REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 22 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS OF THE LAW ENFORCEMENT ACADEMY OF THE KENYA WILDLIFE SERVICE AND THEIR DECISION CONTAINED IN THE LETTER OF THE DIRECTOR GENERAL (KWS) DATED 6TH FEBRUARY 2018

AND

IN THE MATTER OF THE KENYA WILDLIFE SERVICE, PERSONNEL DISCIPLINARY CODE

AND

IN THE APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

PETER NDEGWA KIMENJU.....APPLICANT

VERSUS

THE COMMANDANT, LAW ENFORCEMENT ACADEMY,

KENYA WILDLIFE SERVICE (KWS).....1ST RESPONDENT

THE DIRECTOR GENERAL,

KENYA WILDLIFE SERVICE.....2ND RESPONDENT

JUDGMENT

The Application before this Honourable Court for determination is dated 20th June 2018 and filed and under the provisions of Order 8 rule 3 and 5 of the Civil Procedure Rules 2010.

The Applicant seeks the following orders:

a. Spent.

b. That this Honourable Court be pleased to grant the Applicant an Order of Certiorari to remove to this Court (sic) for purposes of quashing the decision of the Commandant Law Enforcement Academy and the Director General Kenya Wildlife Service dated 6th February 2018 contained in their letter of the same date.

c. That this Honourable Court be pleased to grant the Applicant an Order of Prohibition directed to the Kenya Wildlife Service through its Director General stopping him from terminating or suspending the *ex parte* Applicant from the Kenya Wildlife Service pending the hearing and determination of this Application.

d. That this Honourable Court be pleased to grant the Applicant an Order of Prohibition directed to the Kenya Wildlife Service through its Director General from making unlawful deductions to the *ex parte* Applicant monthly salary and allowances.

e. That the cost of this application be provided for.

The Application is based on the grounds as set out herein below.

a. That the disciplinary proceedings against the *ex parte* Applicant presided over by the commandant Law Enforcement Academy (KWS) and the three appeals were carried out un-procedurally.

b. That the decision and directions of the Director General (KWS) in the three appeals filed by the *ex parte* Applicant from the disciplinary proceedings from the Law Enforcement Academy (KWS) were ultra vires the KWS Disciplinary Code 1990 and law generally.

c. That the two orders (on appeal) were made without or in excess of jurisdiction granted to the Director General KWS by the KWS Disciplinary Code 1990.

d. That there has been unlawful deductions of the *ex parte* Applicant's instructors allowance upon the impugned conviction.

e. That the *ex parte* Applicant is an instructor in martial arts at the KWS Academy and is the highest qualified such instructor and draws an allowance from the extra duties.

Applicant's Case

The application is supported by the affidavit of Peter Ndegwa Kimenju, the *ex parte* applicant sworn on 20th June 2018.

It is the Applicant's averment that on 20th June 2017, he was charged with an offence of leaving his place of work without properly being relieved contrary to the KWS Disciplinary Code 1990. He pleaded not guilty to the charges and full Orderly Room Proceedings were conducted by the Commandant Law Enforcement Academy (KWS) and he was found guilty and convicted.

It is the Applicant's averment that he was able to prove through witnesses that on the material day and time, he had received instructions from N-Commanding Officer (NCO) to leave his work station and proceed to the main gate of the KWS Compound. The NCO testified on his behalf during the 1st trial.

The Applicant avers that he appealed against the conviction to the Director General who instructed the Commandant Law Enforcement Academy (KWS) to retry and summon additional witnesses. On 18th September 2017, the Applicant appealed against the 2nd trial and conviction dated 12th September 2017. Despite there being insufficient evidence to convict the Applicant, the Director General instructed the Commandant Law Enforcement Academy (KWS) to have a third trial and to have the Applicant's defence witness testify for the prosecution. The third trial took place and resulted in a third conviction. The Applicant appealed yet again and his conviction was upheld vide the letter dated 6th February 2018.

It is the Applicant's position that his instructor's allowance was withdrawn without reasons or justification.

