



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW NO. 27 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 4th February, 2019)

REPUBLIC.....APPLICANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

AND

THE DIRECTOR OF

CRIMINAL INVESTIGATIONS.....1ST INTERESTED PARTY

WISO J.M, COMMISSIONER

OF POLICE (CP) LEGAL, DIRECTOR

OF CRIMINAL INVESTIGATIONS.....2ND INTERESTED PARTY

EXPARTE: FRANCIS AMINA JUMA

JUDGMENT

Introduction

1. The Ex parte Applicant is an employee of the Respondent having been employed in 1978 and has risen through the ranks and now holds the position of Principal Technician Mechanical.
2. The Respondent, Kenya Pipeline Company Limited is a State Corporation established under the Companies Act (CAP 486) Laws of Kenya, 100% owned by the Government of Kenya who is the current Employer of the ex parte Applicant.
3. The 1st Interested Party the Directorate of Criminal Investigations is a department established under Section 28 of the National Police Service Act, No. 11A of 2011, being an office primarily tasked with undertaking investigations and under the direction, command, and control of the Inspector General.
4. The 2nd Interested Party is a Police officer under the National Police Service, in the rank of Commissioner of Police serving at the Legal department of the 1st Interested Party Directorate of Criminal Investigations.
5. The Applicant in the application dated 5th October, 2018 seeks an order of certiorari to issue to remove into this Honourable Court to quash the decision indefinitely suspending the Ex-parte Applicant from duty as contained in the Respondent's letter dated 25.9.2018 and as varied by the Respondent's letter dated 4th October, 2018.
6. The Application is based on the grounds that the Respondent did not exercise discretion properly, did not act reasonably, and did not act independently and in accordance with the law, in the discharge of its powers with respect to the disciplinary action against the Ex-parte Applicant.

7. That the Respondent acted contrary to mandatory statutory procedural requirement in exercise of its powers to suspend the Ex-parte Applicant indefinitely. That they acted unreasonably with disproportionality and irrationality in exercise of this power.

8. That the decision to suspend the Ex parte Applicant was arrived at without due regard to the law and the Respondent's Staff Rules and Regulations Manual. It was made in bad faith and against the Applicant's legitimate expectation and in breach of the rules of natural justice.

Facts

9. The Ex-parte Applicant avers that on or about Thursday, 18th May 2017 while walking from his lawyer's offices, Ahmed Nasir Abdullahi along Standard Street, he was accosted by Flying Squad Officers led by Police Constable Patrick Shiundu, who he has since learnt was acting under the instructions of CP Wiso J.M, who arrested him without any lawful cause and thereafter wrongfully and in breach of his constitutional rights held him incommunicado until the 22nd May 2017 when they arraigned him in Court.

10. That he denied all the charges and was released on cash bail and thereafter resumed duties at the Respondent's premises. That the said charges have nothing to do with his employer, who had learnt of his arrest from the media, which was posted at the behest of the 2nd Interested Party herein he alleges has a vendetta against for refusing to accede to his request to make him an equal partner in his business at no cost.

11. That he was in custody at the Flying Squad Headquarters, on 20th May 2017 Saturday between 6:30 to 8 pm and both the 2nd Interested Party and the said officer Patrick Shiundu came to the room where he was and threatened him.

12. He also avers that during the pendency of the said criminal charges, he continued with employment in the normal manner until the 25th May 2018 when officers from the Ethics and Anti-Corruption Commission mounted a raid on 5 officers working with the Respondent but none of them was charged with any offence.

13. He avers that subsequent to the said raid, the Managing Director verbally sent those in employment on leave and the position remained so with the exception of one Mr. Nicholas Gitobu who resumed duties. He contends that since his arrest last year in May 2017 he has been receiving intimidating messages through emissaries from the 2nd Interested Party herein intended to exert pressure on him to give in to his demands.

14. That on the 28th September 2018 Friday morning, he received a letter suspending him from duty from his employer dated 25th September 2018. He was not to access the Respondent's premises but would continue to receive full salary and benefits. That the suspension was not based on any facts but was instigated by the 1st Interested Party.

15. That later the Respondent varied the suspension to an interdiction through a letter dated 25.9.2018 still at the instance of the 1st Interested Party and the Ex-parte Applicant is now receiving half salary.

