



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 129 OF 2018

IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 22, 23, 40, 47, 50, 159, 162, 236, 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

AND

IN THE MATTER OF: STATE CORPORATIONS ACT, CAP. 466

AND

IN THE MATTER OF: THE SPORTS ACT, NO. 25 OF 2013

AND

IN THE MATTER OF: ALLEGED AND/OR THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 27, 47, 50, 157, 236, 238 AND 244 OF THE CONSTITUTION

BETWEEN

JOHN MARK WAMBUGU.....APPLICANT

v

NATIONAL SPORTS FUND BOARD OF TRUSTEES.....RESPONDENT

JUDGMENT

1. On 23 March 2017, the Principal Secretary, Ministry of Sports, Culture and the Arts, State Department of Culture and the Arts wrote to John Mark Wambugu (Petitioner) informing him that he (Petitioner) had been appointed to act as the Chief Executive Officer, National Sports Fund.
2. The letter did not set out the duration of the acting appointment.
3. On 26 November 2018, the Chairman of the National Sports Fund Board of Trustees (Respondent) sent out a Memo to all staff to inform them that Jaxon Indakwa had been appointed as the acting Chief Executive Officer of the Fund, and that the Petitioner would resume his designated role of Director, Corporate Services (two other Managers were also affected).
4. The Petitioner was not satisfied by the action of the Respondent and he moved the Court on 5 December 2018 alleging that his removal from the acting appointment was irregular, unprocedural and breached his rights to fair administrative action and fair hearing.
5. The Petitioner also contended that the action of removing him from the acting position violated the national values and principles, and amounted to victimisation.
6. On 6 December 2018, the Court directed that the motion accompanying the Petition be abandoned on terms that Petition be heard on an accelerated basis, and that the Respondent file and serve a Reply to the Petition on or before 14 December 2018. Hearing was scheduled for 20 December 2018.

7. When the Petition came up for hearing on the scheduled date, the Respondent sought for an adjournment to enable it file responses to the Petition. The Court declined to grant the adjournment (reasons are on record).

8. The hearing therefore proceeded without any formal response from the Respondent. The Court allowed the Respondent to cross examine the Petitioner.

9. The Petitioner filed his submissions on 11 January 2019 while the Respondent filed its submissions on 8 February 2019.

10. The Court has considered the pleadings, evidence on record and the submissions.

11. In opposing the Petition, the Respondent contended that pursuant to clause 2.19 of the Respondent's *Human Resource Manual*, an acting appointment could not exceed 6 months; the appointment of the Petitioner to act as the Chief Executive Officer was *ultra vires* the powers of the Principal Secretary as it was contrary to section 25 of the Sports Act and Code of Conduct for State Corporations.

12. The Respondent also questioned the competency of the Petition.

13. The Respondent drew the attention of the Court to a decision from the Court of Appeal, Philippines, *Generoso R. Sevilla v The Hon. Court Of Appeals & Nerito L. Santos G.R. No. 88498, June 09, 1992.*

Competency of the Petition

14. The Respondent attacked the competency on two main grounds.

15. One, it was contended that the Petition did not meet the threshold expected of a Petition and two, that the Petitioner had not exhausted internal dispute resolution mechanisms provided for in the Respondent's establishing statute and the Public Service Commission Act.

16. It is trite law that the Constitutional Petition route should not be invoked and/or trivialised where a dispute can be determined on the basis of statutory law using the usual mode of approaching the Court.

17. In the view of the Court, the dispute advanced by the Petitioner could have been competently determined using the ordinary course of approaching the Court but because the Respondent did not demonstrate any injustice or prejudice, the Court will not drive the Petitioner away from the temple of justice.

18. Further, because of the eventual orders which the Court will make, the Court finds it unnecessary to examine whether the Petitioner should have exhausted other dispute resolution mechanisms before approaching the Court.

***Ultra vires* appointment**

19. The letter appointing the Petitioner to act was in the hand of the Principal Secretary.

20. In terms of section 25 of the Sports Act, the mandate to appoint the Chief Executive Officer is reposed in the Respondent. Technically therefore the Principal Secretary (who is among the Trustees) overstepped his mandate.

21. However, the Respondent did not make any attempt to explain why it waited for over 1 year to question the legality of the Petitioner's acting appointment.

22. It is curious that the Respondent only raised the *ultra vires* issue when this litigation was instituted. It cannot be that the Respondent throughout the acting tenure of the Petitioner were not aware of the law or the valid appointing authority.

23. Although the law was on its side on this question, the Court is of the view that the *ultra vires* issue was more of an afterthought, otherwise the Respondent should have at the earliest opportunity sought to rectify the anomaly, being the requisite entity with the mandate to appoint an acting Chief Executive Officer.

