



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO.3 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF SECTIONS 3, 4, 7, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF Rules 72, 73 and 74 OF THE EGERTON UNIVERSITY SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED

AND

IN THE MATTER OF THE EGERTON UNIVERSITY SACCO SOCIETY LIMITED HUMAN RESORUCE POLICIES AND PROCEDURES MANUAL

AND

IN THE MATTER OF SECTION 3 AND 12 OF THE EMPLOYMENT ACT AND LABOUR RELATIONS COURT ACT.

BETWEEN

VICTOR RUTTOAPPLICANT

VERSUS

DR PATRICK MULIRO.....1ST RESPONDENT

JIM SIMWELO2ND RESPONDENT

THE BOARD OF DIRECTORS EUSACCO.....3RD RESPONDENT

JUDGEMENT

The applicant moved the Court by way of Judicial Review Application dated 13th October, 2017.

The respondents filed Notice of Preliminary Objections on 15th November, 2017.

Both parties addressed the matter by way of written submissions. The court shall address the application and the objections concurrently.

The applicant, Victor Rutto is seeking for orders that;

- a. This court be pleased to grant orders of mandamus and to compel the respondents to pay up all the accrued and unpaid monthly pension contributions and to continue paying the monthly contributions towards the pension fund for the applicant.

- b. The court be pleased to grant the applicant to an order of mandamus to *compel the 1st* respondent to allow the applicant herein resume his position as the C.E.O. of the Egerton SACCO.
- c. That this court be pleased to grant an order of certiorari to bring into this court *and quash the decision of the 1st respondent of employing the 2nd respondent as the C.E.O of the Egerton SACCO.*
- d. Costs of this application be borne by the respondent.

The applicant's grounds are that he was engaged as the chief executive officer (the CEO) of the Egerton University Savings and Credit Co-operative Society limited (the Sacco) in the year 2015. As the CEO the applicant and other members of the board were adversely mentioned in an enquiry report which led to their illegal dismissal from the Sacco orchestrated by the Commissioner of Cooperative.

The dismissed board members and the applicant successfully applied for judicial review orders of certiorari and the High Court quashed the inquiry report meaning that the status quo that was to be maintained was that existing before the adoption of the inquiry report. Upon the quashing of the inquiry report the board of directors wrote to the applicant informing him to report back to work and to take up his duties as CEO and the chairman directed him to proceed on his annual leave despite the fact that the applicant as CEO did not want to take such annual leave.

The applicant later learnt the Sacco had recruited a new CEO against court orders and that he had been demoted to a FOSA manager and which had been done after the respondent had reviewed the minimum qualifications for one to be CEO. The applicant was not given a hearing or opportunity to improve his qualifications to be a CEO or a hearing on his qualifications for the position he had held before the review.

The applicant other grounds are that the new position he had been given was not in the organisational chart of the Sacco and was not given a job description. The appointment of the new CEO was done in contravention of the Sacco by-laws and human resource guidelines on the terms of employment of employees. It was in violation of express court orders and therefore null and void *ab initio*.

The application is supported by the applicant's statement and affidavit and avers that in the year 2008 he was employed as CEO of the Sacco and worked without a disciplinary record when in August, 2015 the Commissioner of Cooperatives caused an inquiry to be conducted into the affairs of the Sacco and upon the completion of the report an AGM was held on 25th September, 2015 whereupon the recommendations were to be discussed by the general members. No discussion was allowed as the commissioner of cooperatives caused the reported to be implemented without due procedure.

The recommendation of the inquiry report was that 72 persons were adversely mentioned and there were sanctions. The mentioned person included current and former board members of the board of directors of the Sacco, the CEO and Mrs Martha Anunda the financial officer, employees of the Sacco.

Aggrieved by the inquiry report and together with 21 others affected filed judicial review proceedings to quash the report for violating their rights and the law and which was granted and the Sacco directed to maintain the status quo with regard to all persons mentioned in the inquiry report. Upon the hearing of the judicial review matter the court quashed the entire inquiry report and the effect of which was to restore matters as subsisting before such report and where the applicant was the CEO of the Sacco held before the AGM on 25th September, 2015.

Upon reporting on duty the applicant was directed to proceed on his annual leave and later demoted to the position of FOSA manager contrary to matters subsisting prior to 25th September, 2015 and contrary to the court orders issued restoring the status quo. Pending the hearing of the judicial review application the Sacco had no CEO save for an acting CEO, Agnes Munyi.

