



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

JR CAUSE NO. 5 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 28th June, 2018)

IN THE MATTER OF AN APPLICATION BY PATRICK Z. KEIGE MWANGI

FOR ORDERS OF CERTORARI, AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

MICRO AND SMALL

ENTERPRISES AUTHORITY.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF INDUSTRY,

TRADE AND CO-OPERATIVES.....2ND RESPONDENT

NANCY W. MUYA.....INTERESTED PARTY

EX-PARTE APPLICANT.....PATRICK Z. KEIGE MWANGI

RULING

1. On the 29th of January 2018, the applicant approached this court seeking leave to institute JR proceedings against the Respondents herein. This Court certified the Application urgent and directed service upon the Respondents.

2. The application was filed under certificate of urgency wherein the Applicant contends as follows:-

1. THAT on 17th January 2018 the 1st Respondent without following a proper procedure, illegally, unlawfully and unreasonably turned the Finance, Human Resource and Administration Committee Board Meeting into a full Board Meeting and used the same to move a resolution that the Ex parte Applicant be send on a compulsory leave. The Minutes of the said Board Meeting of the 17th January 2018 indicates that the same was not properly constituted, it provides in part:

“with the Chief Executive Officer having been requested to recuse himself from the Meeting, and the Acting Legal Unit, a member of the Staff of the Authority failing to appear for the Meeting, the members affirmed that it was proper, considering the gravity of the issues to be discussed, for the Chairman to nominate a Director to take Minutes of the Meeting and the Board to act as Secretary pro tem to the Board.”

2. THAT on 18th January 2018, the 2nd Respondent without following the right procedure, illegally and unlawfully purportedly appointed NANCY W. MUYA, the Interested Party herein as Acting Chief Executive Office for the 1st Respondent in place of the Ex parte Applicant.

3. **THAT** the 1st Respondent through a resolution of the Finance, Human Resource and Administration Committee scheduled its meeting for the 24th January, 2018 at 10.00 a.m for the reason that the Finance, Human Resource and Administration Committee meeting was scheduled for the 17th January 2018. The Board Meeting was actually scheduled for the 24th January, 2018 as exhibited by the email communication sent to members dated 15th January, 2018.

4. **THAT** on the 17th January, 2018 the Finance, Human Resource and Administration Committee convened as scheduled, however they were later joined by the Chairperson of the 1st Respondent and other members without following the proper procedure contrary to the Micro and Small Enterprises Authority Act No. 55 of 2012, the State Corporations Act, Cap 466, and Mwongozo; the Code of Good Governance for State Corporations, and transformed the said meeting into a full Board.

5. **THAT** the Ex parte Applicant (the 1st Respondent CEO) was ordered to leave the meeting following an argument as to whether the meeting was a Finance Committee Meeting or a full-Board Meeting.

6. **THAT** the impugned decisions purportedly made by the 1st Respondent compelling the Ex parte Applicant to go on a compulsory leave was illegal and unlawful having been made by an ill-constituted Board which turned Finance, Human Resource and Administration Board Committee Meeting into a full Board meeting.

7. **THAT** the impugned decision is illegal ab initio for the reason that removal of the Ex parte Applicant was never an item of agenda in the Finance, Human Resource and Administration Board Meeting held on the 17th January 2018 nor was it in the Agenda of the full board meeting scheduled for 24th January, 2018.

8. **THAT** the said impugned meeting of the Board is contrary to the law and particularly contravenes section 8 (1)(d) of the State Corporation Act which requires that at least fourteen (14) days' written notice of every meeting of the Board shall be given to every member.

9. **THAT** it was unfair for the 1st Respondent to order the Ex parte Applicant out and proceed to deliberate on his case without him and thus denying him an opportunity to defend himself. This is in total disregard of Article 47 of the Constitution of Kenya which provides in part that: "every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

10. **THAT** the impugned decisions purportedly made by the 1st Respondent compelling the Ex parte Applicant to go on a compulsory leave was illegal and unlawful having been made by ill-constituted Board which turned Finance, Human Resource and Administration Board Committee into a full Board meeting. Further although the said impugned decision is described as "compulsory leave" it is apparent from the illegal Board Meeting's Resolution that the alleged "compulsory leave" is removal and/or termination of the Ex part Applicant's employment; the said illegal and unlawful Board Meeting's Resolution reads in part:

1. The Chief Executive Officer proceed on compulsory leave with effect from 17th January, 2018 until further notice.

2. The Authority to seek support from the parent Ministry for an Acting Chief Executive Officer, UNTIL THE BOARD RECRUITS A PERMANENT REPLACEMENT (Emphasis)...."

