



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 4 OF 2018

(FORMERLY NAIROBI HIGH COURT J. R. NO. 17 OF 2018)

HUMPHREY MAKOKHA NYONGESA.....1ST APPLICANT

COLLINS AGWEYU.....2ND APPLICANT

VERSUS

COMMUNICATIONS AUTHORITY OF KENYA....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

FRANCIS WANGUSI.....INTERESTED PARTY

RULING

By Chamber summons dated 18th January 2018, filed under certificate of urgency, the applicants HUMPHREY MAKOKHA NYONGESA and COLLINS AGWEYU seek the following orders : -

- a. Certiorari to bring into the High Court for the purpose of quashing and/or the 1st respondent letter dated 12th January 2018 determining that the Interested Party should proceed on a compulsory leave for the purpose of facilitating audit of Human Resource.
- b. Prohibition prohibiting the 1st respondent from unilaterally making administrative decisions materially affecting its employees without their participation and or involvement.
- c. A declaration that the 1st respondent's letter dated 12th January 2018 and addressed to the Interested Party is inconsistent to its Human Resource Policy Manual, Article 10, 27 and Article 47 of the Constitution, 2010.
- d. A declaration that the 1st respondent's letter dated 12th January 2018 and addressed to the Interested Party discriminates against the interested party herein to the extent that the reasons therein to not apply to all other employees of the 1st interested party.
- e. Costs of the suit and interests thereon.

The application is supported on the grounds on the face thereof and is filed together with a statutory statement on the same date and verifying affidavits of the applicants' sworn on 18th January 2018.

The application was argued before me *ex parte* on 23rd January 2018 when I declined to grant the orders and directed the applicants to serve the respondents and interested party. All the respondents and the interested party filed either notices of appointment. The 1st respondent in addition filed grounds of opposition dated 26th January 2018; notice of preliminary objection dated 26th January 2018 and list of authorities also dated 26th January 2018.

The application together with the notice of preliminary objection were argued in court on 29th January 2018.

Mr. Sifuna for the applicants submitted only on the issue of *locus standi*. He submitted that the applicants are public-spirited individuals who have decided to bring this matter as members of the public. He submitted that the application is also filed under Section 5 (2) of the Fair Administrative Actions Act, 2015 which borrows the language of Article 22 of the constitution. He submitted that the Act provides that "any person" can apply for review of an administrative action. He submitted that any person can bring an action against the respondent, which is a public body both from a constitutional perspective and from the perspective of the Act.

Mr. Sifuna submitted that the High Court has had occasion to deal with a similar issue in **R. U. Kilifi Land Control Board & 9 Others Ex-Parte Owen Yaa Baya (2015) eKLR**. He urged the court to apply the decision in the case.

Mr. Sifuna further submitted that the applicants have a *prima facie* case. He submitted that it would be a *grave lacuna* for the 1st respondent to be allowed to get away with an obvious breach of the law on the technicality of *locus standi*. He prayed that the prayers in the application be granted.

Mr. Ngugi for the 1st respondent opposed the application and relied on his grounds of opposition and preliminary objection.

The preliminary objection questions the *locus standi* of the applicants. The four grounds of opposition are first, that the decision to send the Interested Party on compulsory leave has been effected and there is nothing to set aside, as the stay would be meaningless and further that no exceptional reasons have been advanced to warrant the reversal of the 1st respondent's decision.

The second ground of objection is that the administrative action taken by

the 1st respondent is legal and within the spirit of the 1st respondent's Human Resource Manual, the Constitution and the Fair Actions Act.

The third ground of objection is that the applicants have no *locus standi* and the final ground of objection is that the application as drawn is unmeritorious.

On the issue of *locus standi*, Mr. Ngugi submitted that both Article 22 and 258 require the applicants to demonstrate that they have an interest and that this being an employment matter; they must show that the Interested Party cannot act by himself. He submitted that the Interested Party is present and represented by counsel.