The applicant was invited to attend a meeting with the board on 14th November, 2016 which he did but only met a sub-committee headed by Florence Wanderi which sent him on annual leave and to resume duty in January, 2017. While on leave he was served with letter dated 1st December, 2016 inviting him to a board meeting on 7th member, 2016 with the agenda to discuss his reinstatement and where he was informed there was a restructuring with a new position of FOSA manager below the CEO and which he would hold as the qualifications for CEO had changed and he did not meet the criteria.

The applicant was not reinstated as CEO as the 1st respondent had proceeded to appoint the 2nd respondent as CEO forcing the applicant to move the court seeking orders to compel the respondents to allow him resume his duties as CEO of the Sacco through an application for contempt of the issued court orders to which the respondents replied admitting to employing the 2nd respondent as CEO during the pendency of the judicial review hearing and contrary to the orders of maintaining the status quo. The respondents had acted contrary to the law and in contempt of court, the Sacco by-law, the human resource and the law and such appointment void *ab initio*.

The appointment of the 1st and 2nd respondents was irregular. Such denied the applicant a chance to resume his duties as CEO of the Sacco. He was denied a chance to improve on his qualification which were changed to lock him out and was not allowed a hearing to urge his case to retain his position as CEO. By being allocated another position of FOSA manager was a demotion and such position did not exist in the structure of the Sacco. His allowances were downgraded and these changes were in bad faith and prejudicial. The new position of FOSA manager has no job description.

The actions of the respondents of demotion were not fair and failed the far administrative action as the applicant was not given notice prior to the changes from the position of CEO; he was not given a fair chance to improve on his qualifications following the changes for the position of CEO; he was not allowed a hearing to defend his position of CEO; and there were no reasons given for such changes. There was a

violation of legitimate expectation of being reinstated back to the position of CEO after the inquiry report had been quashed and the orders sought should issue.

In reply the respondents filed the Replying Affidavits of Dr. Patrick Muliro and Ezekiel Cheboi Kiptoo the 1st respondent and who avers that he is chairperson, Board of Director of Egerton University Sacco Society Limited and the Secretary of the Board of Directors respectively and which runs its operations through various committees which included human resource, credit, business and strategy and audit committees which have various mandates and upon its meetings and recommendation such are adopted by the full board.

The human resource committee address the applicant's reinstatement and applied the Sacco by-laws as reviewed per the revised provisions.

The position of the CEO was filled in February, 2016 after following the due process of recruitment which was followed by a report from KUSCO the body mandated to undertake the recruitment. The applicant by letter dated 10th March, 2016 on the day of the AGM reiterated the court orders issued on 14th December, 2015 which barred anyone from adopting the recommendations that touched on the parties to that case and which emanated from the recommendations by the Commissioner of Cooperative.

The respondents also avers that the applicant fails to state when the impugned court orders were served stopping the recruitment of the CEO. There was no count disobedience as alleged. The applicant was aware at the time that there was a recruitment of the CEO and his letter of reinstatement was written by the former vice-chairman Bernard Kibor and not the 1st respondent.

The applicant met with the human resource committee and he was given a hearing. It was also procedural for the applicant to be sent on his leave. The details were discussed with him.

The applicant has come to court with unclean hands. Upon assuming his position on 19th January, 2017 he quickly secured a loan facility as part of his staff benefits in the revised human recourse policy. He has chosen to selectively apply such policy to suit his interests. The Sacco developed its strategic plan which took effect in May, 2015 during the applicant's tenure as CEO but this was put on hold. The Sacco then reviewed and approved the restructuring which included changing the terms of service for the CEO from permanent and pensionable to 5 years terms in conformity with other competitive business organisations in the industry. The qualifications for the CEO were enhanced to meet the skills and competencies required for improved efficiency and effectiveness in Sacco operations.

The Sacco board met and discussed the position of CEO and Martha Anunda who had improved her academic qualifications was deployed as deputy fiancé manager. The position of FOSA manager was existing when the applicant was reinstated and was occupied by Agnes Mwinyi who resigned upon employment as CEO at Bandari Sacco.

The applicant was paid all his salary arrears and benefits as CEO for the period he was away from office and in compliance with the law not to reduce his wages. The applicant hence accepted his position of FOSA manager and under such he applied for a loan facility and applied for his annual leave to enable him improve on his qualifications.

