



**Republic v College & 6 others; Osanjo (Exparte) (Judicial Review Application E004 of 2021) [2022] KEELRC 1102 (KLR) (1 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1102 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION E004 OF 2021**

**B ONGAYA, J  
JULY 1, 2022**

**IN THE MATTER OF ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES, 2010  
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO.4 OF 2015  
IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 25, 27, 28,  
41, 43, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE HEAD OF BANDARI COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**THE HEAD OF ACCOUNTS, BANADARI COLLEGE ..... 2<sup>ND</sup> RESPONDENT**

**THE MANAGING DIRECTOR, KENYA PORTS AUTHORITY .... 3<sup>RD</sup>  
RESPONDENT**

**THE GENERAL MANAGER HUMAN RESOURCE AND ADMINISTRATION,  
KENYA PORTS AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**THE HEAD OF HUMAN RESOURCES, KENYA PORTS  
AUTHORITY ..... 5<sup>TH</sup> RESPONDENT**

**BANDARI COLLEGE, KENYA PORTS AUTHORITY ..... 6<sup>TH</sup> RESPONDENT**

**KENYA PORTS AUTHORITY ..... 7<sup>TH</sup> RESPONDENT**

**AND**

**NANCY AKEYO OSANJO ..... EXPARTE**



## JUDGMENT

1. The *ex-parte* applicant filed a notice of motion on 29.06.2021 through Otieno B.N. & Associates Advocates. The application was under Order 53 rule 3 of the [Civil Procedure Rules](#), the [Law Reform Act](#) Cap 26 and all other enabling provisions of law. The applicant prayed for:
  - i. An order of *certiorari* for the purpose of its being quashed a decision made by the Managing Director or other officers of Kenya Ports Authority, their subordinates, officers, agents, delegates and any other person whatsoever acting under their instructions and or statutory power to interdict the *ex-parte* applicant Nancy Akeyo Osanjo and/or terminate the *ex-parte* applicant's employment.
  - ii. A declaration that Bandari college – Kenya Ports Authority and Kenya Ports Authority through its officers, agents, and/or assigns have jointly and/or severally violated the *ex-parte* applicant's constitutional rights and the provisions of [the Constitution](#) under Articles 10, 19, 20, 21, 22, 25, 27, 28, 41, 43, 47, and 50.
  - iii. A declaration that the *ex-parte* applicant is entitled compensation and an award of damages for unpaid dues and violation of and/ or breach of the *ex-parte* applicant's constitutional rights respectively as per the statement and or memorandum of of grounds for the claim.
  - iv. An order for costs.
  - v. And that all necessary and consequential directions be given.
2. The application was based on the statutory statement on record, the *ex-parte* applicant's verifying affidavit and exhibits thereto, the applicant's supplementary affidavit and exhibits thereto filed on 14.02.2022, and, the *ex-parte* applicant's testimony during the examination and cross-examination on her affidavits as was granted following an application made for her in that behalf. Upon oral application by counsel for the *ex-parte* applicant on 21.10.2021 it was, inter alia, ordered thus, “) The application as against 1st, 2nd, and 5th respondents is marked withdrawn with no orders on costs.”
3. The facts as pleaded for the applicant in support of her case are as follows. She is an employee of the Kenya Ports Authority deployed to serve at Bandari College. Between 2016 and 2017 she reported fraudulent activities allegedly undertaken by the management team of the Bandari College. The report was made to the top management of the 7<sup>th</sup> respondent, Kenya Ports Authority. Thereafter, the applicant pleads that the management of the Bandari College swore to have her dismissed from employment with the consequence that false allegations were made against her including allegations that she defrauded students and arbitrarily sneaked fake academic certificates into the applicant's file and thereafter, accusing her of having submitted fake academic certificates. It is her case that the management of Bandari College violated her right to fair labour practices and other rights equally violated because her salary and other monetary entitlements have been withheld on several occasions. Further, she was interdicted and has been subjected to summary dismissal proceedings. Further, it has been futile to access justice through the internal process of the Kenya Ports Authority. The applicant has been threatened with eviction from the housing accommodation provided for her use by the employer. It is her case that the respondents are behaving vindictively and in abuse of the powers conferred upon them. It is her case that she is labouring under the health conditions that were caused by trauma she was subjected to by the officers and management team of the Bandari College and the Kenya Ports Authority. The process of her dismissal is allegedly based on abuse of power, is in bad faith, and is based on malicious grounds. If the threatened unlawful and illegal termination is allowed