11. **THAT** the decisions and actions of the 1st and 2nd Respondents contained in the letters dated 17th January 2018 and 18th January 2018 respectively are vitiated by procedural improprieties and bad faith on the part of 1st and 2nd Respondents and the impugned decisions and actions of the Respondents violated the Applicant's right under Article 47 of the Constitution and his right to protection of the law under Article 27 thereof.

12. **THAT** the action by the 1st Respondent is against the recent circular issued by the Head of Public Service dated 17th January 2018 which prohibits any termination, hiring, transfer or re-organization of the State Corporations pending the intended merger of these Corporations i.e. The Micro and Small Enterprises Authority with the Uwezo Fund, Youth Enterprise Development Fund and the Women Enterprise Development Fund. Further in the event that the said mergers are undertaken in the absence of the Ex parte Applicant, he will be unfairly and unjustly locked out of employment.

13. **THAT** based on the foregoing the impugned decision purportedly made by the Authority, the 1st Respondents is illegal and unlawful for the following reasons:

a. Failure to afford the Ex parte Applicant an opportunity to be heard before being sent for a compulsory leave and eventual termination.

b. Breach of the legitimate expectations of the Ex parte Applicant that he shall be treated equally before the law and shall enjoy the benefit of the law.

c. The decision was made in bad faith with the intention to punish the Ex parte Applicant because of his firm stand on the issue integrity and accountability in the institution.

d. The decision is vitiated by procedural improprieties and bad faith.

e. The decision is vitiated by failure by the Authority to take into account relevant considerations and taking into account irrelevant considerations.

14. **THAT** the impugned decision compelling the Ex-parte Applicant to go for a compulsory leave was actuated by malice and is an abuse of power by the 1st Respondent Chairperson and some members of the Authority.

Under section 4 (3) of the Fair Administrative Action Act, 2015, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator is required to give the person affected by the decision a prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations in that regard. The Respondent did not give the Applicant an opportunity to be heard prior to making the decision to send him on a compulsory leave.

15. **THAT** the impugned decision compelling the Ex-parte Applicant to go for a compulsory leave was actuated by malice, abuse of power and bad-blood between the 1st Respondent Chairperson and the Ex parte Applicant.

16. **THAT** the Ex parte Applicant is therefore seeking for leave to apply for an Order of Certiorari removing into the Employment and Labour Relations Court for purposes of being quashed the decision of, MICRO AND SMALL ENTERPRISES AUTHORITY and CABINET SECRETARY, MINISTRY OF INDUSTRY, TRADE AND COOPERATIVES the 1st and 2nd Respondents respectively, sending the Ex parte Applicant on compulsory leave and purportedly appointing the Interested Party as the Acting Chief Executive Officer for the 1st Respondent contained in the two letters dated 17th and 18th January 2018 respectively.

17. **THAT** this Honourable Court be pleased to grant leave to apply for an order of Prohibition to prohibit the 1st and 2nd Respondents either by themselves, agents, employees or whomsoever from taking any steps, actions and/or measures to enforce or implement their decisions contained in the two letters dated the 17TH and 18th January, 2018 sending the Ex parte Applicant on compulsory leave and appointing the Interested Party as the Acting Chief Executive Officer for the 1st Respondent respectively or any in any other way interfering with the employment contract of the Ex parte Applicant.

18. **THAT** the leave sought do operate as a stay of the decision of the 1st and 2nd Respondents impugned decisions sending the Ex parte Applicant on compulsory leave and further the impugned appointment of the Interested Party as the Acting Chief Executive Officer for the 1st Respondent contained in the two letters dated 17th and 18th January 2018 respectively.