He further submitted that the applicants have not demonstrated that the decision to send the Interested Party on compulsory leave which they have impugned, is tainted by illegality and violation of the rules of natural justice. He submitted that the 1st respondent's Human Resource Manual specifically provides for compulsory leave at Clause 9.7.2 of the manual at page 48 to 49 of the Manual. He further submitted that sending an employee on compulsory leave is not disciplinary action but the beginning of an investigation.

process. He relied on the case of **Justice Amraphael Mbogholi Msagha –vs- Chief Justice of the Republic of Kenya & 7 Others (2006) eKLR** in which the court held that the decision to send an employee on suspension pending investigations is just a holding operation pending inquiries and the rules of natural justice do not apply at that stage. He submitted that in the judgment the court quotes Megarry Judge in *John –vs- Rees*.

Mr. Ngugi submitted that there is no breach and therefore no prima facie case has been demonstrated by the applicants. He submitted that the application is thus premature. He submitted that this was the position taken by the court in the case of **Lewis –v– Heffer & Others** where Lord Denning stated that –

“Where suspension as made as a holding operation pending enquiries the rules of natural justice did not apply because the suspension was a matter of good administration.”

Mr. Ngugi’s further argument is that the decisions against the Interested Party had already been executed by the time the present application as filed and stay orders cannot be granted as it would be tantamount to overturning the decision. He submitted that this fact is admitted at paragraph 5 of the statutory statement where the interested party is described as a public officer who is on compulsory leave. He submitted that nothing is left to be stayed. He relied on the decision in the case of **Jacob Odhiambo & Others –vs – University of Nairobi** where the court held that stay would be useless where action has been taken.

Mr. Ngugi further relied on the case of **Communication Workers’ Union & Another –vs– Communication Authority of Kenya**. He submitted that while allowing the preliminary objection, the Judge observed that employment is a matter of private law.

Mr. Ngugi distinguished the case of **Republic –vs– Baya (Supra)** on the grounds that the applicants therein went to court to observe the rule of law while in the present case there is no breach. He prayed that the application be dismissed.

Ms. Odhiambo for the 2nd respondent associated herself with the arguments and position taken by Mr. Ngugi for the 1st respondent and added that the applicants have not demonstrated how they will be affected. She prayed that the application be dismissed.

Mr. Angira for the Interested Party associate himself with the submissions of the ex – parte applications. He submitted that Article 258 (c) allows ex –parte applicants to bring this matter to protect public interest. He submitted that in the present case the public interest is the rule of law, the 1st respondent being a public body, and avoidance of waste of taxpayers’ money.

He submitted that the Interested Party holds a public office and all he does is for the benefit of the citizens of the county. He expressed surprise that the 2nd respondent sided with the 1st respondent yet Article 156(6) provides that the Attorney General must at all times promote, protect and uphold the rule of law and protect the public interest.

On the 1st respondent’s argument that the subject matter of this application is a private affair, he submitted that the Interested Party’s office is a public office and the citizens of Kenya have a stake in how the affairs of the 1st respondent are conducted.

On whether the orders of stay can issue, Mr. Angira invited the court to consider the reason for sending the Interested Party on compulsory leave. He submitted that under the respondent’s Human Resource Manual it is clear that compulsory leave can only apply in circumstances when an employee is under investigations and that the reason given for the Interested Party’s compulsory leave is to facilitate audit of human resources. He wondered whether this audit was specific to the Interested Party or the rest of the employees and whether human resource audit is investigations.

On the 1st respondent’s argument that a stay cannot be granted where a decision has been made, Mr. Angira posed the questions: What happens if the decision contravenes natural justice provisions of the

constitution? Is it to say the Interested Party would be left without a remedy?

On the issue that the ex –parte applicants have not demonstrated how they will suffer in terms of operations of the 1st respondent, Mr. Angira that should the Interested Party sue for damages the public would suffer. He prayed that the application be allowed.

