



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. E023 OF 2021

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY FOR AGRICULTURE, LIVESTOCK,

FISHERIES AND COOPERATIVES.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

STATE CORPORATIONS ADVISORY

COMMITTEE (SCAC).....1ST INTERESTED PARTY

AGRICULTURAL DEVELOPMENT

CORPORATION (ADC).....2ND INTERESTED PARTY

STEPHEN NDICHU KINUTHIA.....EX PARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted by the Court on 18th August 2021, the Ex Parte Applicant Stephen Ndichu Kinuthia filed a Notice of Motion Application dated 6th September 2021 seeking for Orders:-

1. A DECLARATION does issue that the revocation of the ex-parte applicant's membership to the Agricultural Development Corporation without any notice offends the rule of law and the principle of natural justice and was thus irregular and unlawful.

2. A DECLARATION does issue that 1st Respondent violated the Applicant's right under Article 27 of the Constitution regarding the right to equality and freedom from discrimination by unlawfully, illegally, selectively and discriminately revoking the appointment of the Petitioner as a Member of the Agricultural Development Corporation.

3. A DECLARATION does issue that the 1st Respondent's further violated the ex parte applicant's right to fair administrative action under Article 47 of the Constitution and his right not to be discriminated upon.

4. A DECLARATION does issue that the decision by the 1st Respondent was malicious, unlawful and violated the ex parte applicant's right to fair labour practice as provided under Articles 41 of the Constitution of Kenya 2010 and Section 47 of the Employment Act 2007, Laws of Kenya.

5. This court be pleased to issue an Order of CERTIORARI to bring into the Court for purposes of being quashed the decision of the 1st Respondent, the Cabinet Secretary for Agriculture, Livestock, Fisheries and Cooperatives communicated vide Kenya Gazette Notice Number 8030 dated 11th August 2021 purportedly pursuant to Sections 5(1)(b) of the Agricultural Development Corporation Act, Cap 444 Laws of Kenya.

6. The Court be pleased to award the ex-parte applicant damages for the unfair and irregular revocation of his Appointment by the 1st Respondent.

7. The costs of this application be awarded to the ex parte applicant.

2. The Application is based on the grounds that Section 5(1)(b) of the Agricultural Development Corporation Act, Cap. 444 Laws of Kenya confers no such powers on the 1st Respondent to revoke the appointment of the Ex Parte Applicant and was thus *ultra vires*. That the 1st Respondent's decision to revoke the Applicant's appointment was unprocedural, unreasonable for lacking merit and constitutes an abuse of power since he was not given any notice of the same or a chance to be heard before the said decision was arrived at. That the said decision seeks to deny the Applicant the benefit of the legitimate expectation to the 3 year term he had been appointed to serve and also contravened his constitutional rights to fair labour practice and fair administrative action. The Application is supported by the Applicant's Supporting Affidavit wherein he avers that by virtue of Kenya Gazette Notice Number 1 of 2021 published on 4th January 2021, the 1st Respondent exercising his statutory powers appointed him as a member of the Agricultural Development Corporation (2nd Interested Party) for a term of 3 years with effect from 4th January 2021 and lapsing on 4th January 2024. That he was subsequently issued with a letter of appointment reference number MD/11/C/LK dated 11th January 2021 and was later taken aback when one of the co-directors informed him of the revocation of his appointment vide a gazette notice of 11th August 2021. He asserts that in the absence of any reason by the 1st Respondent for the revocation, it is impossible to understand and rationalize why the decision to revoke his appointment barely 8 months into his tenure. That he was always punctual and diligent in attending to the business of the Corporation, attended meetings of the Corporation without fail, is both physically and mentally healthy, and enumerates evidence of his exemplary membership in the Board. He believes that the illegal revocation of his appointment was meant to intimidate other Board Members from objectively and independently discharging their duties. The Ex Parte Applicant further avers that the 1st Respondent singling him out for revocation of appointment from among all the Corporations board members was intentional and discriminatory towards him and that the same was meant to taint his name socially, politically and professionally. That he has as a result lost his dignity as a political leader and believes he is entitled to damages from the 1st Respondent for infringing on his rights and for the reputational damage he has suffered.