3. The Applicant filed the application by way of Chamber Summons filed Under Section 8 and 9 of the Law Reform Act, Cap 26 laws of Kenya Order 53 rule 1, 2, 3 and 4 of the Civil Procedure Rules 2010 seeking orders:

1. **THAT** this application be certified as urgent and fit to be heard forthwith.

2. **THAT** this Honourable Court be pleased to grant the Ex parte Applicant leave to apply for an order of certiorari to bring into this Honourable Court for purposes of being quashed the decision of the MICRO AND SMALL ENTERPRISES AUTHORITY and CABINET SECRETARY, MINISTRY OF INDUSTRY, TRADE AND CO-OPERATIVES, the 1st and 2nd Respondents herein compelling the Ex parte Applicant to go on compulsory leave and appointing the Interested Party as the Acting Chief Executive Officer for the 1st Respondent contained in the two letters dated 17th and 18th January 2018 respectively.

3. **THAT** this Honourable Court be pleased to grant leave to the Applicant to apply for an order of Prohibition to prohibit the 1st and 2nd Respondents either by themselves, agents, employees or whomsoever from taking any steps, actions and/or measures to enforce or implement their decisions contained in the two letters dated the 17th and 18th January, 2018 sending the Ex parte Applicant on compulsory leave and appointing the Interested Party as the Acting Chief Executive Officer for the 1st Respondent respectively.

4. **THAT** the leave sought do operate as a stay of the impugned decisions of the 1st and 2nd Respondents compelling the Ex parte Applicant to go on compulsory leave and appointing Interested Party as the Acting Chief Executive Officer for the 1st Respondent contained in the two letters dated 17th and 18th January 2018 respectively.

4. The application is based on the provisions of the law and annexed by the supporting affidavit of Patrick Z. Keige Mwangi deponed to on 29th January 2018, and premised on the statements of facts stating:

1. **THAT** the 1st Respondent, the MICRO AND SMALL ENTERPRISES AUTHORITY, is a body corporate with perpetual succession and a common seal established under Section 29 of the Micro and Small Enterprises Act No. 55 of 2012.

2. **THAT** the 2nd Respondent, CABINET SECRETARY MINISTRY OF INDUSTRY, TRADE AND CO-OPERATIVES, is the Cabinet Secretary responsible for the Ministry of Industry, Trade and Co-operatives and appointed as such in accordance with Article 152 of the Constitution of Kenya, 2010.

3. **THAT** the Interested Party, NANCY W. MUYA, is the Senior Assistant Director Industries, State Department for Investment & Industry, and has purportedly been appointed in an acting capacity in place of the Ex parte Applicant as the Chief Executive Officer of the 1st Respondent.

THE RELIEF

1) **THAT** this Honourable Court be pleased to grant the Ex parte Applicant leave to apply for an order of certiorari to bring into this Honourable Court for purposes of being quashed the decisions of the MICRO AND SMALL ENTERPRISES AUTHORITY and CABINET SECRETARY, MINISTRY OF INDUSTRY, TRADE AND CO-OPERATIVES, the 1st and 2nd Respondents

herein compelling the Ex parte Applicant to go on a compulsory leave and appointing the Interested Party as the Acting Chief Executive Officer for the 1st Respondent contained in the two letters dated 17th and 18th January 2018 respectively.

2) **THAT** this Honourable Court be pleased to grant leave to the Ex parte Applicant to apply for an order of Prohibition to prohibit the 1st and 2nd Respondents either by themselves, agents, employees or whomsoever from taking any steps, actions and/or measures to enforce or implement their decisions contained in the two letters dated the 17th and 18th January sending the Ex parte Applicant on compulsory leave and appointing the Interested Party as the Acting Chief Executive Officer for the 1st Respondent respectively or in any way interfering with the employment contract of the Ex parte Applicant.

3) **THAT** the leave sought do operate as a stay of the decision of the 1st and 2nd Respondents impugned decisions sending the Ex parte Applicant on compulsory leave and appointing Interested Party as the Acting Chief Executive Officer for the 1st Respondent contained in the two letters dated 17th and 18th January 2018 respectively.

4) **THAT** cost of this Application be provided for.