to go on, then the applicant will be evicted from the servant quarters provided for applicant's housing. If orders prayed for are not granted the applicant will be prone to suffer immensely and irreparably.

4. The applicant has exhibited the following correspondence on her verifying affidavit:
  - a) Her letter dated 19.12.2018 to the Managing Director of Kenya Ports Authority notifying that the applicant was going through very painful and stressful situation at Bandari College. The letter states that several allegations had been staged against her and she had written to the Head of Human Resource, Head of Security, General Manager Legal, Head of Employee Relations, and Head of Ethics and Integrity but she had received no the letter stated that her predicament and frustrations started when she questioned why people were paying cash to listed officers instead of at the bank as was required. Her salary had been withheld and occasioned her serious financial embarrassment and hardship such as failure to pay loans, her children going without food, high indebtedness, and her request for transfer had been denied. In the letter she denies receiving any money from students in form of school fees as was alleged by her bosses. Further, two of her bosses told her they would ensure she was sacked by December 2018. Further, her certificates had been investigated twice and she received information from an anonymous caller from HR department and a Sacco official that her dismissal was underway on account of fake certificates. Further, one of her bosses one Earnest Mbalanya told her to start looking for alternative employment. The letter requested the Managing Director to reinstate her salary and she hoped the investigations would find her innocent. She also requested to be transferred to an office she would work without being idle. That she had a clean record of service of 7-years at the College.
  - b) Applicant's letter dated 12.09.2018 addressed to Head of Bandari College. The letter was on the subject of false accusation of receiving school fees from students pursuing courses at Bandari College. She requested to be provided with the names of her accusers, the amount they paid to her to facilitate their enrolments together with the admission letters she issued to them. She requested for the time table for classes the alleged students undertook together with the copies of the receipts that she gave them. Also she requested to be provided with the alleged receipt of Kshs. 240, 000.00 which it was alleged to have issued to Mohamed Jabali Chondo as fees collected from him.
  - c) Letter of interdiction from duty dated 04.05.2020 addressed to the applicant by the Daniel O. Ogut for Managing Director. The allegation was that the applicant presented a forged KCSE certificate to KPA management for the purpose of employment or career advancement. The Kenya National Examination Council had by the letter dated 18.10.2018 confirmed that the applicant did not register or sit for the year 2000 KCSE examination at Rae Girls High School under index number 711208014 and, the centre code 711208 belonged to Mukubo Secondary School in the year 2000 KCSE examination and not Rae Girls High School. The KNEC had concluded that the certificate presented to KNEC for verification purpose was not genuine. The interdiction letter stated that presentation of a fake KCSE certificate was a gross misconduct justifying summary dismissal per sections K.c (xvi) of the HR Manual, 2017. She was interdicted pending investigation upon half salary, not to leave home station of Nairobi without permission, and to report to the office of the Head of Employee Relations on Monday and Friday every week at 9.00am for further instructions to be issued to her. She was also to show-cause within 72 hours of receipt of the letter why she should not be dismissed from service of the Authority. The letter stated that if she failed to respond in stipulated time then action would be taken against her without further reference to her.