Respondents' Case

The Respondents responded to the Application vide a Replying Affidavit of Jacob M. Mwanjala sworn on 11th September 2018.

It is the Respondent's case that the Kenya Wildlife Service is a body corporate with perpetual succession and a common seal capable of suing and being sued and as such the Respondents are improperly before Court. That on the night of 27th June 2017, the Applicant was supposed to be on duty at the Administration Block. The deponent was informed that on the material night at around 22.35 hours a member of staff was stranded at the gate with no one to open the gate for him. Those on duty were contacted through their mobile phones but in vain. Further, there was no one at the Administration Block. The Applicant was one of the night security on duty. He was called and when the Applicant was asked of his whereabouts, he stated that he had been sent to the gate and apologized for his mistake.

Consequently, the Applicant was charged under the Kenya Wildlife Service (Armed Wing) Disciplinary Code 1990 Regulation 5 paragraph (F) with the offence of leaving his Post (Administration Block) without being relieved. The Applicant received notice of the proceedings and was subjected to due process. The Applicant pleaded "Not Guilty" and a hearing was conducted, where witnesses were called to testify, the Applicant given an opportunity to cross-examine them, make his own defence and upon conviction duly mitigated before the sentence was passed.

It is the Respondents' averment that when the proceedings and sentence were forwarded to the Director General for endorsement, the Director General ordered a retrial which led to the second Orderly Room Proceedings, in which due process was followed once again. The proceedings were forwarded to the Director General once again for endorsement, and he ordered a retrial and the taking of further evidence as provided under the Code of Discipline.

It is the Respondents' position that the Administration Block which the *ex parte* Applicant allegedly left unattended, houses extremely sensitive items and if left unattended, there is a security risk to both the staff and wildlife should the items fall into wrong hands.

It is the Respondents' case that rangers are not trained as instructors but the *ex parte* Applicant had special skills in martial arts and was as an exception to the general rule, deployed for a limited period to train and/or carry out instructor's duties hence the instructors allowance

reflected in his pay slip. That once the duties were over the allowance was stopped. The Respondent avers that the Claimant did not undergo an instructor's training or possess the relevant certificate.

It is the Respondent's position that the Applicant relied on confidential and sensitive documents as evidence, which were never addressed or copied to him and that there was a procedure for accessing such documents. That it is strange that the *ex parte* Applicant accessed the documents as the file mysteriously disappeared from the deponent's desk when he requested for the same. The said file has not been recovered to date in spite of a vigorous search, which loss is now the subject of investigations.

The Respondents aver that lately, the *ex parte* Applicant has been behaving in an extremely provocative manner calculated to induce a suspension or termination from the Service in order to justify his prayer for Prohibition Orders.

The Applicant put in a Further Affidavit sworn on 22nd October 2018 asserting that what was in issue was whether the Applicant's trial and conviction was procedural and not whether other people were tried. Further, that the application herein is properly before this Court as it was against the persons named as respondents and not KWS.

Submissions

The Applicant in his submissions dated 22nd October 2018 and filed on even date, submits that the particulars on his charges as framed are farfetched and do not marry with the meaning of desertion or insubordination as envisaged in the Kenya Wildlife Service Disciplinary Code of Conduct and the Kenya Wildlife Crimes Code and thus lack authenticity.

It is the Applicant's submissions that his appeal to the Director General ought to have proceeded on appellate level wherein conviction or dismissal ought to have been arrived at on an Appellate jurisdiction instead of redirecting the hearing to the Commandant. As such, the Respondents failed to exercise their duties as quasi-judicial officers.

The Respondents in their submissions dated 27th November 2018 and filed on 29th November 2018 submit that the Application herein is fatally and incurably defective both in form and substance and ought to be struck out. It is the Respondents' submissions that ***section 6 (1) and (2) of the Wildlife and Conservation Management Act*** establishes KWS as a body corporate. The Respondents are employees of KWS and cannot be sued in their official capacities as office holders hence they were improperly enjoined in these proceedings.