3. The Respondents and the 1st Interested Party filed a Replying Affidavit sworn on 15th October 2021 by the 1st Respondent who depones that Section 5(1) of the Agricultural Development Corporation Act gives the Minister power to appoint the members of the Corporation on conditions and terms of appointment determined by the Minister. That Section 6(3) of the Act also gives the Minister power to remove a member of the Corporation appointed under the said Section 5(1) and for the grounds set out thereunder. He avers that after the Applicant's first appointment to the Corporation's Board, he was subsequently re-appointed to the Board vide Kenya Gazette Notice No. 11 of 5th January 2021 Vol. CXXIII No. 2 after revocation of the Gazette Notice of his initial appointment. That he later on was required to revoke the appointment of the Applicant following an Advisory from the Ethics and Anti-Corruption Commission (EACC) vide Letter Ref. No. EACC.7/10/1 Vol. XLVI (38) dated 19th July 2021. That the said revocation was pursuant to his statutory mandate and was made in his official capacity and that the same was thus lawful and proper. He further avers that the Board of the 2nd Interested Party has already been re-constituted with new members under Gazette Notice No. 10667 of 8th October 2021 with effect from 6th October 2021. That the orders sought herein are therefore incapable of being issued as they have long been overtaken by events and that the Applicant has also not demonstrated any reasonable and/or justifiable cause to warrant issuance of the orders sought. He also depones that the prerogative orders of certiorari sought herein cannot issue as this is a not a matter of public law but the cause of action is rather founded on a contractual relationship and further, that the Judicial Review Application is a disguised normal claim.

4. The 2nd Interested Party also filed a Replying Affidavit sworn on 19th November 2021 by its Corporation Secretary Mr. Rodgers Karumpu who avers that the 2nd Interested Party is aware that the actions of the Ex-parte Applicant arising from non-compliance with the law and/or other relevant regulations in his previous appointment caused the said revocation of his appointment to the board. That since the 2nd Interested Party is not a participant to the process that gave rise to the cause of action(s) herein, it has been wrongfully enjoined in the cause and that its presence is not necessary. Further, the Applicant has not raised any triable issue against or to be supported by the 2nd Interested Party and that the 2nd Interested Party is a public entity interested in pursuing matters of public interest and not the Ex-parte Applicant's private personal interest. He asserts that there will be no prejudice caused to the Ex-parte Applicant if this Honourable Court thus struck out the 2nd Interested Party from the proceedings in this case.

5. Ex-Parte Applicant's Submissions

The Applicant submits that his appointment could only be terminated under the provisions of Section 6 of the Agricultural Development Corporation Act; or Section 7 of the State Corporations Act. That Section 6(3)(c) of the Agricultural Development Corporation Act provides that a member of the Corporation shall cease to hold office- "*if, on the advice of the Corporation the Minister removes him from office on the grounds that he is incapacitated by mental or physical illness or is otherwise unable or unfit to discharge the functions of a member or is unable to continue as a member*". That Section 7 of the State Corporations Act provides that a President may at any time revoke the appointment of any board member constitute a new Board in consultation with the Committee, where it appears that a Board has failed to carry out its functions. That from the above two provisions it is clear that the 1st Respondent has no authority to revoke his appointment as the State Corporations Act reserves to the President the power to summarily dismiss. That Section 6(c) on the other hand contains inherent safeguards to guard against abuse by the Minister by requiring that the revocation on the grounds thereunder be made through advice by the Corporation. That however no such advice was ever tendered to the 1st Respondent by the Corporation and the 1st Respondent never undertook any assessment to determine the fitness of the Ex Parte Applicant to continue acting as a member of the Corporation and that if any such assessment was undertaken then the same did not involve the Applicant herein. In submitting that the 1st Respondent acted *ultra vires*, the Applicant relies on the obiter in **Republic v Commissioner General, Kenya Revenue Authority Ex parte Sanofi Aventis Kenya Limited [2019] eKLR** where the Court analysed the *ultra vires* principle. He further submits that the reason that a communication from the EACC advised on his unfitness to hold public office does not cure the 1st Respondent's *ultra vires* actions because the same was mere allegations. It is the Applicant's submission that whereas the 1st Respondent is under a constitutional duty to provide reasons for his actions, he failed in this duty as the Gazette Notice communicating revocation of his appointment did not contain any reason for the revocation. That Article 47 (2) of the Constitution of Kenya provides that a person whose right or fundamental freedom is likely to be adversely affected by

administrative action has the right to be given written reasons for the action. He submits that in the case of **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300** as quoted with approval by the Court in **Republic v Land Registrar Kajiado North District & 6 Others Ex-Parte Irene Naipanoi Montet [2014] eKLR**, the Court held that 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. The Applicant invites the Court to adopt the definition of legitimate expectation advanced by authors **De Smith, Woolf & Jowell** in “**Judicial Review of Administrative Action**” 6th Edn. **Sweet & Maxwell at page 609** as:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

6. He further relies on the holding of the Court in **Republic v Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** as quoted with approval in **Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR** where the principle of legitimate expectation was discussed. He submits that trusts and confidences must be honoured in public law and the 1st Respondent arriving at an unreasonable decision cannot be allowed to stand as it goes against the Ex Parte Applicant’s legitimate expectation. The Applicant submits that the 1st Respondent violated his right to fair administrative action and fair labour practice guaranteed under Articles 47 and 41 of the Constitution and further under the provisions of the Fair Administrative Action Act, 2015 and should not be allowed to stand. That having demonstrated the illegality of the 1st Respondent’s actions, it is manifestly clear that he is entitled to the reliefs sought which your Lordship ought to therefore grant. Further, that his prayer for damages is grounded in Section 11 (1) (j) of the Fair Administrative Actions Act, 2015 and that the Court may grant the same by way of compensatory damages and exemplary damages of Kshs. 2 Million, with the considerations enumerated in his Submissions.