16. That Section 62 of the Anti-Corruption and Economic Crimes Act, 2003 does not provide for suspension of public officers charged with any crime, e.g. under the Penal Code and/or any other statute but strictly charged with corruption and/or economic crimes. He avers that he has not been charged with any economic crime within the purview of corruption and/or economic crimes under the Anti-Corruption and Economic Crimes Act 2003.

17. Further that the Respondent's Staff Rules and Regulations with respect to suspension do not conform with Ex-parte Applicant's suspension herein.

18. The Ex-parte Applicant avers that the charges he faces against the said company FAJ Safeway Foods Limited have nothing to do with his employment as the company has never done any business with the employer. In any event, before any action is taken against him, he is entitled to a hearing, which so far has not been accorded to him.

19. He claims that he is pensionable and is left with barely one year to retirement. Having served his employer dutifully and diligently since 1978, without warning and/or committing any breaches, he stand to suffer irreparably if he were to be summarily dismissed at the behest of the Interested Parties. That the Respondent's decision to indefinitely suspend him as contained in the suspension letter dated 25th September 2018 should be brought to this Court and quashed.

20. The Interested Parties have filed Replying Affidavits in opposition of the orders sought sworn by the 1st Interested Party who avers that he has always been the investigating officer in a case of making a false document without authority after a complaint was reported to the police by a credible whistle blower which investigations led to the arrest of the ex parte Applicant.

21. That Mr. J.M. Wiso has never been an investigator in the matter but a legal advisor by virtue of being an Advocate of the High Court employed by the National Police Service offering services as a legal expert. That the Interested Party in this case is the state through the Directorate of Criminal Investigation (DCI) and not an individual officer acting on his own volition but on behalf the Government to enforce the law as opposed to what is assumed by the Applicant.

22. They state that the application fails the test of law since all proceedings against the government ought to cite the Attorney General who is the Chief Government Legal Representative in all Civil Proceedings. Further, that the application is made in bad faith and it is a delaying tactic to divert attention from the prosecution of the Criminal case against him as he has employed the same tactics in the High Court by filing unsuccessful applications and petitions.

23. That the EACC case is independent from the case the DCI is investigating contrary to the allegations contained in the verifying affidavit.
24. They also aver that the interdiction was in line with Respondent's Staff Rules and Regulations 2015 and Section 62 (1) and (2) of the Anti-Corruption and Economic Crimes Act 2003, and the Discipline Manual for Public Service.
25. That the delay to place the Applicant under interdiction as required by law by his employer was an oversight which has been corrected upon discovery that he continues to enjoy full government salary despite having been arraigned before Court for a Criminal offence.
26. The Interested Parties state that they have no role in the employment and/or disciplinary process of the Ex parte Applicant and that they acted within their mandate in investigating, arresting and arraigning the Applicant for prosecution of criminal offences.
27. They aver that there are no legal or factual issues arising in the proceedings against the Interested Parties for trial by this Court and thus the Interested Parties should be struck off from these proceedings. That the application lacks merit and should be dismissed with costs.

Submissions

28. It is the Applicant's submission that the decision to suspend him was unreasonable and unjustifiable for the reasons that;

- i. The Applicant is not facing any such charges contemplated under Section 62 of the Anti-Corruption and Economic Crimes Act;*
- ii. The Applicant is not facing any such crimes that fall within the cited Regulation 8.3.4 of the Kenya Pipeline Staff Rules and Regulations;*
- iii. The charges the Applicant is facing are not in any way related to his duties and/or role with the Respondent and he is not being charged in regard to his affairs with the Respondent;*
- iv. The Ethics and Anti-Corruption Commission are not in any way involved in the criminal proceedings in question and neither are they parties therein.*

29. He cites Section 62 of the Anti-Corruption and Economic Crimes Act which is to the effect that:-

“A Public Officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge”.

30. Regulation 8.3.4 of the Kenya Pipeline Staff Rules and Regulations on the other hand provides thus:-

“An employee shall only be suspended if their presence on KPC premises is likely to interfere with investigations.

An employee under suspension shall be on full pay and benefits unless the reason for suspension is of an economic type as defines in the Economic Crimes Act, 2003:-

a) If an employee commits or on reasonable and sufficient grounds is suspected of having committed gross misconduct or a criminal offence against or to the substantial detriment of the Company or the Company property, the Company shall suspend the employee with half salary and full benefits to allow for investigations.

b) The employee shall not attend his place of work and must keep off the Company's operation premises.