The Respondents submit that the orders sought cannot be granted as prayed since the decisions of KWS are not subject to Judicial Review but can be challenged in the ordinary manner between an employer and employee by seeking declaratory or injunctory orders, because KWS is a body corporate. The Respondents relied on the cases of: ***Nrb HC Misc. Applcn No. 248 of 2016 (JR); Republic vs. SASRA & Another ex parte Martin Njuhigu & 10 Other*** where the Court relied on several cases that addressed the issue of Judicial review. They further relied on the case of ***Kondi Riaga vs. Commissioner for Co-operative Development [2016] eKLR*** where the Court held that Judicial Review is not concerned with private rights or the merits of the decisions being challenged but with the decision-making process. The Respondents also rely on the case of ***Kenya National Examination Council vs. Republic ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR*** where the Court stated:

> **"…** *but if the complaint is that the duty had been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what* has *already been done... Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."*

The Respondents submit that it was not in dispute that *ex parte* Applicant was not at his designated station as required and his explanation for not being at his station was only a mitigating factor and the fact still remains that the offence was committed.

It is the Respondents' submissions that the relationship between the *ex parte* Applicant and KWS is that of an employee and employer guided by the law as laid out in the Employment Act 2007. That the Applicant's employment was not terminated.

As regards the order of prohibition directed at KWS not to deduct the Claimant's salary, the Respondents submit that at the filing of the Application herein, KWS had recovered Kshs.2,420 from the Applicant. In addition, the deduction of the instructor allowance was not part of the sentence being impugned by the Applicant. The payment of instructor's allowance was peculiar to the Applicant and was not part of his contracted salary. The withdrawal of the instructor's fee was because the Applicant was no longer deployed at the training department.

Determination

The issues arising for determination herein are the following –

1. Whether the respondents herein are non-suited.

2. Whether the matter herein has been properly brought by the ex parte applicant, and

3. Whether the ex parte applicant is entitled to the remedies

The application herein has been brought against The Commandant, Law Enforcement Academy, Kenya Wildlife Service (KWS) and the Director General, KWS. Both are employees of KWS and are accused of matters they undertook or decisions they made in the course of

employment of KWS, which has not been enjoined to this suit. Secondly, the vehicle that the applicant chose being judicial review is a special vehicle intended to check the exercise of powers against public authorities. Judicial review is defined in Blacks Law Dictionary 10th Edition as "***a court's power to review the actions of other branches or levels of government, especially the court's power to invalidate legislative and executive actions as being unconstitutional***."

In the case of ***Staff Disciplinary Committee of Maseno University and 2 Others –V- Ochonga Okello (2012) eKLR*** Visram J. as he then was had this to say –

> "*A parallel may be drawn from* ***Civil Appeal No. 20 of 1994 Erick D. J. Makokha & Others versus Lawrence Sagini & others*** *in which a question arose whether the breach of contract of personal service of lecturers from a public University could be remedied by equitable remedies of injunction and specific performance. In a unanimous judgment, a five judge bench of this court had this to say:*
>
> "*In our opinion the well settled rule that a breach of contract of personal service cannot be redressed by the equitable remedies of injunction and specific performance remains good law. The comparatively few cases in which declarations were made and injunctions were granted to restrain a breach of contract of personal services are exceptions to the general run of the common law. In our opinion the common law rule that damages are the generally accepted remedy for redressing breaches of contracts of personal service is too firmly established to be overthrown by side wind. While we note the emerging changed attitudes and remedial changes they are bringing about, we cannot help feeling that the common law and the doctrine of equity which Section 3 of the Judicature Act obliges us to apply is the established and well known common law. It is on the faith of this that the transactions are entered into."*
>
> *I concur with the above proposition and find that the breach or threatened breach of the appellants' contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the respondent and the appellants, governed by private law. It was not therefore an appropriate action justifying the granting of orders of judicial review. The respondent may well have had a genuine grievance. His remedy however, lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of judicial review as Prof. Ochong' did not have public law right capable of protection under the supervisory jurisdiction of the Court."* (Emphasis added)