- d) On 17.05.2020 the applicant wrote to the Managing Director appealing against the interdiction and requesting to be heard about the allegations. She again wrote an undated letter stating that she had received the interdiction letter long after the 72 hours for responding had lapsed. She denied submitting the fake certificate as alleged and denied she had been deployed in Nairobi as stated in the interdiction letter. She requested a hearing date towards getting her justice.
- e) She again wrote the letter dated 07.06.2021 to the Managing Director. The letter states that the interdiction letter was received after 7 days of its issue long after lapsing of 72 hours therein for showing cause. Further, at the hearing, the letter states, the applicant was not given time to narrate the genesis of her predicament. The letter sets out in detail the background about irregular payments of fees by students and the irregular issuance of certificates by the college due to that irregular payment of fees. The letter states the irregularities were widespread affecting over 40 former students said to have paid fees in cash to individual members of staff instead of at the bank account. Her predicament started and in an earlier case there was attempted planting of a certificate from Asumbi Girls High School into her file. It was stated the present allegations mirrored that earlier case. Further as at time of employment she had not presented a KCSE certificate as was alleged. In the earlier case, the finger print analysis showed the listed management officers of the College had come into contact with the fake Asumbi Girls Certificate. Like in that earlier case the fake Rae Girls High School KCSE certificate must have been planted in her file by such officers of Bandari College towards victimizing the applicant. Further she had completed a qualifications verification form and which shows only one qualification being Certificate in Front Office Operations Course. The certificate allegedly from Rae Girls High School was not presented by herself and it was the wider scheme of her superiors to frustrate and terminate her employment. She requested for another hearing of the case in a fair trial.
- f) By letter dated 18.06.2020 the KPA invited the applicant (in view of her request for personal hearing) to be heard by the Committee of Inquiry appointed by the management to investigate the case and fixed for 23.06.2020. The letter advised she was entitled to be accompanied with a union representative or a co-worker of her choice.
5. In her supplementary affidavit filed on 14.02.2022 the applicant stated that at the time of filling the KPA employee details form she clearly stated that that she did not have a KCSE certificate. She had sign language interpretation skills and her employment was not based on any KCSE certificate. Further, at recruitment for the employment she had presented no KCSE certificate, CV, or any other academic certificate. That the KCSE certificate had been planted in her personal file as she had crossed on the form indicating she lacked the academic certificates. Further, she was the whistle blower whenever she encountered fake documents in staff employment records and the management was not pleased with such as there were vested interests – like in 2016, 300 employees had been interdicted for fake certificates following her whistle blowing and that time her file was investigated and marked as cleared. Further in 2016, an Utalii College certificate had been planted in her file and was found fake. It was her case that she is not punished on account of the KCSE certificate planted in her employment file or records and done so maliciously.
6. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents opposed the application by filing on 27.08.2021 the replying affidavit of Daniel O. Ogutu, the General Manager, Human Resource & Administration of the KPA; and filed through John Turasha Kinyanjui Advocate. Their case was as follows.