In his rejoinder, Mr. Sifuna submitted that the application is made in the interest of the public, the constitution and the observance of the rule of law. He submitted that the application is anchored on two grounds: the first being that the rule of law and rules of natural justice were not complied with and the second being that the action has been brought as an administrative action as opposed to a disciplinary action. He submitted that Section 2(2) of the Fair Administrative Actions Act defines administrative action to mean –

“any act, omission or decision of any person, body or authority that affects the legal rights of interests of any person to whom such action relates;”

He further submitted that Section 4 (3) of the Act provides that where administrative action is likely to affect the rights or fundamental freedoms of any person, the person ought to be subjected to natural justice and to be given a hearing. He disagreed with the arguments made on behalf of the 1st respondent to the effect that the compulsory leave was the beginning of disciplinary process. He submitted the decision in the case of **Lewis –vs– Heffer** which was made in 1978 would not be applicable in post 2010 Constitution Kenya. He submitted that compulsory leave of the claimant cannot be deemed to be a holding position pending inquiry where rules of natural justice are not applicable.

On the argument that there is nothing to stay Mr. Sifuna submitted that the Interested Party’s case is of exceptional circumstances involving breach of the constitution and ongoing violation of the law and further that it is an illegal action. He submitted that the applicants have demonstrated a prima facie case and that irreparable loss is not a factor for granting of the reliefs sought.

Determination

I have considered the application herein and the arguments made both in support and against the same. I have further considered the authorities cited by the parties.

Essentially what the ex –parte applicants seek is leave to file an application for Judicial Review orders of *certiorari* and prohibition to quash the decision of the 1st respondent to send the Interested Party on compulsory leave for a period of 3 months with effect from the date of the letter which is 12th January to 12th April 2018, to facilitate audit of Human Resources. The decision is impugned by the applicants on grounds that the decision did not comply with the Rules of Natural Justice and the Rule of Law and is therefore illegal and unconstitutional.

The applicants describe themselves as Kenyan nationals who are second year law students at the University of Nairobi at Faculty of Lawo Campus in Parklands, Nairobi. They describe the 1st respondent as a body corporate established under Section 3 of Kenya Information and Communications No. 2 of 1998; whose object and purpose is to licence and regulate postal, information and communication services in accordance with the provision of the Parent Act being No. 3 of 1998. The 2nd respondent is described as the principal legal advisor to the government of the Republic Kenya with the capacity to be sued on behalf of the government of Kenya and is established under Article 156 of the Constitution and official representative of the government in all proceedings.

The Interested Party is described as a Public Officer currently the Director General of the 1st respondent since 22nd August 2015 and whose term is to expire on 22nd August 2019.

The ex parte applicants have expressed their interest and capacity in their verifying affidavits as follows –

That he has filed the instant suit imploring the court to declare the 1st respondent's letter dated 12th January 2018 and addressed to the Interested Party as unreasonable, discriminatory and inconsistent with the letter and spirit of the Constitution.

That he is a passionate second year law student at the Faculty of Law in Nairobi sUniversity and he is well aware that is his constitutional obligation to respect, uphold and defend the constitution whenever it is under attack.

That he is equally aware of the Parable of Jesus Christ, in particular, Parable of the Good Samaritan and I am persuaded that it is my moral obligation as a Christian to love my neighbour as I love myself and to defend and champion for the greatest enjoyment of their human rights and fundamental freedoms as guaranteed under the constitution.

That he is interested in living in a country that seeks to protect and promote human rights and fundamental freedoms and thus the thought anybody being a victim of an injustice aches his heart. Thus, he cannot sit and watch as the any citizen is discriminated upon or subjected to unreasonable reason in an attempt to tramp his/her labour rights.

That he has thus sued in his private capacity as a citizen, a tax payer, an ardent student of the law and on behalf of the greater public interest which involves promoting good governance within our borders by ensuring that all administrative decisions are focused at promoting the national values and principles of governance and must precisely, the Mwongozo Code of Governance for State Corporations.

Ordinarily, leave to commence judicial review applications is granted ex-parte. In this case, however, I questioned the capacity of the applicants, as described above, to be granted the orders they seek in the application, taking into account the nature of judicial review orders and the underpinning constitutional provisions.

