



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MALINDI

MISCELLANEOUS CAUSE NO 4 OF 2021

**IN THE MATTER OF AN APPLICATION BY ALFRED SIFA FOR LEAVE TO APPLY 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

REPUBLIC.....APPLICANT

-VS-

THE COUNTY GOVERNMENT OF KILIFI..... RESPONDENT

RULING

1. The application before me seeks leave of this court to commence Judicial Review proceedings against the Respondent challenging the lawfulness of the prolonged disciplinary process against the Ex-parte Applicant. The Ex-parte Applicant contends that the Respondent has failed to process and conclude the matter expeditiously to the Ex-parte Applicant’s detriment. He further contends that the Respondent has kept him in a state of uncertainty over the matter by failing to provide him with information on the process.

2. Thus, the Ex-parte Applicant prays that leave be granted to him to, among other prayers, apply for the disciplinary proceedings to be brought before the court for purposes of being quashed. He also seeks for leave to apply for orders prohibiting the Respondent from instituting fresh disciplinary proceedings against him on the basis of the same set of facts.

3. The application has been filed pursuant to the provisions of Order 53 of the Civil Procedure Rules (Order 53 of the CPR). This is in line with the 7 (2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which permit invoking of Order 53 of the CPR when processing Judicial Review proceedings before the Employment and Labour Relations Court.

4. On 12th November 2021, the Respondent entered appearance and filed a Notice of Preliminary Objection to the application. This was after the court had given direction that written submissions be filed on the application. On 15th November 2021 when the matter came up for mention to confirm the filing of submissions and to fix a ruling date, the Respondent sought directions of the court on its preliminary objection.

5. I indicated that in view of the earlier directions on the filing of written submissions, the application should be listed for ruling and that the Respondent could reserve its preliminary objection for the main motion should leave to commence it be issued.

6. From the heading of the application, the Ex-parte Applicant proposes to challenge the Respondent's impugned actions not just on the basis of the provisions of the Employment Act but also article 47 of the Constitution of Kenya 2010 as read together with the Fair Administrative Action Act, 2015. Therefore, the proposed proceedings, in a sense, intend to invoke the court's constitutional mandate to issue the remedy of Judicial Review.

7. The purpose of applications for leave under Order 53 of the CPR is to separate deserving cases from frivolous and vexatious ones. At this stage, the court is required to interrogate the matter and only permit deserving applicants to proceed to the next stage of the substantive motion for Judicial Review (see *Republic vs County Council of Kwale & another Ex-parte Kondo & 57 others*).

8. Part of the requirements of Order 53 of the CPR is that the application for leave must be accompanied by an affidavit verifying the fact that there is no other cause pending, and that there have been no previous proceedings in any court between the Ex-parte Applicant and the Respondent, over the same subject matter. I understand this provision of law as raising a bar to applications for Judicial Review where the issue in contention is either pending before the court in another matter or has been the subject of a suit that has been determined on its merits.

9. A perusal of the Ex-parte Applicant's affidavit suggests that there has not been compliance with this procedural requirement. At least, on the face of it, the affidavit does not set out the averment regarding the existence of other cases between the parties arising from the same set of facts. However, I note that the statement filed alongside the application discloses that the parties have been to court over the matter in two other suits namely Malindi ELRC Petition No 1 of 2020 and Malindi ELRC Cause No 3 of 2020.

10. The first case was dismissed on a point of law. The court declined to assume jurisdiction in the matter on the ground that the Ex-parte Applicant (Petitioner in the cause) had filed it in violation of the exhaustion principle. That he ought to have filed his appeal before the Public Service Commission before invoking the court's jurisdiction.

11. In my view, the above Petition was not decided on its merits. What the court told the parties was that they ought to refer their dispute to the right forum where it may be interrogated on merit.

12. In the second suit, the Ex-parte Applicant (Claimant in the cause) appears to have obtained some orders directing the Respondent to conclude the disciplinary proceedings against him within a fixed period of time. Whether the orders were complied with is a matter which is contested by the Ex-parte Applicant. However, it is not stated in the verifying affidavit whether the main suit was ever heard and determined.

13. In order to reach an informed decision on the current status of the suit in paragraph 11 above, the court called for and perused the original court file. From the court records, the suit was apparently withdrawn on 22nd October 2020 by agreement of the parties. It is therefore no longer pending for determination before this court. And neither was it decided on its merits.

14. I am therefore inclined to hold that the matter proposed to be filed by the Ex-parte Applicant is not the subject of a pending matter before another court. I also hold the view that the matter has not been the subject of previous proceedings that have been decided on merit between the parties.