GROUND UPON WHICH THE RELIEF IS SOUGHT

1. For the reasons set out hereunder, the Respondents' decision to send the Applicant on a compulsory leave and further the decision appointing the Interested Party in an acting capacity as the Chief Executive Officer of the 1st Respondent is illegal, is unreasonable, irrational, is in bad faith, constitutes an abuse of power, is in breach of the rules of natural justice and is in breach of the Applicant's legitimate expectation.

2. **THAT** on 17th January, 2018 MICRO AND SMALL ENTERPRISES AUTHORITY, the 1ST Respondent herein purportedly through unsigned letter dated 17th January 2018 sent the Ex Parte Applicant on compulsory leave with effect from 17th January 2018 without following proper procedure and without affording the Ex parte Applicant an opportunity to be heard.

3. **THAT** on 17th January 2018 the 1st Respondent without following a proper procedure, illegally, unlawfully and unreasonably turned the Finance, Human Resource and Administration Committee Board Meeting into a full Board Meeting and used the same to move a resolution that the Ex parte Applicant be sent on a compulsory leave. The Minutes of the said impugned Board Meeting of 17th January, 2018 indicates that it was not properly constituted, it provides in part that:

“with the Chief Executive Officer having been requested to recuse himself from the Meeting, and the Acting, Legal Unit, a member of the staff of the Authority failing to appear for the Meeting, the members affirmed that it was proper, considering the gravity of the issues to be discussed, for the Chairperson to nominate a Director to take Minutes of the Meeting and to act as Secretary pro tem to the Board.”

4. The said impugned decision of the 1st Respondent was communicated to the Ex Applicant through unsigned letter of the 17th January 2018 in part the said letter stated as follows: “Following the full Board Meeting held on the 17th January 2018, it was resolved that you proceed on a compulsory leave with effect from today, 17th January 2018, until further notice.”

5. **THAT** on 18th January 2018, the 2nd Respondent without following the right procedure, illegally and unlawfully purportedly appointed NANCY W. MUYA, the Interested Party herein as Acting Chief Executive Office for the 1st Respondent in place of the Ex parte Applicant.

6. **THAT** the 1st Respondent through a resolution of the Finance, Human Resource and Administration Committee scheduled its Board meeting for the 24th January, 2018 at 10.00 a.m for the reason that the Finance, Human Resource and Administration Committee Board meeting was scheduled for the 17th January 2018. The full Board meeting was slated for the 24th January 2018 as exhibited through an email communication dated 15th January 2018 which reads in part: “...in the view of the foregoing I wish to inform you that the date of the 19th Meeting of the Board of Directors has been rescheduled to Wednesday 24th January, 2018 at 10:00 a.m. This will enable the Principal Secretary of the Parent Ministry to attend the Board Meeting.”

7. **THAT** the impugned decision is illegal ab initio for the reason that removal of the Ex parte Applicant was never an item of agenda in the Finance, Human Resource and Administration Board Committee Meeting held on the 17th January 2018. The letter dated 12th January 2018 inviting members to the Finance Meeting of the 17th January 2018 provide as follows:

“Agenda 1. Prayers 2. Quorum and apologies 3. Adoption of Agenda 4. Declaration of interest 5. Confirmation of Minutes of the Previous Meeting 6. Matters Arising from Previous Minutes 7. Report and Financial Statements for the Quarter ended 31st December 2017 (a) Government Grant (Recurrent and Development) (b) KYEOP Interim Financial Report for the Quarter ended 31st December 2017 8. 2nd Quarter Procurement Reports for the 2nd 2017/2018 Financial year 9. Revised itemized Budget (Supplementary Estimates No. 2) for 2017/2018 financial year 10. Human Resource Report 11. MSEA Resource Requirement in line with Big 4 12. Report on Review of MSEA Accounting.”

8. **THAT** on the 17th January, 2018 the Finance, Human Resource and Administration Board convened as scheduled, however they were later joined by the Chairperson of the 1st Respondent and other members and without following the proper procedure in accordance with the Micro and Small Enterprises Act No. 55 of 2012, State Corporations Act Cap 446, and Mwongozo; the Code of Good Governance for State Corporation transformed the said meeting into a full Board Meeting. It is apparent from the impugned Board Meeting's decisions of the 17TH January 2018 that the Finance, Human Resource and Administration Meeting was indeed transformed to full Board Meeting, the said Minutes provides in part:

“That the Chairman and members noted no Board papers were prepared and circulated for the Meeting.” “There being no Board Papers, Ms. Joyce Ogundo proposed and Mr. Benjamin Nkungi seconded that the Agenda:-

- Shall be the conduct of the Chief Executive Officer*
- Shall be the conduct of the Acting Head, Legal Unit*

The Chairman proposed and it was carried unanimously that the Agenda for the meeting be adopted.”

9. THAT the said impugned meeting of the Authority Board is contrary to the law and particularly contravenes section 8 (1)(d) of the State Corporation Act which requires that at least fourteen (14) days’ written notice of every meeting of the Board shall be given to every member.

10. THAT it was unreasonable for the 1st Respondent to order the Ex parte Applicant out and proceeded to deliberate on his case without him and thus denying him an opportunity to defend himself. This is in total disregard of Article 47 of the Constitution of Kenya which provides in part that: “every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

11. THAT the impugned decisions purportedly made by the 1st Respondent compelling the Ex parte Applicant to go on a compulsory leave was illegal and unlawful having been made by ill-constituted Board which turned Finance, Human Resource and Administration Board Committee Meeting into a full Board meeting. Further although the said impugned decision is described as “compulsory leave” it is apparent from the illegal Board Meeting’s Resolution that the alleged “compulsory leave” is removal and/or termination of the Ex part Applicant employment; the said illegal and unlawful Board Meeting’s Resolution reads in part: “1. The Chief Executive Officer proceed on compulsory leave with effect from 17th January, 2018 until further notice.”

The Authority to seek support from the parent Ministry for an Acting Chief Executive Officer, UNTIL THE BOARD RECRUITS A PERMANENT REPLACEMENT (Emphasis)....”

12. THAT further the Board was not properly constituted to ensure the proper conduct of its day to day activities.

13. THAT the decisions and actions of the 1st and 2nd Respondents contained in the letters dated 17th January 2018 and 18th January 2018 respectively are vitiated by procedural improprieties and bad faith on the part of 1st and 2nd Respondents and the impugned decisions and actions of the Respondents violate the Applicant’s right under Article 47 of the Constitution and his right to protection of the law under Article 27 thereof.

14. THAT based on the foregoing the 1st Respondents decision is illegal and unlawful for the following reasons:

- Failure to afford the Ex parte Applicant an opportunity to be heard before being sent on a compulsory leave;*
- Terminating the Ex Parte Applicant from employment without following the due process;*
- Breach of the legitimate expectations of the Ex parte Applicant that he shall be treated equally before the law and shall enjoy the benefit of the law;*
- The decision was made in bad faith with the intention to punish the Ex parte Applicant because of his firm stand on the issue integrity and accountability in the institution.*
- The decision is vitiated by procedural improprieties and bad faith.*
- The decision is vitiated by failure by the Authority to take into account relevant considerations and taking into account irrelevant considerations.*

15. THAT the impugned decision compelling the Ex-parte Applicant to go on a compulsory leave was actuated by malice and is an abuse of power by the 1st Respondent Chairperson and the members thereof.

16. Under Section 4 (3) of the Fair Administrative Action Act, 2015, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator is required to give the person affected by the decision a prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations in that regard. The Respondents did not give the Ex parte Applicant an opportunity to be heard prior to making the decision to send him on a compulsory leave and eventually terminate his employment.

5. The Respondent filed their replying Affidavit where they aver that they are mandated under the Provisions of Section 5(3) of the state Corporations Act to appoint the Acting Chief Executive officer of the 1st Respondent authority upon recommendations of its Board of Directors. That the appointment of the Interested Party as the acting Chief Executive Officer of the 1st Respondent was necessitated by the recommendation of the Board of Directors that the Applicant be sent on compulsory leave to allow a forensic audit to be undertaken since audit queries had been raised by the Office of the Auditor General on the financial management of the Authority.

6. They further aver that vide a letter dated 18th January 2018 they deployed the Interested Party as the Acting Chief Executive Officer of the 1st Respondent Authority. That this was necessary as the 1st Respondent is an institution with serious management challenges. They state that the orders sought are incapable of being issued as they have been overtaken by events as the 2nd Respondent had long acted on the recommendations of the Board of the 1st Respondent regarding the subject matter at the time of filling this Application.

7. They aver that the balance of convenience and in public interest the 1st Respondent should have a duly appointed Acting Chief Executive Officer in the office to enable its operation and that the Applicant has not demonstrated that the decision to appoint the Interested Party was unreasonable, irrational and neither has the Applicant demonstrated that he is to suffer, since this is an administrative process and he continues to enjoy his salary and full benefits.

8. The Interested Party also filled her Replying Affidavit where she avers that she was appointed on secondment as the Acting Chief Executive Officer for the Micro and Small Enterprises Authority by the Cabinet Secretary, Ministry of Industry, Trade and Cooperatives Vide a letter Ref No. 1990096431(252) dated 18th January 2018 which was a result of the request by the 1st respondent to the 2nd Respondent.

9. She further avers that her appointment was necessitated by the fact the Ex-parte Applicant had been sent on compulsory leave and hence the operations of the Authority which is a public office could not be put on hold and that since assumption to the office there has not been any handover from the Ex-parte Applicant to her and thus she had no access to some essential facilities that enable the office operate.

10. The 1st Respondent filed their Replying Affidavit where they aver that they held their Board meeting where upon deliberations resolved to send the Chief Executive Officer on compulsory leave to allow forensic audit to be undertaken since audit queries had been raised by the office of the Auditor General on the financial management of the Authority. They state that the Board members accorded the Ex-parte Applicant dignity and deserved respect by requesting him to step out as his matter was being discussed as it is the procedure when a matter touching on any one is being deliberated on.

11. They further aver that once the Board finalized its deliberations the Ex-parte Applicant was recalled to the boardroom but he had unceremoniously left. An email was sent to him and upon acknowledge of receipt of the email, he stated that he was not able to avail himself in the office for handover because he was indisposed which was unfortunate as he had ignored the kindness of the Board by turning down the request to avail himself in the office for briefing.

12. They state that the ex-parte Applicant's application is premature and ill-advised as he has not been terminated and neither has he been dismissed from employment and since the Ex-parte Applicant has proceeded on compulsory leave, the operation of the Authority cannot be put on hold thus the Acting Chief Executive Officer has stepped in and is in charge for the time being until the issues raised are dealt with.

Submissions

13. The Applicant filed his submissions where he contends that the alleged decision of sending him on a compulsory leave is illegal, is unreasonable, irrational, is in bad faith, constitutes an abuse of power, is in breach of the rules of natural justice and is in breach of his legitimate expectation and therefore seeks the court's leave to apply for Judicial Review orders of certiorari and prohibition against the decision of the Respondents stating that there was no proper board meeting of the 1st Respondent as premised on the fact that the said meeting was pushed to the 24th January 2018.

14. He avers that sending him on compulsory leave was irrational, unreasonable, illegal and unlawful, and further that the conduct of the 1st Respondent was actuated by malice claiming that the 1st Respondent's Chairman has on several occasions harassed him including using investigative institutions to threaten and intimidate him. He states that the impugned decisions of the 1st Respondent dated 17th January 2018 was a culmination of the long-drawn war carried out by the Chairman of the 1st Respondent.

15. He states that the Civil Procedure Rules, 2010 pursuant to order 53 (1) (1) provides that "no application for Judicial for an order for mandamus, prohibition or certiorari shall be made unless leave has been granted in accordance with this rule."

16. It is apparent that a party desirous of pursuing judicial review proceedings must in the first instance seeks the leave of the Court, which is apparent from the Applicant Further Affidavit and Affidavit in support of the Application for leave that indeed the Respondents impugned decision of 17th January 2018 was malicious, unreasonable, irregular and unlawful.

17. It is clear that the Applicant was not given an opportunity to be heard during the 1st Respondent's meeting held on the 17th January, 2018 nor was he accorded an opportunity to face his accusers. This is in total disregard and violation of Article 48 of the Constitution. On that point alone, the Applicant avers that he has established a prima facie case and thus leave to institute judicial review proceedings. He relied on the case of **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321.**

18. He further states that the alleged audit was never carried out. It was merely used as an excuse of sending the Applicant on compulsory leave, the issue of the alleged audit query has never been brought to his attention prior to sending him on compulsory leave.

19. Further Auditor-General Report dated 30th June 2017 revealed that the financial statements present fairly, in all material respect the true financial position of the 1st Respondent and there is no shred of evidence that points to any financial impropriety on his part. It is clear from the evidence on record that alleged issue of audit on which the Applicant was purportedly sent on compulsory leave was never an issue at all.

20. The Applicant therefore humbly submits that based on the material evidence on record, Affidavits and documents adduced in the matter, the Applicant has established a prima facie case and ought to be granted leave to institute judicial review proceedings for orders of certiorari and prohibition.

21. The Respondents filed their submissions where they submit that the Ex-parte Applicant's case in this application does not meet the threshold for a prima facie case. They submit that he should therefore, not be granted leave to institute Judicial review proceedings for orders of certiorari and mandamus as instituting Judicial Review proceedings at this stage is premature and an abuse of the court process.

22. They aver that compulsory leave is not classified as punishment under the Micro and small Enterprises Authority (MSEA), Human Resource Manual therefore the Ex-parte Applicant cannot thus claim that the decision to send him on compulsory leave was an administrative action. They relied on the case of **Justice Amrahael Mboghli Msagha Vs Chief Justice of the republic of Kenya & 7 others (2006) Eklr.**

23. They further aver that despite being sent on compulsory leave, the Ex-parte Applicant continues to enjoy full pay and benefits in accordance with his contract. Despite being a public body, the employment relationship between the 1st Respondent and the Ex-parte Applicant is strictly governed by private law hence the orders sought by the Ex-parte Applicant cannot be granted as that would amount to application of public law principles to private law matters. The Ex-parte applicant is thus not entitled to the orders of certiorari and prohibition is sought.

24. I have considered the submissions of both parties. In considering whether this is a fit case for which to grant the leave sought. I am guided by the law, Order 53 rule 1 of the Civil Procedure Rules which states as follows:-

1) "No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

17. In further determining whether the leave sought is merited, this Court should consider if on the face of it without going into merits of the case, it appears that the Applicant has an arguable case. This reason is valid in order to enable to Court at the earliest opportunity to dismiss frivolous cases and also prevent public bodies from being paralyzed due to civil actions which will stall their operations just to be found to be frivolous in the end.

18. Waki J (as he then was) in **Republic vs County Council of Kwale & Another Ex-Parte Kondo & 57 others Mombasa HCMCA No. 384/1996** had this to say on the purpose of seeking leave to institute Judicial Review application:-

"The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexatious or hopeless and secondly to ensure that the Applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review if it were actually pending even through misconceived... Leave may only be granted therefore if on the material available the Court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant, the test being whether there is a case fit for further investigation at full inter partes hearing of the substantive discretion but as always it has to be exercised judicially".

19. In the case of **Murugi Kariuki vs AG Civil Appeal No. 70 of 1991 (1991-1994) E A 156, (1992) KLR8 the Court of Appeal** opined as follows:-

"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb

represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought.”

20. I have considered the submissions of the Parties. In my view there seems to be arguable issues before this Court which necessitate that the orders sought be granted.

21. In the circumstances, I will grant the prayers for leave sought to the Applicant herein to file substantive Judicial Review proceedings as sought.

22. The leave sought will apply as a stay of the decision of the 1st and 2nd Respondents' impugned decisions sending the Ex-parte Applicant on compulsory leave and further the impugned appointment of the Interested Party as the Acting Chief Executive Officer of the 1st Respondent contained in the two letters dated 17th and 18th January 2018.

23. Costs in the cause.

Dated and delivered in open Court this 28th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Lesaigor for Claimant Ex-parte – Present

Odukenya holding brief for Chesinya for Respondents – Present