7. The applicant was employed by the 7<sup>th</sup> respondent, Kenya Ports Authority (KPA) as a receptionist. The minimum requirement for employment by the KPA as a receptionist was KCSE Grade D+ per prevailing Schemes of Service. At employment the applicant presented a CV which informed to support her employment. By internal memo dated 19.11.2009 her case for employment was presented to the KPA Managing Director who approved her employment based on the CV. The applicant was offered employment on 19.11.2009 as a receptionist. She accepted the offer by her letter dated 24.11.2009. On 31.11.2019 the applicant completed Employee Details Form indicating she attended Langata Secondary School and obtained C+ in 1999 KCSE examination. On 02.12.2009 she had written committing to deliver to KPA her certificates to fulfil the requirements of her employment. Her 1<sup>st</sup> contract of service was signed on 15.12.2009. The applicant presented her various certificates and academic documents including a KCSE certificate No. 1971026 showing she sat KCSE examination in 2000 at Rae Girls High School as index No. 711208/014 and attained mean grade C-. On 19.10.2011 the Principal of Bandari College (now defunct) requested for renewal of the applicant's fixed term contract that was ending. The memo dated 22.11.2011 issued and the approval was granted. The memo shows that the applicant had a C- at KCSE and so the renewal was granted on that basis. The contract was renewed for 2 years from 01.12.2011 per letter dated 29.11.2011 and the contract was signed on 08.12.2011. In 2012 KPA was restructured and the applicant was placed on permanent and pensionable terms of service per letter dated 02.11.2012
8. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents' further case is as follows. In accordance with public service directives KPA undertakes continuous verification of the authenticity of academic documents and certificates presented by its employees. By letter dated 18.10.2018 KPA requested KNEC to verify authenticity of several KCSE certificates presented by its employees. By letter dated 23.10.2018 KNEC confirmed that the KCSE certificate No. 1971026 showing the applicant sat KCSE examination in 2000 at Rae Girls High School as index No. 711208/014 and attained mean grade C- was not genuine. The KPA therefore commenced disciplinary proceedings against the applicant as per section K 1 (c) (xvi) of the HR Manual, 2017 which provides that it amounts to gross misconduct to present or cause to be presented any fake or forged document or academic transcript or certificates or qualification with a view to getting employed or when in employment, with a view to influencing his promotion or career advancement or knowingly employs or promotes a person presenting such document or knowingly allows such a person to remain in employment.
9. Further, at the time disciplinary proceedings commenced, the applicant was serving at Bandari College, then a department of KPA but ceased which to exist when by Gazette Notice No. 233 dated 16.11.2018 the Bandari Maritime Academy (BMA) was established as a successor of the KPA Bandari College; BMA being a body corporate with perpetual succession, common seal and capable of suing and being sued. In view of the transition, the disciplinary case against the applicant was held in abeyance and in 2020 the applicant was interdicted by the letter dated 04.05.2020 and required to show cause why disciplinary action would not be taken against her. By letter dated 12.05.2020 she requested to be heard. By letter dated 23.06.2020 she requested 7 listed persons not to be part of the disciplinary committee. By the memo dated 14.09.2020 another disciplinary committee was constituted to hear the levelled case of presenting forged certificate. She was invited and she attended the disciplinary hearing on 21.12.2020. She did not present any academic certificate to support her case. By letter dated 04.05.2021 the Ethics and Anti-Corruption (EACC) Commission wrote to KPA about the case levelled against the applicant and the 4<sup>th</sup> respondent replied by the letter dated 31.05.2021 stating that she had undergone disciplinary process and dismissal recommended but to be communicated in due course. The applicant was personally heard and found culpable as had been alleged against her. She was dismissed by the letter dated 04.06.2021 as clarified by the letter dated 14.06.2021 which lifted her interdiction. The applicant could not be traced on phone or at the housing accommodation



provided to her by the KPA. The two letters were therefore posted to her last known address being P.O. BOX 393, Uhuru Gardens, Nairobi as per information of her employment details provided to KPA. The terms of service were that upon termination of the contract of employment the applicant had to vacate the provided housing accommodation. Any rents owing are therefore deductible from her withheld remuneration during interdiction period. It was urged that the application was misconceived, frivolous, vexatious and a total abuse of Court process.

10. Final submissions were filed for the parties. The Court has considered all the material on record and makes findings on the issues for determination as follows.
11. The 1st issue for determination is whether in filing a judicial review application under Order 53 Rule 3 of the *Civil Procedure Rules*, the *Law Reform Act* Cap. 26 and all other enabling provisions of law, the applicant was as well entitled to seek a declaration relating to violation of rights and constitutional provisions and, a declaration that the applicant was entitled to an award of damages and compensation in view of that violation of constitutional rights. It is submitted for the respondents that the ex-parte applicant opted to move the Court under Order 53 of the *Civil Procedure Rules* which is a special procedure and Rule 7(3) of the *Employment and Labour Relations Court (Procedure) Rules* limits the scope as provided in Order 53 of the *Civil Procedure Rules*. The respondents cite *Emfil Limited v Registrar of Titles Mombasa & 2 Others* [2014]eKLR where the Court of Appeal (Okwengu, Makhandia, & Sichale JJ.A) held thus

“ [17] In the appellant’s case, the application for Judicial Review was made in August 2011 after the promulgation of *the Constitution* of Kenya 2010 (hereinafter *the Constitution*, which replaced the repealed Constitution. Article 23 of *the Constitution*, provides for an order of Judicial Review as an appropriate relief that may be granted in the enforcement of the Bill of Rights. Clearly, the appellant had the option to bring his application under Article 22 and 23 of that Constitution, but opted for Judicial Review proceedings under Order 53 of the Civil Procedure Rules.