At the end of the suspension period, should the employee be terminated, he shall be paid dues less all liabilities owing.

All cases of suspension will be authorized by the Managing Director for implementation by HR & Administration Division Head and every effort shall be made to reach a decision without delay as to whether or not an employee should be reinstated.

Notice of suspension shall be given in writing to the employee concerned and where applicable copied to the Union as stipulated in the CBA.

Suspension shall be for a maximum period of six months”.

31. That the foregoing Regulation as read with Section 62 of the Anti-Corruption and Economic Crimes Act stipulates the circumstances under which an employee may be suspended and the terms of such suspension including whether it is on full or half pay. The foregoing Regulation further imposes a time limit upon which a suspension might last which is a maximum period of six months.

32. It is submitted that in the instant case, the Applicant has been suspended indefinitely and the reasons given for the suspension are not the ones contemplated either under Section 62 of the Anti-Corruption Act or the Kenya Pipeline Staff Rules and Regulations.

33. The Applicant submits therefore that his fundamental rights and freedoms of equal protection of the law as guaranteed under Article 27

(1) of the Constitution; his right to human dignity as guaranteed under Article 28 of the Constitution; his right to fair administrative action as guaranteed under Article 47 of the Constitution as read with the provisions of the Fair Administrative Action Act; his right to a fair trial and hearing as guaranteed under Articles 50 of the Constitution; his economic and social rights under Article 43 of the Constitution have been greatly infringed as he has been unreasonably and unlawful suspended and denied the right to his full pay and benefits as he is entitled to.

34. It is further submitted that the Applicant had and still has a legitimate expectation that the Respondent shall at all material times act in accordance with the law and abide by the Constitutional principles. They cite the Court of Appeal decision in **Child Welfare Society of Kenya v Republic & 2 others Ex-parte Child in Family Focus Kenya [2017] eKLR** set out the efficacy of judicial review as follows:-

“39. For a long time in the history of the common law, JR has been tried and tested as the most efficacious remedy for control of administrative decisions. It was not concerned with private rights or the merits of the decision being challenged but with the decision making process. See Commissioner of Lands vs Kunste Hotel Limited [1997] eKLR and R vs Secretary of State for Education and Science ex-parte Avon County Council [1991] 1 ALL ER. 282. It was also principally concerned with the 3 'Is' — 'Illegality, Irrationality and (procedural) Impropriety' — and many are the decisions which followed such narrow considerations. For example:- An Application by Bokobu Gymkhana Club [1963] EA 478; Council of Civil Unions vs Minister for the Civil Service [1985] AC 2; both cited with approval in the Ugandan case of Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300 which Courts in this country have followed, stating:-

“In order 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...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. ”

35. The Ex parte Applicant submits that it is a cardinal principle of law that an administrative authority must be exercised in accordance with the law as Lord Scarman's pointed out in his decision in **R VS. BARNET LONDON BOROUGH COUNCIL EX P NILISH SHAH [1983] 1 ALL ER 226, 240, HL** that:-

“It is now settled law that an administrative or executive authority entrusted with the exercise of a discretion must properly direct itself properly in the law. ”

The Court in the case noted that it could only interfere with a decision of a public authority if the same was premised on unreasonableness. The Court stated thus:-

1126].... The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. As was appreciated by Professor Wade in a passage in his treatise on Administrative Law, 5th Edition at page 362 and approved by in the case of the Boundary Commission 119831 2 WLR 458, 475:“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the Court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The Court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. ”

36. He urges the Court to allow the Application as drawn.

37. I have examined the averments and submissions of the Parties herein. The Ex parte Applicant has sought this Court's intervention to quash an administrative decision contained in a letter dated 4/10/2018 suspending him from duty with half salary. The letter in question reads as follows:-

“Reference is made to your being arrested on 18th May, 2017 and arraigning before Court the particulars of the charges being within your knowledge.

Further, whereas in our letter dated 25th September 2018 refers, you were notified of your suspension from duty with full salary and benefits, please note that in view of the nature of the offences you were charged with being of economic type and criminal under the Penal Code names: 'making a document without authority', you will be paid half of your basic salary as opposed to full salary as earlier advised during the period of suspension but retain other benefits.

All other terms while you are serving suspension shall be as contained in the earlier letter dated 25th September, 2018.....”

38. The Applicant contends that the decision to suspend him was illegal, unreasonable and unjustifiable and reached as a result of improper exercise of power and discretion, an abuse of power, premised on an error of law, irrational and made on bad faith.

