any outstanding salary and allowances as a result of the unlawful suspension aforesaid.
  - f) An order of prohibition against the Respondent barring the Respondent from instituting fresh disciplinary proceedings against the Ex-Parte Applicant on the basis of the same set of facts informing the current dispute.
  - g) An award of costs of the motion to the Ex-Parte Applicant.

**DATED, SIGNED AND DELIVERED ON THE 2<sup>TH</sup> DAY OF JULY, 2022**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

In person Ex-Parte Applicant

Muliro for the Respondent

**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 15<sup>th</sup> 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.

**B. O. M. MANANI**

**JUDGE**