[18] The extract of the judgment of the High Court reproduced herein above (paragraph 13) reveals that the adoption of the constitutional reference proceedings under Article 22 and 23 by the learned judge was basically to expand the proceedings in order to include the issue of compulsory acquisition. But the appellant in the notice of motion only mentioned compulsory acquisition in passing. It was not a specific relief that was sought. Unlike the Githunguri case, it cannot be said that it was necessary to convert the applicant’s Judicial Review proceedings to a constitutional reference in order to allow the court the latitude in granting relief. The issue of compulsory acquisition was not before the judge for determination, such as to justify expanding the proceedings to accommodate it. The only interest that was advanced by the change in the nature of the proceedings was that of the alleged squatters. The appellant having specifically moved the court for orders of Judicial Review, which were available to the appellant under Order 53 of the Civil Procedure Rules, the court had no business tampering with his application by turning it into an application for enforcement of the bill of rights under *the Constitution*.

[19] Judicial Review proceedings, are proceedings of a sui generis nature subject to its own peculiar rules. While we appreciate Article 159 of *the Constitution* and



the need to apply substantive justice, that article provides no justification for a court to ignore a specific procedure provided by law and deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest. Thus the court was bound to apply the specific provisions of Order 53 of the Civil Procedure Rules. Rule 4 of the Order provides that the relief granted in Judicial Review proceedings can only be the relief sought in the statutory statement filed under Rule 2 of the same Order, and in this case neither compulsory acquisition nor compensation for compulsory acquisition was a relief sought by the appellant.”

12. For the *ex-parte* applicant, there appears to be no specific submissions made in that regard. The Court has considered the respondent’s submissions against the relevant provisions of the [Employment and Labour Relations Court \(Procedure\) Rules](#).
13. Rule 7 of the [Employment and Labour Relations Court \(Procedure\) Rules](#) provides as follow,
  - 7 A party who wishes to institute a petition shall do so in accordance with the
  - (1) Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.
  - (2) A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the [Law Reform Act](#) and Order 53 of the [Civil Procedure Rules](#).
  - (3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.
14. The same Rules define suit thus, “suit means a claim, petition, application for judicial review, appeal or any proceedings before the Court for determination.” The Court considers that in view of Rule 7(3), the applicant’s mixed application for the judicial review order of certiorari and declarations as prayed for was saved. The application will not therefore fail on the basis of the objection as urged for the respondents. Further, in so far as the applicant has specifically pleaded and prayed for the two declarations in the present case, it appears to the Court that such specific pleading and prayers distinguish the present application from the one in the Court of Appeal decision cited for the respondents in which no such specific pleadings and prayers appear to have been made with respect to the impugned relief of compulsory acquisition therein.
15. The 2nd issue for determination is whether due procedure was followed in interdicting and subsequently summarily dismissing the applicant. It is submitted for the applicant that section K.5. (b) (ii) of the KPA HR Manual, 2017 provides that the supervisor shall issue an employee with a formal charge sheet specifying the offences the employee is alleged to have committed. It is submitted that the applicant was not issued with a formal charge sheet and the procedure was breached in that respect. For respondents it is submitted that the disciplinary procedure was strictly in accordance with the HR Manual, 2017. It is submitted that the interdiction letter amounted to the prescribed charge sheet because it set out the particulars of the allegation. The Court agrees with that respondents’ submission. The interdiction letter was clear that the applicant was confronted with the allegations whose particulars were set out and was required to answer accordingly, and, to answer within 72 hours. The evidence is that the allegations related to the respondents’ operational requirements, the



