



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW APPLICATION NO. E007 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTION 17(1)(b) AND SECTION 19(3) OF THE EMPLOYMENT ACT

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

DR ABRAHAM ANJESTSA MALENYA.....EX-PARTE APPLICANT

AND

KIBABI UNIVERSITY.....RESPONDENT

RULING

1. Dr Abraham Malenya (the *ex-parte* applicant) filed a Summons with the Court on 7 June 2021 seeking orders:

(i) ...

(ii) Pending the hearing and determination of this application and/or main Motion, the Respondent be ordered to release the *ex-parte* applicant's salary to his designated account at Family Bank account number xxxxxxxxxxxxxx Kakamega.

(iii) Leave be granted to the *ex-parte* applicant to institute judicial review proceedings seeking for an order of certiorari to be directed to the Respondent, by themselves, their servants and/or agents or any other officer acting under their authority to bring to the Court for purpose of being quashed their decision made by them from August 2020 to channel all the *ex-parte* applicant's salary after deductions to an unknown account managed and operated by IG SACCO.

(iv) Leave be granted to the *ex-parte* applicant to institute judicial review proceedings seeking for an order of mandamus directed to the Respondent to compel it to channel the *ex-parte* applicant's salary after deductions to his account at Family Bank Kakamega, Account number xxxxxxxxxxxxxx or any other designated account by the applicant in accordance with section 17(1)(b) of the Employment Act.

(v) Leave so granted do operate as a stay of any action of the Respondent to the *ex-parte* applicant's salary to an unknown account at IG SACCO or anywhere else other than his account at a Family Bank Kakamega account number xxxxxxxxxxxxxx.

(vi) Costs of this application be provided.

2. The Respondent filed Grounds of Opposition on 15 June 2021.
3. Pursuant to further Court orders, the *ex-parte* applicant filed his submissions on 24 June 2021 while the Respondent filed a replying affidavit and submissions on 28 June 2021.
4. The Court has considered the Summons, affidavits, grounds of opposition and the submission and come to the view that leave should not be granted for the reasons that follow.
5. One, judicial review orders are discretionary and may not be granted even when merited.
6. The *ex-parte* applicant has a contract of service with the Respondent. On 15 June 2020, he wrote to the Chief Executive Officer of Invest and Grow Sacco requesting that his salary be paid through the Sacco to facilitate ease of repaying a loan he had taken.
7. On 2 July 2020, the *ex-parte* applicant notified the Registrar of the Respondent that his salary should be paid through his account with Family Bank Ltd.
8. The dispute between the *ex-parte* applicant and the Respondent revolves around breach of contract.
9. There are allegations that the *ex-parte* applicant stopped repaying his loans and the Sacco moved against his guarantors as a result of which an agreement was reached that the salary be channelled through the Sacco.
10. The primary mode of approaching the Court in employment/contractual disputes is not through judicial review but through a Statement of Claim.
11. The *ex-parte* applicant did not disclose why he opted to take the judicial review route rather than the normal route.
12. Secondly, there is on record affidavit evidence that the *ex-parte* applicant had taken a loan which he defaulted in repaying forcing the Sacco to deduct the outstanding amounts from the guarantors.
13. When confronted with the default, the *ex-parte* applicant made a commitment to have the salary paid through the Sacco in order for the Sacco to directly deduct repayments.
14. By now attempting to run from the commitment, the *ex-parte* applicant appears to exhibit bad faith.
15. The Court therefore declines to grant leave as sought.
16. The Summons is dismissed with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF JULY 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For *ex-parte* applicant Chimei & Co. Advocates

For Respondent Federation of Kenya Employers

Court Assistant Chrispo Aura