24. It is also instructive that the Respondent did not notify the Petitioner that the acting appointment was being revoked for having been made *ultra vires*.

25. For the Court, *ultra vires* should not be decisive in this case.

Right to fair administrative action

26. Litigants keep on raising the applicability of the right to fair administrative action (Article 47 of the Constitution) in the employment sphere but fail to develop the argument. More often than not, the right and the *Fair Administrative Action Act* are merely thrown at the Court.

27. The Petitioner contended that because clause 2.19.7 of the Respondent's *Human Resource Policy Manual* provided that an employee should be notified of cessation of an acting appointment, that contractual provision seen in the context of the rights to *fair administrative action* and fair labour practices required that he be heard before being removed from acting in the position of Chief Executive Officer.

28. In unravelling whether the Petitioner's right to fair *administrative action* was violated, it is germane to examine briefly what administrative action connotes.
29. In other words, was the Respondent performing an *administrative action/function* when it revoked the appointment of the Petitioner as acting Chief Executive Officer?
30. In the view of this Court, a distinction must be made on the actions of an employer as an employer, and an employer as an entity performing an *administrative action/function*.
31. In ordinary employment, it would be very exceptional for the action of an employer to fit the *administrative action* or function bill.
32. In the Court's view, to meet the *administrative action* test, the employee must have special statutory protections as to the removal from office. Such is not the case here.
33. In revoking the Petitioner's appointment as acting Chief Executive Officer, the Respondent was not performing an *administrative action/function*.
34. Even in terms of contractual agreement, the Court is unable to discern any *administrative action/function* in the text of clause 2.19.7 of the Manual.
35. What the clause ordains is that the employee should be informed of the date of cessation of the acting appointment.
36. It is a fact, and the Respondent did not demonstrate otherwise, that the Petitioner was not notified explicitly that his acting appointment was ceasing, or the date of such cessation.
37. The Respondent was merely content with notifying the general staff about the appointment of a new acting Chief Executive Officer.
38. In the view of the Court, that failure was an irregularity which may not attract a substantial remedy in the circumstances of this case.
39. The Court would draw the attention of the parties herein to the very persuasive decision of the Constitutional Court of South Africa in *Chirwa v Transnet Ltd & Ors* (2008) 2 BLLR 97.

Right to fair hearing

40. The Petitioner was appointed to act while still holding his position as Director, Corporate Services. He asserts that he should have been afforded an opportunity to be heard before being removed from the acting position. He invoked the provisions in Articles 50 and 236 of the Constitution.
41. First of all, the parties herein were and are in a contractual relationship. Can it be said that by removing the Petitioner from the acting appointment, the Respondent was in breach of contract? Could it have been a dismissal or termination of employment invoking the essentials of termination as envisaged by sections 35(1), 41, 43 and 45 of the Employment Act, 2007, and any contractual agreements in place?
42. The answer to that question, on the surface is no, for the Petitioner did not direct the attention of the Court to any express or implicit contractual terms which were breached.
43. The Employment Act, 2007 and the other primary labour statutes do not provide for any rights as to an *acting* position.
44. The Constitutional provisions implicated herein by the Petitioner do not show any restrictions upon an employer exercising the power to remove or revoke an acting appointment, or that the removal from an acting appointment are only exercisable on specified grounds.
45. The acting appointment, in my view was held at the pleasure of the Respondent/employer as no law providing protections from removal from the acting appointment was invoked. The removal was not part of a disciplinary process.
46. The Court would in this regard endorse the legal principle by the *Court of Appeals Philippines* that an acting appointment is temporary and lasts until revoked or a new appointment is made.
47. In the view of the Court, the removal of the Petitioner from the acting appointment was not a penalty or sanction arising from allegations of *misconduct, performance or incapacity* warranting the invocation of the age old doctrine of *natural justice* or right to a hearing.
48. The Court is however concerned that the Respondent did not have the courtesy to notify the Petitioner directly that his acting appointment was being revoked.
49. Put within the context of the Petitioner's un rebutted testimony that the relationship between him and the Chair of the Respondent was not that rosy as the Chair had rejected his leave application after he had secured permission from the Head of Public Service to travel out of the country, one may infer *bad faith*.
50. The bad faith and/or lack of courtesy however does not lend to any relief in the circumstances presented here.

Conclusion and Orders

51. The Court finds no merit in the Petition, and orders it dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 15th day of February 2019.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Wakwaya instructed by Gitobu Imanyara & Co. Advocates

For Respondent Ms. Cheysina, State Counsel, Office of the Hon. Attorney General

Court Assistant Lindsey