39. The issue for this Court's determination is whether the decision to suspend the Applicant from duty was done with illegality and without proper exercise of power.

40. As held in the Court of Appeal decision in **Child Welfare Society of Kenya 2017 eKLR** (supra) – in order for an Applicant to succeed in JR, the Applicant must show that the decision complained of is tainted with illegality, irrationality and with procedural impropriety.

41. It is not disputed that the Applicant is currently facing criminal charges before the CM’s Court Milimani where he was charged on 22/5/2017 with an offence of making a document without authority contrary to Section 351(a) of the Penal Code.

42. The Respondents contend that the suspension of the Applicant stems from this fact. The Respondent have submitted that they acted to suspend the Applicant from duty lawfully. They referred to their Appendix PAJ.3, a letter from DCI dated 21.9.2018 which brought to the attention of the Respondent the fact that the Applicant had been arrested and charged in Court and asking them to interdict the Applicant from duty as per Government Regulations.

43. The Respondent have also referred Court to their Staff Rules and Regulations which at Clause 8.3.4 states as follows:-

“SUSPENSION

An employee shall only be suspended if their presence on KPC premises is likely to interfere with investigation.

An employee under suspension shall be on full pay and benefits unless the reason for suspension is off an economic type as defined in the Economic Crimes Act 2003:-

a) If an employee commits or on reasonable and sufficient grounds is suspected of having committed gross misconduct or a criminal offence against or to the substantial detriment of the Company or the Company property, the Company shall suspend the employee with half salary and full benefits to allow for investigations.

b) The employee shall not attend his place of work and must keep off the Company’s operation premises.....”

All cases of suspension will be authorized by the Managing Director for implementation by HR & Administration Division Head and every effort shall be made to reach a decision without delay as to whether or not an employee should be reinstated.....

Suspension shall be for a maximum period of six months...”.

44. From the provisions of law, the Constitution of Kenya Article 47, and the Fair Administrative Action Act (FAAA) Section 4, every person has a right to administrative action which is efficient, lawful, reasonable and procedurally fair. This Court has jurisdiction to review any administrative action if as provided under Section 7(2) of the Fair Administrative Action Act:-

1. “Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to:-

a) a Court in accordance with section 8; or

b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law”.

45. From my understanding of the submissions before me, the Applicant was suspended because he is facing criminal charges.

46. This definitely conform to the Respondent’s Staff Rules and Regulations above. The Applicant submitted that the Respondent were influenced by outside forces to suspend him this being the DCI. I believe the fact the DCI played in this case was to notify the Respondent that the Applicant was facing criminal charges which in my view was a reasonable process as the DCI was the one who preferred the charges against the Applicant and it was reasonable to bring this fact to the attention of the Respondent for further action if need be.

47. The Applicant contends that he was not facing any charges of an economic nature and so should not have been placed on suspension. Indeed the Applicant was not charged under Section 62 of the Anti-corruption Economic Crimes Act, which states that, a public officer who is charged with corruption and economic crimes shall be suspended at half pay with effect from the date of the charge.

48. The Applicant faces a charge under the Penal Code.

49. Article 8.3.4 of the Respondent’s Manual however refers specifically to incidences where the employee has committed a gross misconduct or a **criminal offence against or to the substantial detriment of the company or the company property**. (emphasis is mine).

50. The charge facing the Applicant is not in any way related to the Respondent. It is a charge of forgery and from the charge sheet presented before me, the complainant is not the Respondent herein. It is therefore true as submitted by the Applicant that it was not within the Respondent’s powers to suspect or interdict him from duty.

51. The Respondent therefore acted without any legal right to interdict the Applicant and this was illegal, illogical and without authority in so acting.

52. It is therefore my finding that the Respondent herein acted without discretion and unreasonably and illegally by suspending the Applicant

from duty as contained in the letter of suspension dated 4/10/2018.

53. I therefore allow the application before me and order that an order of certiorari do issue to remove into this Honourable Court and quash the decision indefinitely suspending the Exparte Applicant from duty as contained in the Respondent's letter dated 25th September 2018 and as varied by the Respondent's letter dated 4th October 2018.

54. Costs of the Application be paid by the Respondent.

Dated and delivered in open Court this 4th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Okeyo holding brief Mr. Mutua for Exparte Applicant

No appearance for Respondent