The Sacco salary structure has since been changed and revised by creation of grade 12 commensurate with the qualifications of the CEO as per the human resource policy and such was not applied to isolate any employee.

The EUSACCO through the Sacco Board gave mandate for the recruitment of the CEO which was advertised in the location dailies. In the year 2011 the advertisement was carried out internally when the applicant met the specifications set out at the time. His then deployment as FOSA manager followed a board resolution and any appointment as CEO follows a board decision.

The applicant has retained his wages and benefits and his application herein is not made in good faith and should be dismissed.

As set out above the respondent also filed Notice of Preliminary Objections on the grounds that;

1. This claim offends the provisions of Regulations 60 and 63(1) and (2) of the Sacco Society (Deposit – Taking Sacco Business) Regulations 2010.
2. This claim is sub judice to an earlier application for Judicial Review No.21 of 2015 made by the Applicant against the same parties which is due to be determined on an application by the applicant against the Board of Directors of Egerton Sacco for Contempt of Court.
3. This claim is res judicata to an earlier application for judicial Review No.21 of 2015 made by the applicant against the same parties which had been decided to finality.
4. This claim is an abuse of the court process the claimants having no authority to institute the suit and further this suit fails to raise any reasonable cause of action against the respondent.
5. This suit is incompetent, bad in law and that the same should be struck out.
6. Ad other reasons to be adduced at the hearing thereof.

The applicant submitted that he is seeking for orders of *mandamus*, *certiorari* and to be reinstated to his rank as CEO and the position restored upon filing Nakuru High Court JR No.21 of 2015. The 1st respondent has since been replaced by Ezekiel Cheboi since May, 2016

and the 2nd respondent replaced the applicant as CEO and the 3rd respondent was replaced by a new entity. The responses by the respondents are therefore illegal and in abuse of court process.

The contention that the applicant failed to disclose that he had filed JR No.21 of 2015 is a misnomer and erroneous comprehension of the concept of cause of action and jurisdiction and the respondents are inept in raising such grounds as they have been found in contempt of court.

The applicant also submitted that the respondents lack the proper standing with the court as they have been held in contempt of the court. They have committed illegalities and what remains to be addressed in the issue of reinstatement of the applicant back to the position of CEO. Such is in admission by the respondents that the 2nd respondent was illegally installed as CEO which was nullified by the court. In the case of **Aggrey Wasike Lukorito versus Kenya Power & Lighting Company Limited Cause No.109 of 2015 (Nyeri)** the court held that in considering the order of reinstatement or not must look at the right to work, to free choice of employment and to protection against employment. Every time an employee works it generates satisfaction and self-esteem which is a necessary component of the employee's human dignity beyond what is paid for the work.

A reinstatement should be ordered based on the employee primary remedy and in this case upon reinstatement the applicant has a legitimate expectation to the position of CEO of the Sacco.

The respondents submitted that the applicant has failed to disclose to the court that he had filed Nakuru High Court JR No.21 of 2015 where he was seeking similar orders as herein. Such matter has since been addressed by a competent court of equal jurisdiction and to move the court as herein is contrary to the rules of *res judicata* and in *sub judice*.

While JR No.21 of 2015 was pending before the High Court, the applicant filed these proceedings against the respondent. This is an admission that the dispute relates to employment where he is seeking to be reinstated in his former position as CEO, a matter this court has original jurisdiction and not the High Court vide ruling in JR No.21 of 2015.

Efforts by the applicant to seek reinstatement to the position of CEO is illegal and proceedings in JR No.21 directing for his reinstatement was contrary to written law. The applicant ceased to be the CEO in April, 2017 and has since been FOSA manager and the respondents cannot hence be sued for a to reinstate him for a position he ceased holding and accepted a new position.

Juma Simwelo is the current CEO after the position was advertised and a recruitment process undertaken. Section 49 of the Employment Act, 2007 sets out the parameters within which the court should consider in addressing the order of reinstatement which is not the case for the applicant. He has not met the threshold for reinstatement as CEO as held in **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**.

The respondents also filed submissions on the objections made that under Regulation 63(1) and (2) of the Sacco Societies (Deposit – Taking Sacco Business)

Regulations 2010 the board of directors has the mandate for the removal and appointment of a CEO of the Sacco. The 1st respondent as chairperson cannot appoint or remove and follows board decisions. The High Court in JR No.21 of 2015 has addressed a similar question with finality and to move the court as herein seeking orders of mandamus and certiorari is improper and renders the application herein bad in law and should be dismissed.