15. Despite the views I express above, it is clear that the Ex-parte Applicant did not include this averment in his verifying affidavit. The issue I must now address is whether this failure ought to be a reason why I should decline the application notwithstanding that I was able to discern this information from other parts of the application.

16. After the promulgation of the Constitution of Kenya 2010, the general trend in dispute resolution has been to lean towards doing substantive justice to the parties. Consequently, the court will be reluctant to remove a party from the seat of justice on account of failure to adhere to a procedural rule unless it is demonstrated that to fail to enforce the procedural rule will prejudice the other party to the cause.

17. Indeed, this is what article 159 of the Constitution conveys when it calls on courts to administer justice without undue regard to procedural technicalities. In a couple of decisions, courts have expressed themselves on this requirement. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR* for instance, the Court of Appeal (majority decision) had this to say on this question: -

“ It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

18. This is a position I share. I see no prejudice that will be visited upon the Respondent if I were to overlook the requirement aforesaid in respect of this application. This is particularly so because I have been able to establish from other parts of the application and from other court records that indeed there have been suits on the subject matter some between the parties but which were not determined on merits.

19. But again I ask myself what would be the usefulness of rejecting this application. I ask this question because of the recent constitutional developments in the country on the remedy of judicial review.

20. Initially, the public law remedies of mandamus, certiorari and prohibition were only available to litigants by virtue of sections 8 and 9 of the Law Reform Act. And section 9 of the Act requires that rules regulating proceedings in respect of these remedies provide for leave of the court before the filing of the proceedings.

21. Currently, the Constitution provides for Judicial Review as one of the several remedies available to a party alleging violation or threatened violation of rights under the Bill of Rights. This includes the right to fair administrative action under article 47 of the Constitution that the Ex-parte Applicant claims.

22. The Fair Administrative Action Act operationalizes articles 47 of the Constitution. Under Part III of the Act, a victim of unfair administrative action can apply to the court for review of the impugned action. By virtue of section 10 of the Act, an application for Judicial Review is to be heard and determined without undue regard to procedural technicalities.

23. Further, the Chief Justice is required to make rules to regulate the procedure of approaching the court for orders of Judicial Review under the Act. Unfortunately, the rules are yet to be formulated.

24. What is important is that the Act has not adopted the procedure under the Civil Procedure Rules for Judicial Review proceedings brought pursuant to provisions of the Constitution of Kenya 2010 as read with the Act. Order 53 of the CPR only applies to what has been referred to as Judicial Review simplisiter motions. As a result, it has been observed that these rules have no application to Judicial Review proceedings premised on the Constitution and the Fair Administrative Action Act.

25. The net effect of the foregoing is that the current application, in so far as it seeks leave to commence Judicial Review proceedings under the Constitution and the Fair Administrative Action Act is really superfluous (see *Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) [2021] eKLR and JJ Okwaro & Co Limited v Firearms Licensing Board [2021] eKLR*). Refusal to grant the orders will not in law stand in the Ex-parte Applicant's way to file the main application.

26. However, for what it is worth, I think that the Ex-parte Applicant has a compelling complaint to warrant the proposed application. On the face of the record, the Respondent commenced disciplinary action against the Ex-parte Applicant on 9th January 2020 when it suspended the Ex-parte Applicant from work to pave way for investigations and subsequent disciplinary hearing session. Thereafter, Respondent issued the Ex-parte Applicant with a show cause letter.

27. After responding to the show cause, the Ex-parte Applicant has apparently never been told what exactly became of the accusations leveled against him. He cannot tell whether he was cleared of the charges or whether they are still pending. The fate of these proceedings appears to remain in limbo despite the court's order in the now withdrawn case that they be concluded within a fixed timeframe.

28. Although the Ex-parte Applicant's suspension was implicitly lifted by the Respondent's letter of 15th March 2021 re-deploying the Ex-parte Applicant to a new department, this is not the same thing as terminating the disciplinary proceedings that have been pending against him. He has never really been informed whether the disciplinary case against him was withdrawn or is still pending.

29. The failure by the Respondent to resolve the discipline issue against the Ex-parte Applicant for this long and in a manner that is open and transparent, prima facie violates the Ex-parte Applicant's right to fair administrative action. I will therefore grant him the leave sought to commence Judicial Review proceedings against the Respondent as prayed. Such application to be filed and served within 21 days from the date of this order.

30. The costs of this application shall abide the outcome of the Judicial Review application to be filed.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF DECEMBER 2021

B. O. M. MANANI

JUDGE

In the presence of:

Mr. Oduor for the Ex-parte Applicant

No appearance 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 15th April 2020, this Ruling 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