7. Respondents and 1st Interested Party’s Submission

The Respondents and the 1st Interested Party submit that revocation of the Applicant’s appointment was done within the law and in accordance with Chapter 6 of the Constitution, the Leadership and Integrity Act, the State Corporations Act and the Agricultural Development Act. That there were allegations against the Applicant, from his previous appointment at the Tourism Finance Corporation, of misrepresentation of the said Corporation’s Board through sharing of confidential and sensitive information on board matters and issuing misleading information. That the advisory letter from EACC also noted that the Applicant’s appointment while serving as Director at Tourism Finance Corporation was revoked under Section 2(e) of the State Corporations Act and he is accordingly not eligible for appointment in any other board as per the provisions of Section 6(3) of the State Corporations Act. That the 1st Respondent was thus justified to revoke the Applicant’s appointment in the 2nd Interested Party’s Board since his conduct is inconsistent with the provisions of the Constitution as regards leadership and integrity. Further, that as the appointing authority he also had power to revoke such appointment under the **Mwongozo: The Code of Conduct for State Corporations** and the Interpretation and General Provisions Act. They urge the Court to be persuaded by the decision in the case of **John Waweru Wanjohi & 2 Others v Attorney General & 3 Others [2012] eKLR** that in the exercise of the oversight role Courts must carry out a fine balancing act and be careful not to usurp the powers and functions of the appointing authority. It is their submission that the Ex Parte Applicant is not entitled to damages as revocation of his appointment was done in accordance with the law and this Honourable Court ought to dismiss the Application with costs to the Respondents. They further submit that the Ex parte Applicant has not demonstrated with reasonable precision how his fundamental rights and freedoms under the Constitution have been violated or are threatened contrary to Article 22(1) of the Constitution and the *locus classicus* decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**. That as the Ex parte Applicant has merely reproduced the provisions of various articles of the Constitution and generally claimed violation, the same should be dismissed. The Respondents also submit that the prerogative order of *certiorari* cannot be available to the Ex parte Applicant since the application is purely based on issues of contract which fall within the realm of private law and not public law and that the same was affirmed in the decisions in **Alphonse Mwangemi Munga & 10 Others v African Safari Club Limited [2008] eKLR**; and **Republic v Mwangi S. Kaimenyi ex parte KIPPRRA [2013] eKLR**. Further, the Applicant has been unable to prove all the elements required for the issuance of an order of *certiorari* which would also have the effect of curtailing the statutory duty and function of the Respondents. They urge the Court to be persuaded by similar findings in **Republic v Kenya Revenue Authority & Another Ex-Parte Bear Africa (K) Limited [2013] eKLR** wherein Majanja J. quoted with approval the decision of Githua J. in **Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited [2012] eKLR** and not interfere with the 1st Respondent’s action to revoke the Ex parte Applicant’s appointment as the same was lawful and done in public interest and further because the 2nd Interested Party’s Board has been reconstituted. They submit that whereas costs follow the event, a general exception to this rule is where the litigation is shown to be frivolous and vexatious as highlighted in **Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011**, page 94. They urge the Court to dismiss the Ex parte Applicant’s Application with costs as he has failed to prove his case on the required standard of balance of probabilities.

8. 2nd Interested Party’s Submissions

The 2nd Interested Party submits that having pleaded that it has been wrongfully enjoined in the suit, there will be no prejudice caused to the Ex parte Applicant if this Honourable Court struck out the 2nd Interested Party from the proceedings in this case as provided under Order 1 Rule 10(2) of the Civil Procedure Rules. It cites the case of **Meme v Republic [2004] 1 EA 124** where the High Court observed that a party could be enjoined in a matter for the reasons that:

"(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation."

9. The Ex Parte Applicant seeks a slew of reliefs against the Respondents on account of revocation of his appointment. The Respondents counter that the revocation by the 1st Respondent was after an advisory by the Ethics and Anti-Corruption Commission that the Ex Parte Applicant had ceased to hold office in the Tourism Finance Corporation pursuant to a revocation under Section 2(e) of the State Corporations Act. The Ex Parte Applicant from a reading of Section 6(3) of the State Corporations Act is ineligible for appointment in any other board. This is not something the Court can reverse as an order of *certiorari* cannot issue *contra statute*. The Ex Parte Applicant was misguided in his challenge to the 1st Respondent's revocation notwithstanding his assertions of legitimate expectation. The people of Kenya have a legitimate expectation that State Corporations will follow the law in their appointments and the revocation of the appointment of the Ex Parte Applicant was in keeping with these salutary expectations. The Judicial Review application is devoid of merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021

NZIOKI WA MAKAU

JUDGE