The respondents also submitted that the matter is *res judicata* having been addressed in similar terms and orders against the same respondents by the applicant before a court of equal jurisdiction. In the case of **Kenya Planters Co-operative Union versus Kenya Cooperative Coffee Millers Limited & another [2016] eKLR** the court held that no court shall proceed on a matter that has been tried by a court of equal jurisdiction. In this case JR No.21 of 2015 has been concluded and cannot be re-litigated by the applicant filing a fresh application with the court as held in **Okiya Omtatah Okoiti versus Communications Authority of Kenya & 14 others [2015] eKLR** that the rationale of the *res judicata* rule is to avoid litigation under the same title and between the same parties on a matter already addressed to finality.

The matter herein should be dismissed with costs to the respondent.

The issues which emerge for determination can be summarised as follows;

Whether the preliminary objections raised are with merit;

Whether the judicial review orders sought should issue; and Who should pay costs.

Preliminary objections once raised should be addressed instantly and before the court can delve into any other matter as where such objections are found with merit and with a possibility of terminating the proceedings if found with merit save on judicial time and reduce on costs.

However, preliminary objections should only be with regard to matters of law only and do not require the verification by facts. In the **Mukisa Biscuits Manufacturing Company Limited versus West End Distributors (1969) EA** the court held that;

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a

matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

The respondents objections relates to the provisions of Regulations 60 and 63(1) and (2) of the Sacco Society (Deposit – Taking Sacco Business) Regulations 2010 and which Regulations apply to the internal operations of the 3rd respondent and related Sacco and not a statute of general application but a subsidiary matter and not to be equated with an Act of Parliament. The Regulations relied upon as source of objections being subsidiary to any legislation cannot have an overbearing effect to the law as held in **Anthony Wandeto Mwangi versus Agba Motors Limited, Cause No.369 of 2012**. Rules of procedure or operational guidelines cannot override the law.

With regard to the objections that the application herein is *res judicata* and *sub judice*, these are serious matters of law to which the applicant did not give much weight in submissions.

The respondents submitted that the application filed Nakuru High Court JR No.21 of 2015 on similar facts, addressing the same remedies and against the same parties. That the matter has since been adjudicated with finality. The applicant on the other hand does not contest that there is such matter already addressed by the High Court.

On the applicant's affidavit dated 13th October, 2015 he has attached orders relating to Nakuru High Court JR No.21 of 2015 wherein the same related to him and 22 others being the 9th *ex parte* applicant against the **Directorate for Co-operative Development, County Directorate of Co-operatives and the Attorney General & 4 Interested parties** including the current 1st respondent. The issues in dispute therein assessed by this court relates to the decision to surcharge the applicants following an inquiry conducted by the respondents into the affairs of the Sacco and recommendations therefrom over various allegations.

The High Court Ruling in JR No.21 of 2015 delivered on 17th June, 2016 the issues for determination are well articulated with a finding that the applicant herein was the Sacco CEO.

I take it prompted by this ruling from the High Court, the applicant moved this court as herein and seeking reinstatement to the position of CEO of the Sacco. There is therefore noting *sub judice* or *res judicata* as there is clear distinction with regard to matters addressed in High Court JR No.21 of 2015 and the current application. There is no abuse of process and the applicant is properly before this court.

On the application by the applicant as set out above, he is seeking for orders of *mandamus* to compel the respondents to pay up all the accrued and unpaid monthly pension contributions and for orders of *mandamus* to compel the 1st respondent to allow him resume his position as CEO of the Sacco and for orders of *certiorari* to bring into this court and quash the decision of the 1nd and 2nd respondents of employing the 2nd respondent as CEO of the Sacco.

In addressing matters between him and the respondents, the applicant opted to take the route of Judicial Review Proceedings. In its nature, judicial review proceedings is the jurisdiction granted to courts to review the lawfulness of an enactment or decision, action, or failure to act in relation to a public function. The Court of Appeal in **Grain Bulk Handlers Limited v J. B. Maina & Co. Ltd & 2 others [2006] eKLR** summarized the purpose of judicial review by stating that;

Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions.

