



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC CAUSE NO. 65 OF 2019

IN THE MATTER OF: KERIO VALLEY DEVELOPMENT ACT CAP 441

AND

IN THE MATTER OF: CIVIL PROCEDURE ACT CAP 21

AND

IN THE MATTER OF: STATE CORPORATIONS ACT, CAP 446

AND

IN THE MATTER OF: INTERPRETATION AND GENERAL PROVISIONS ACT CAP 2

AND

IN THE MATTER OF: EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: INDUSTRIAL COURT ACT, CAP NO. 20 OF 2011

AND

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

AND

IN THE MATTER OF: THE PROVISIONS OF THE CONSTITUTION

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC THROUGH

DAVID KIMOSOP.....APPLICANT

AND

KERIO VALLEY DEVELOPMENT

AUTHORITY.....RESPONDENT

JUDGMENT

1. On 4 June 2019, the Court granted leave to David Kimosop (*ex-parte* applicant) to commence judicial review proceedings against Kerio Valley Development Authority (Respondent).
2. The Court reserved a decision on whether the leave would operate as stay but during appearances, the prayer for leave was abandoned in favour of expediting the substantive motion for hearing and determination, and on condition that the Respondent would not advertise the position of Managing Director.
3. The *ex-parte* applicant filed the substantive motion, submissions and (list of authorities) on 14 June 2019 while the Respondent filed a replying affidavit sworn by its acting Managing Director, and submissions on 21 June 2019 and 24 June 2019 respectively (Respondent purported to introduce the Attorney General as a Respondent in the documents).

Background

4. The *ex-parte* applicant was initially appointed as Managing Director of the Respondent around April 2012. The appointment was for 3 years. A second term commenced around March 2015 and was to expire in April 2018.
5. On 7 October 2017, the *ex-parte* applicant applied for renewal of the contract for another 3 year term, starting 22 April 2018.
6. On 15 December 2017, the Respondent's Board met to consider among other agenda items, the renewal of the *ex-parte* applicant's contract.
7. The Board resolved to recommend the extension of the *ex-parte* applicant's contract for 2 years with effect from 22 April 2018, and a letter to that effect was sent to the Cabinet Secretary, Devolution and Planning on 18 December 2017.
8. On 27 February 2018, the Head of Public Service issued a Circular clarifying the Terms and Conditions of Service for State Corporations Chief Executive Officers. The Board addressed and considered the Circular.
9. On 18 April 2018, the Cabinet Secretary Devolution wrote to the *ex-parte* applicant to inform him of appointment as Managing Director for 3 years (with effect from 23 April 2018).
10. The Respondent's Board ratified the appointment by the Cabinet Secretary on 4 May 2018, and a contract of employment was duly issued on the same day.
11. However, the Head of Public Service had on 19 April 2018 advised the Principal Secretary, Planning, National Treasury that the *ex-parte* applicant had served 2 terms as Managing Director and was, therefore, ineligible under the *Mwongozo Guidelines* for extension of contract as recommended by the Board.
12. The Head of Public Service further advised that the appointment be extended for 6 months during which time the Board was requested to recruit a replacement.
13. On 8 May 2018, the Head of Public Service wrote to the Cabinet Secretary Devolution, noting that the Cabinet Secretary had prepared a Gazette Notice renewing the *ex-parte* applicant's contract for 4 years contrary to the advice in the letter of 19 April 2018.
14. It seems the Cabinet Secretary and the Board did not address the concerns by the Head of Public Service and on 13 May 2019, the Head of Public Service wrote to the Cabinet Secretary, East African Community and Regional Development expressing concerns on the extension of the *ex-parte* applicant's contract beyond 6 months, and requesting the taking of immediate action to appoint an acting Chief Executive Officer in the interim pending appointment of a substantive office holder.
15. The Cabinet Secretary, East African Community and Regional Development wrote to the Chair of the Respondent's Board on 16 May 2019 directing that the directive by the Head of Public Service be complied with.
16. As a consequence, the Respondent's Board met on 30 May 2019 and resolved to terminate the *ex-parte* applicant's contract. The *ex-parte* applicant was informed of the decision the same day.
17. The decision triggered the current legal proceedings.

Evaluation

18. The Court has anxiously considered the material placed before it.
19. The Court is enjoined by Article 159 of the Constitution to administer substantial justice without undue consideration of procedural technicalities.
20. At the core of the *ex-parte* applicant's cause of action is unfair termination of employment, howsoever worded the grounds relied upon.

21. Judicial review orders are discretionary and may not be granted even where a party has proved his case to the required standard.
22. It is not disputed that employment and labour rights have been given constitutional underpinning in the Constitution and more so through Articles 41 and 236.
23. In order to realise and enforce the rights, the legislature has put in place specific statutory instruments and of relevance in the instant case being the Employment and Labour Relations Court Act and the Employment Act, 2007.
24. Under the statutory framework in place, the manner of approaching the Court is through a *Statement of Claim* or *Memorandum of Claim*. The Court may also be moved through a Petition if the threshold is met.
25. In certain instances, it may also be appropriate to approach the Court through Judicial Review proceedings, more so if the employee has special or specific constitutional or statutory protections against removal from office, for instance, in the case of a judicial officer.
26. In the case at hand, and the Court so holds, this was a case of an ordinary employment and the proper avenue for the *ex-parte* applicant was (is) to approach the Court in the normal way so that the parties are given an opportunity to interrogate disputed facts and the applicable law.
27. As an illustration of disputed facts, the *ex-parte* applicant has contended that he was not afforded an opportunity to be heard before the decision to terminate his employment was made whilst the Respondent has asserted that he was afforded an opportunity, but snubbed the same by failing to appear before the Board.
28. The Court, therefore, finds the Court of Appeal decision in ***Speaker of the National Assembly v Karume (2008) KLR 425 on poignant in this regard.***
29. For the above reasons, and in order not to prejudice the *ex-parte* applicant, the Court will not delve into the merits of the case.
30. Since the *ex-parte* applicant's cause of action is still within the prescribed limitation period, he may want to seek legal advice on the way forward.
31. In the view of the Court, the appropriate order to make would be that these legal proceedings be struck out with no order as to costs. It is so ordered.
32. The Court regrets that it could not deliver this judgment on 27 September 2019 due to other official engagements out of the country.

Delivered, dated and signed in Nairobi on this 11th day of October 2019.

Radido Stephen

Judge

Appearances

For <i>ex-parte</i> applicant	Mr. Katwa Kigen instructed by Katwa & Kemboy Advocates
For Respondent	Ms. Akuno, Litigation Counsel instructed by Hon. Attorney General
Court Assistant	Lindsey