The determination of the present application turns on two issues;

1. Whether the applicants have *locus standi* to bring this suit; and,
2. Whether the subject matter of the application falls within the public or private arena.

The two issues would establish whether or not the applicants have a *prima facie* case which would in turn determine whether or not they are entitled to the orders sought in the application. The other issues raised by the parties in their submissions would be supplementary and not for determination at this stage.

i. Locus standi

The Constitution of Kenya 2010 has expanded locus standi beyond the pre-2010 constitution as was expressed in the case of **Mumo Matemo –vs- Trusted Society of Human Rights Alliance & 5 Others** when the court stated as follows –

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the constitution by necessity and logic broadens access to the courts. In this border context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this; we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.”

The Constitution has also expended the remedies that may be granted by courts as provided in Article 23 as follows-

23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

The foregoing notwithstanding, the constitution limits the persons who may enforce the Bill of Rights at Article 22 as follows-

22. Enforcement of Bill of Rights

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

a. a person acting on behalf of another person who cannot act in their own name;

b. a person acting as a member of, or in the interest of, a group or class of persons;

c. a person acting in the public interest; or

d. an association acting in the interest of one or more of its members.

Article 258 further provides for enforcement of the constitution by the following persons; -

258. *Enforcement of this Constitution*

1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- a. a person acting on behalf of another person who cannot act in their own name;**
- b. a person acting as a member of, or in the interest of, a group or class of persons;**
- c. a person acting in the public interest; or**
- d. an association acting in the interest of one or more of its members.**

Thus a person who wishes to enforce the Constitution must fit into one of the categories set out in the two Articles and must specify the capacity in which they have come to court under either of the two constitutional provisions.

In the present case, the applicants have stated that their interest in this application is that they have an obligation to respect, uphold and defend the constitution whenever it is under attack, in their capacity as “*good Samaritans*” and “*on behalf of the greater public interest.*” The foregoing begs the question whether the issue before the court is in the public interest or falls within the private law arena.

What does the public stand to suffer because the Interested Party has been sent on compulsory leave? In the view of the court, the only person who is affected by the compulsory leave is the Interested Party. As the letter sending him on compulsory leave states, he was to hand over his office to the Director/General Compliance and Standards who was appointed to act while the Interested Party is on leave. This means there would be no disadvantage to the public while the Interested Party is away on compulsory leave, as his duties would be adequately covered by the person appointed to act in his position.

If there is no loss by the public, then the applicants, as members of the public, stand to suffer no disadvantage. This would mean that this is not a matter that falls in the public interest or arena.

The second limb for the court to consider is whether there is breach of Article 47 of Constitution as read with Section 4 of the Fair Administrative Actions Act. Article 47 of the Constitution provides as follows

Fair administrative action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

47. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

3 (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

Section 4 of the Fair Administrative Actions Act provides as follows

1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2. Every person has the right to be given written reasons for any administrative action that is taken against him.

3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a. prior and adequate notice of the nature and reasons for the proposed administrative action;**
- b. an opportunity to be heard and to make representations in that regard;**
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- d. a statement of reasons pursuant to section 6;**
- e. notice of the right to legal representation, where applicable;**
- f. notice of the right to cross-examine or where applicable; or**
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

4. The administrator shall accord the person against whom administrative action is taken an opportunity to-

- a. attend proceedings, in person or in the company of an expert of his choice;**
- b. be heard;**
- c. cross-examine persons who give adverse evidence against him; and**
- d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different

Section 3 of the Fair Administrative Action Act provides that.

3. (1) This Act applies to all state and non-state Application agencies, including any person

- a. exercising administrative authority;**
- b. performing a judicial or quasi-judicial function under the Constitution or any written law; or**
- c. whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.**

ii. Public vs Private law

By its very definition, Judicial Review is the means through which the courts supervise the actions or decisions of administrative bodies or tribunals. In the case of COUNCIL FOR CIVIL SERVICE

UNIONS V MINISTER FOR CIVIL SERVICE [1985] A.C. 374 the court classified judicial review under three heads: illegality, irrationality and procedural impropriety. In a Judicial Review application, the court's role is not to concern itself with the merits of the decision but with the decision making process. This was aptly put by the court in **Municipal of Mombasa vs Republic and Umoja** (supra). The court made similar observations in **Pastoli v Kabale District Local Government Council and Others** (supra), which cited with approval the decision of the court in **Council of Civil Unions vs Minister for the Civil Service [1985] AC 2** and in **An application by Bukoba Gymkhana Club [1963] EA. 478**.