The court is hence only confined to a limited power and to check on the legality, rationality and procedural propriety of an impugned decision. See **Republic vs. Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd & Another [2012] eKLR**. This is to avoid the temptation of the court going into the arena and interrogating the decision made and replacing it with its own as this is not the purpose of judicial review in the first instance. The rationale is that judicial review jurisdiction is a special supervisory jurisdiction and different from ordinary constitutional or civil jurisdiction, and also distinguishable from the appellate jurisdiction by its limited reach.

It is therefore imperative that even where the applicant had a genuine claim and with proper foundation to move the court as appropriate.

The gist of the matter before court relates to his reinstatement back to the position of CEO of the Sacco and payment of the due monthly pension contributions and attendant benefits. As the applicant correctly submitted in the case of **Aggrey Wasike Lukorito versus Kenya Power & Lighting Company Limited Cause**

No.109 of 2015 (Nyeri), an order of reinstatement to obtain, the provisions of section 49 of the Employment Act, 2007 must be gone into and interrogated by the call of evidence. The facts of the matter must be interrogated as to whether such a remedy is the most efficacious taking into account when the cause of action arose in terms of section 90 of the Employment Act, 2007 read tighter with section 12 of the Employment and Labour Relations Court Act, 2011. Such are matters which requires an interrogation as to whether there was an unlawful and or an unfairness visited against the applicant. These are matters best addressed in an ordinary Memorandum of Claim and cannot be urged by invoking the judicial review jurisdiction of the court.

Similarly, on the claim that there are unpaid pensions and monthly pension contributions, such requires to be articulated by call of evidence and filing of affidavit cannot resolve such matters to conclusion. The operational regulations requiring the employer to have a pension scheme for the benefit of employees are regulated and should be urged under a Memorandum of Claim and not by way of judicial review

proceedings.

In **Nicholas Mayieka & 22 others versus Judicial Service Commission Petition No.260 of 2016 (Nakuru)** the court held that;

In matters of employment and labour relations, unless otherwise prescribed, through a Statement of Claim a party is allowed to urge its case. Such memoranda gives the other party a fair chance to call its witnesses and cross-examine them and have the court address the case on its merit(s). The application of technical procedures under a petition with mere citations of various articles of the constitution where ordinarily a suit ought to be commenced by way of Statement of Claim only serves to deny the other party and the court crucial evidence to the disadvantage of the petitioner.

Similarly in Court of Appeal in addressing an appeal with regard to filing of judicial review proceedings instead of filing a Memorandum of Claim in the case of **Maurice Adongo Anyango versus Kenyatta International Convention Centre [2018] eKLR** held as that;

Furthermore, this Court has in several decisions held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. See for instance **Speaker of the National Assembly v Karume** (supra). The appellant's claim was based on a contract of employment. A specialized court exists to deal with employment matters and it would cause jurisdictional rivalry and/or confusion if courts would allow litigants to shuffle between any courts, even if they are of equal status. ...

In the findings above, the court made reference to the decision of **R versus East Berkshire Health Authority, ex p. Walsh [1984]0 APP.L.R. 05/14, that;**

The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for re-instatement or re-engagement and so on. ...

The orders of *certiorari* sought to quash the decision of the 1st respondent of employing the 2nd respondent as the CEO of the Sacco, it follows the finding above, without addressing the legality, rationality and procedural propriety of the decision to remove the applicant as CEO of the Sacco, to delve into the appointment of the 2nd respondent by the 1st respondent as the CEO of the Sacco on affidavits filed would be to deny both a fair chance to urge their defences and shift the dispute herein from a claim made by the applicant for the respondents to defend their positions. Such is not the nature of employment and labour relations disputes adjudication.

The applicant well represented by counsel and conversant with the Rules of Procedure for this court ought to have moved the court under a Memorandum of Claim. This is summarised in the case of **Pater Ndegwa Nderitu versus Teachers Service Commission Petition No.11 of 2018 (Nakuru)** as follows;

.....a party aggrieved by a decision of the employer to move the court as appropriate and in view of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 where the matter elates to a constitutional violation and the remedies therefrom or seek for judicial review orders are where necessary or by Memorandum of Claim, apply the same accordingly.

Accordingly, the application herein is found without merit and orders sought shall not issue in the form urged and is hereby dismissed. Costs to the respondents.

Dated and delivered electronically this 4th June, 2020 at 0900 hours

M. MBARU JUDGE

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 March, 2020 the Order herein shall be delivered to the parties via emails. this 4th June, 2020 at 0900 hours

M MBARU JUDGE