- applicant's capacity, compatibility, and conduct as envisaged in section 45 of the *Employment Act*, 2007.
16. The further evidence was that the applicant was invited to a disciplinary hearing and was given an opportunity to attend with a co-worker or union representative. In that regard, the due procedure of a notice and a hearing per section 41 of the Employment Act cannot be said to have been breached, and as had been incorporated in the respondents HR Manual, 2017. It could be that the interdiction letter conveying the allegations as was levelled might have been received by the applicant after lapsing of the 72 hours for responding. However, the evidence is that the claimant subsequently responded and subjected herself to the due disciplinary proceedings. The Court considers that by her conduct she waived insistence on the belated service of the interdiction letter, or, the belated service, if any, amounted to an excusable procedural error to the extent that the applicant was subsequently afforded a chance to show-cause and render her exculpatory explanations per the ensuing disciplinary proceedings.
  17. Whether the applicant by herself or by other persons was employed upon fake KCSE certificate, by her own testimony she confirmed that she lacked the requisite qualifications when in cross-examination on her affidavits she stated, "I was employed, not per prevailing law and processes. I did not fit in the Scheme of Service of Receptionists. I was employed politically with no advertisement or interview. I provided no certificate at employment. I was told to bring any certificate I held but I did not go with any certificate. I appeared before committee. I did not deny anything because no hearing took place...I was receptionist because of my sign language proficiency. I did not hold KCSE certificate."
  18. The Court finds that the procedure leading to the applicant's interdiction and then summary dismissal was not therefore unfair or *ultra vires* the HR Manual, 2017 or the relevant provisions of the *Employment Act*, 2007 as the substantive applicable law including sections 41, 43, 45 as read with 47(5) of the Act.
  19. To answer the 3rd issue for determination the Court returns that in view of the answer to issue 2 above, the applicant has failed to show that her constitutional rights and fundamental freedoms were breached as alleged. While making that finding the Court has considered that the interdiction was on 01.11.2018 and effective the same date. The applicant prayed for an order of certiorari to quash that interdiction in an application commenced by way of an application for leave filed on 21.06.2021. While there appears to be no submissions by parties on this point, the Court finds that the prayer for certiorari appears to have been time barred under Order 53 Rule 2 as the application was made long after lapsing of 6 months of limitation as prescribed in that Rule.
  20. The Court considers that even if an order of certiorari were available and was to be granted, the applicant has admitted that she did not qualify to hold the office of a receptionist. Quashing the interdiction and subsequent summary dismissal would amount to the applicant reverting back to the service of KPA in circumstances whereby, first, she lacks qualifications and second, the department of her deployment namely Bandari College has been shown to no longer exist. The Court follows *Republic -Versus- Director General of East African Railways Corporation Ex-Parte George Nume Kaggwa* [1977]eKLR where Z.R. Chesoni J held, " Adequate supervision of enforcement is inter-related with the possibility of effective enforcement which must exist for the order of *mandamus* to go. Thus, the person or authority against whom it is prayed must have the power to obey. If the results of granting the order would be futile the Court will, usually, refuse the order...If the circumstances have rendered the performance of something impossible, a *mandamus* will not go." While in that case the Court was dealing with grant of an order of *Mandamus*, the Court considers that the same safeguards would apply in exercising the discretion to grant an order of certiorari and it is that the Court should not grant orders in vanity – it should grant orders that are capable of being implemented



by those the orders are directed at and failing, the Court should then avail itself effective enforcement and supervision of the implementation thereof.

21. The Court has considered all circumstances of the application including the long time that lapsed prior to the conclusion of the disciplinary case against the applicant and which must have been seriously prejudicial. The Court returns that the application is liable to dismissal with no orders on costs.
22. In conclusion the ex-parte applicant's notice of motion dated and filed on 29.06.2021 is hereby dismissed with no orders on costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 1ST JULY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