Again, in the case of **Municipal Council of Mombasa v Republic and Another [2002] EKLR** it was held:

Judicial Review is concerned with the decision-making process, not with the merits of the decision itself The court would only be concerned with the process leading to the making of the decision....

Is sending an employee on leave by his employer an administrative action? Would it fit into the above compartmentalisation of judicial review? I do not think so. I agree with Mr. Ngugi that the sending of an employee on compulsory leave is not disciplinary action but the beginning of an investigation process and that as observed in the case of **Justice Amraphael Mbogholi Msagha –vs- Chief Justice of the Republic of Kenya & 7 Others** is just a holding operation pending inquiries and the rules of natural justice do not apply at that stage. I further subscribe to the decision in **Communication Workers' Union & Another –vs–Communication Authority of Kenya** where the Judge observed that employment is a matter of private law.

Section 41 of the Employment Act provides for employers to discipline their employees and section 12 requires employers who employ more than 50 employees to have a statement of disciplinary rules. This is what is contained in the 1st respondent's Human Resource Policy Manual, which provides for compulsory leave for employees in the circumstances stated therein. Whether or not the 1st Respondent was right in sending the interested party on compulsory leave is again not a matter for this application.

It is on the basis of the foregoing that I find the action taken against the Interested Party by the 1st respondent a matter of private contract governed by the employment law and the terms and conditions of employment in the employment contract. I further find that in the sending the Interested Party on compulsory leave, the 1st respondent was not exercising administrative authority and therefore the action does not fall within the preview of Article 47 of the Constitution and the Fair Administrative Actions Act.

This is not to say that judicial review cannot apply in employment contracts. In the case of **Republic –vs– Mwangi S. Kaimenyi, Ex-parte KIPPRA (supra)**, the Court of Appeal discussed instances when judicial review remedies are available in contracts of employment and observed that –

“... 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 –vs– Evans (1982) 1 WLR 1155**, Lord Hailsham pronounced himself thus:

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 matter, which it is authorized by law to decide for itself a conclusion, which is correct in the eyes of the court

In the case of **Eric Makokha & Others –vs– Lawrence Sagini & Others C. A No. 20 of 1994** at Nairobi, the 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 this employment is guaranteed by statute is hardly of any help. As a concept, it may also mean the employee's 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."

Before I conclude, I think it is in order to clarify a misnomer that I have noted in the arguments by counsel for the applicants that where a body established by law engages the employment of any person that employment has statutory underpinning and is subject to judicial review. It is important to distinguish between a public body acting in its public capacity and a public body acting in a private capacity. A public body like any other employer, enters into private contracts with its employees. In such cases the rights, duties and obligations of the public body are no different from any other private entity that has entered into a private contract with its employees. This is the kind of relationship that the 1st Respondent has with the interested party herein, which should not be confused with employment with statutory underpinning where there is no direct employment relationship between the "employer" and employee.

Conclusion

For the foregoing reason, I make the following findings and conclusions –

1. That the relationship between the 1st respondent and the Interested Party is that of a private employment contract and does not fall within the provisions of Article 47 and the Fair Administrative Actions Act.
2. That the applicants have not demonstrated that they have *locus standi* either under Article 22 or 258 of the Constitution.
3. That this being a matter of private contract, even if the applicants had demonstrated their interest under Article 22 and 258, they would still have no *locus standi* in view of the action taken by the 1st respondent falling under private employment contract.

For the foregoing reasons the application dated 18th January 2018 is declined with the result that it is dismissed.

There shall be no orders for costs.

DATED, DELIVERED AND SIGNED ON THIS 5TH DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE