



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW 9 OF 2016

(Formerly Nairobi High Court Judicial Review No. 183 of 2016)

(Before Hon. Justice Mathews N. Nduma)

IN THE MATTER OF AN APPLICATION BY PROF SOLOMON S.R. MPOKE

AND

IN THE MATTER OF KENYA MEDICAL RESEARCH INSTITUTE

AND

IN THE MATTER OF UNLAWFUL AND ULTRA VIRES DECISION TO TERMINATE CONTRACT

AND

IN THE MATTER OF ISSUANCE OF TERMINATION NOTICE

REPUBLIC.....APPLICANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE.....1ST RESPONDENT

CHAIRPERSON, BOARD OF MANAGEMENT OF

KENYA MEDICAL RESEARCH INSTITUTE.....2ND RESPONDENT

AND

PROF. SOLOMON S. R. MPOKE.....SUBJECT/EXPARTE

J U D G M E N T

1. The Judicial Review application was initially filed at the High Court but was transferred to this court following a preliminary objection on the jurisdiction of the court to hear and determine the matter.
2. Leave to file substantive motion for judicial review was granted by the court on 20th June, 2016. Arguments on the issue of stay were reserved for 7th July, 2016.
3. Application by the intended interested party was heard and determined by a ruling delivered on 27th January, 2017 disallowing the joinder. Arguments on stay were not done and stay was therefore not granted.
4. The Notice of Motion dated 27th June, 2016 seeking judicial review by certiorari to quash the decision of the 1st Respondent against the applicant on grounds that the decision was taken in excess of jurisdiction and that the Respondent violated the rules of natural justice in that they did not give the applicant an opportunity to be heard before purporting to remove him as a member of Board of the 2nd Respondent.

5. The Application is opposed by a replying affidavit of Dr. Lilian Apadet, Chairperson of the 1st Respondent sworn on 22nd August, 2016.

6. The Issues for determination are as follows:-

(i) Whether the 1st Respondent had authority to remove the Applicant as a Director/Chief Executive of the 2nd Respondent or acted in excess of her jurisdiction.

(ii) Whether the Respondents violated the rules of natural justice and therefore the action was null and void.

(iii) Whether the applicant is entitled to the reliefs sought.

Issue 1

7. The applicant was appointed the Director/Chief Executive Officer of the 1st Respondent by a letter dated 4th July, 2013 for a term of seven (7) years with effect from 10th August, 2013. The letter of appointment is by James W. Macharia Cabinet Secretary Ministry of Public Health and Sanitation.

8. On 18th December 2015, the applicant was sent on compulsory leave by a letter written by Mr. Gerald M. Mkoji – Ag. Director of the 2nd Respondent. The leave was extended by a letter dated 19th January, 2016.

9. On 5th February, 2016 the applicant received a notice to show cause on allegations of mismanagement and misappropriation of funds at KEMRI, in contravention of Public Finance Management Act, 2012 and following the final Audit report dated 20th November, 2015. Upto nine (9) charges were made against the applicant.

10. The applicant was required to explain the charges against him.

11. The applicant responded to all the allegations levelled against him and by a letter dated 14th March, 2016, the employment of the applicant was terminated following a meeting of KEMRI Board of Management held on 10th March, 2016, which considered the written responses to the notice to show cause and found that the explanation given by the applicant to the various charges was not satisfactory.

12. The Board found that the application as the Director and Accounting Officer of KEMRI the applicant neglected to perform his duties carefully and properly resulting to mismanagement of KEMRI as set out in detail in the notice to show cause and enumerated in items one(1) to eight(8) in the letter of termination.

13. The applicant was to be paid upon termination:-

(i) Salary earned up to the date of termination of the contract.

(ii) Three months' salary in lieu of notice.

(iii) Cash payment for unutilized leave days carried forward with due approval.

14. The matter was referred by the Board also to other government agencies for further investigations and other necessary action.

15. The termination letter was written by Dr. Lilian Apadet, Chairperson, Board of Management, KEMRI.

16. The applicant relied on the provisions of sections 3(1), 4, 5(3), 6(1) and (2), 26 and 27 of the State Corporations Act Cap 446 Laws of Kenya for the argument that the Board of KEMRI had no authority to terminate the term of the applicant by a letter of its Chairman. That the termination was in excess of authority and therefore null and void.

17. Section 6(1) of the Act, provides –

“ unless the written law by or under which a state corporation is established on the articles of association of a state corporation otherwise require a Board shall, subject to subsection (4) consist of –

(a) Chairman appointed by the president who shall be non-executive unless the president otherwise directs;

(b) The Chief Executive;

(c) The Permanent Secretary of the parent Ministry;

(d) The Permanent secretary to the Treasury;

(d)The Attorney-General or his representative;

(e) Not more than eleven other members not being employees of the state corporation, of whom not more shall be public officers, appointed by the Minister.

6(2) Every appointment under subsection – 1(a) and (e) shall be by name and by notice in the Gazette and shall be for a renewable period of five years or for such shorter period as may be specified in the notice, but shall cease if the appointee –

(a)

(b)

(c)

(d)

(e) Conducts himself in a manner deemed by the Minister in consultation with the committee to be inconsistent with members of the Board.”

18. There is no other provision in the Act which directly addresses the appointment and removal of the Director and Chief Executive officer of the Board. It would however appear that the Chief Executive officer is first and foremost, a Director of the Board and if he ceases to be a Director of the Board, the position of Chief Executive Officer would be untenable.

19. The court was referred to section 26(1) which establishes the State Corporations Advisory Committee which in terms of section 27(1) thereof empowers the committee to advise on the matters and perform any functions it is required by the Act to perform. One of those functions under section 27(1) (d)(i) –

“where necessary, advise on the appointment removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment”

20. It is submitted by the applicant that the advice of the committee was not sought on his removal and for this reason the decision was unlawful and void.

21. The Respondent submits that the terms and conditions of the applicant are contained in the four corners of his letter of appointment and the court should not look any further to find that the removal of the applicant from the position of Director/Chief Executive Officer was done by the Board of KEMRI lawfully, and in terms of a fair procedure.

22. It is clear that the cabinet secretary in the letter of appointment approved the recommendation of KEMRI Board to appoint and to renew the appointment of the applicant.

23. The Board simply recommended the appointment to the CS and the CS made the appointment.

24. In terms of section 51 of the interpretation and General Provisions Act, Cap 2 Laws of Kenya:-

“(1) Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.”

25. In the present case, the Act is silent on the appointment of the Chief Executive officer but the letter of appointment is manifestly clear that the appointment is by Cabinet Secretary Ministry of Public Health and Sanitation. It is the same Cabinet Secretary who has the power of removal. The Board through its chairperson acted ultravires its powers and authority under the contract to terminate the appointment of the applicant as the Chief Executive Officer.

26. To this extend, the letter by the KEMRI Board signed by Dr. Lilian Apadet, the Chairperson has no legal effect and is null and void. However, the applicant was appointed on a three (3) year contract with effect from 10th August, 2013. That contract expired on 9th August, 2016 by effluxion of time. This is the finding of the court on this issue.

Issue II

27. The Board has authority to discipline the applicant and recommend his removal to the cabinet secretary. The Board acted properly and within its authority to conduct disciplinary proceedings against the applicant. The applicant was served with a notice to show cause and was given opportunity to explain himself which he did in detail. The Board acted within its authority and mandate to consider the matter and find that the applicant had not made satisfactory explanation to the charges of negligence and deliction of duty made against him. The court finds that the Board did not violate the rule of natural justice with respect to the claimant.

28, The court refers to the Court of Appeal decision in the case of County Assembly Kisumu and 2 others v Kisumu County Assembly

Service Board and 6 others [2015] eKLR regarding requirements of natural justice because the Board met the requirements in the court's view especially because the matter was a subject of a detailed Audit report from an independent agency which had also involved the applicant in the investigation.

29. The Board however had no mandate as said earlier to terminate the contract of the applicant and the same remained valid until it expired. The court finds accordingly.

Issue III

30. The exparte applicant sought an order of certiorari to bring to the court the decision of the respondents contained in the letter of termination of appointment dated 14th March, 2016 and quash the same.

31. The court has already found that the Respondent acted in excess of jurisdiction and had no authority to terminate the three (3) year contract of the exparte applicant.

32. Accordingly, the court makes the final orders as follows –

(i) The decision of the Respondents to terminate the three (3) year appointment of the exparte applicant or the Director/Chief executive Officer communicated in the letter dated 14th March, 2014 is unlawful, null and void.

(ii) The Decision of the Respondents communicated in the letter dated 14th March, 2016 removing the exparte applicant as Director/Chief Executive Officer of KEMRI is quashed as same is unlawful, null and void.

(iii) The Court declares that the appointment of the exparte applicant expired by effluxion of time on 9th August, 2016, and the exparte applicant be paid salary payable on a monthly basis to the exparte applicant except those benefits, including official transport mileage claims, overtime, telephone service, accommodation and subsistence payable to facilitate actual work from the date of termination 14th March, 2016 to 9th August 2016, a period of five (5) months.

(iv) The exparte applicant be paid gratuity in terms of clause 14 of the Letter of Appointment, calculated at 31% of the annual basic salary of the exparte applicant for the three year contract that expired on 9th August, 2016.

(v) The award in (iii) & (iv) above be paid within 30 days failing which interest to accrue on the award at court rates until payment in full.

(vi) The Respondents to pay costs of the suit.

Dated and Signed in Kisumu this 7th day of March, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 6th day of April, 2018

Maureen Onyango

Judge

Appearances

Mr. Mutinda for Applicant

Mr. Masese for Respondent

Anne Njung'e – Court Clerk