In ***Kenya Universities Staff Union –V- University Council of Masinde Muliro University of Science and Technology and 2 Others***, the court cited with approval the decision in ***Republic –V- Mwangi S. Kaimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR*** when it observed as follows –

> "*I therefore agree that the Employment and Labour Relations Act, and Article 162(2) and 165(5) of the Constitution must all be interpreted in a manner as to allow the Employment and Labour Relations Court to have the powers to grant appropriate remedies when an employment or labour relations matter is before it. To buttress the holding that the said Court can grant judicial review orders in employment matters the Court of Appeal in* ***Civil Appeal 160 of 2008 - Republic vs. Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR*** *stated that:*
>
> "*This is not to say that judicial review remedies cannot be available in contracts of employment. There are instances when such remedies are available. One such instance is when the contract of employment has statutory underpinning and where there is gross and clear violation of fundamental rights. In the case of* ***CHIEF CONSTABLE OF NORTH WALES POLICE – V- EVANS (1982) I WLR 1155****, Lord Hailsham pronounced himself thus:* (Emphasis added)
>
> "*the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court" (See also* ***Commissioner of Lands – vs- Kunste Hotel Limited 1995-1998 1E.A. 1 (CAK)).*** *In the case of* ***Eric Makokha & Others – vs- Lawrence Sagini & Others CA No. 20 of 1994*** *at Nairobi, this court defined statutory underpinning. It was stated: "the word statutory underpinning is not a term of art. It has no recognized meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean the employees removal was forbidden by statute unless the record met certain formal laid down requirements. It means some employees in public positions may have their employment contract guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible that this is the true meaning of what has become the charmed words "statutory underpinning". The statute makes it mandatory that a certain procedure must be observed in some contracts of employment before termination. Examples are constitutional office holders such as judges and the Attorney General."*

A judicial review proceeding is meant to check how a public body exercises its public authority. Therefore, every judicial review application must be aimed at a public body. The public entity mentioned as a Respondent in any judicial review application must be a body corporate capable of being sued and can sue in its own name. A public authority does not act on its own but through agents and/or employees. This does not make the agents or employees personally liable in a judicial review application.

In this particular case, KWS is the employer of the applicant. KWS is established under section 6 of the Wildlife Conservation and Management Act, 2013 that states that there is established a Service to be known as the Kenya Wildlife Service. It further provides that

> "*the Service shall be a body corporate with perpetual succession and a common seal and capable, in its corporate name, of suing and being sued; purchasing, holding and disposing of movable and immovable property; and doing all such other things as may be done by a body corporate".*

Whereas section 11 of the Act provides for the creation of an office called Director-General, it does not give the said office ability to sue in its own name or to be sued. Like the Applicant, the Director General is also an employee of the service.

Premised on the above position, it is certain that the Respondent in the application ought to be KWS. Suing and/or naming the Commandant and Director General is like seeking judicial review orders against a fellow employee(s). Even if the court was to be sympathetic with the predicament of the Applicant and issue the orders as prayed, who will enforce such orders? The matter cannot be better expressed than in the words of Ojwang J (as he then was) in ***B vs. Attorney General [2004] 1 KLR 431*** that:

> *"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."*

From the foregoing I find that not only did the applicant sue the wrong persons but he also came to court through the wrong vehicle.

The respondents herein can only be sued together with their employer KWS on whose behalf they exercised disciplinary control over the applicant. Without KWS this application cannot stand as the respondents herein were only agents exercising the authority and powers on behalf of KWS, the mutual employer of the applicant and the respondents.

Further the applicant's prayers are incapable of being granted as both the respondents against whom his prayers are directed did not make any decisions. The decisions were made by a KWS who is not a party in these proceedings.

Finally the prayers sought were not made by the respondents in the nature of the exercise of public authority; it was a decision of an employer in the exercise of disciplinary control over an employee which is a matter of contract under private law.

For these reasons, the application must fail with the result that it is accordingly dismissed. In view of the nature of the relationship between the applicant and the respondents, I order that each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE