



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

JR APPLICATION NO. 2 OF 2018

IN THE MATTER OF: RIGHT TO FAIR ADMINISTRATIVE ACTION UNDER ARTICLE 47 OF THE CONSTITUTION

IN THE MATTER OF: RIGHT TO FAIR ADMINISTRATIVE ACTION UNDER ARTICLE 47 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 THE EMPLOYMENT ACT NO. 11 OF 2007

AND

IN THE MATTER OF: TEACHERS SERVICE COMMISSION ACT NO. 20 OF 2012

AND

IN THE MATTER OF: TEACHERS SERVICE COMMISSION CODE OF REGULATIONS FOR TEACHERS (2015)

AND

IN THE MATTER OF: THE LETTER OF INTERDICTION PURPORTING TO TAKE DISCIPLINARY ACTION AGAINST ELIZABETH W. MAGUTA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL MURANG'A HIGH SCHOOL.....1ST RESPONDENT

BOARD OF MANAGEMENT MURANG'A HIGH SCHOOL.....2ND RESPONDENT

TEACHERS SERVICE COMMISSION.....3RD RESPONDENT

EX PARTE ELIZABETH W. MAGUTA

RULING

1. The application before me is the 1st & 2nd Respondent’s preliminary objection dated 25th October 2018. The objection is to the effect that the judicial review application violates the mandatory provisions of Section 9(2) of the Fair Administrative Action Act, No. 4 of 2015 and the legal doctrine of exhaustion. The 1st and 2nd Respondents’ objection was urged by Mr. Rugo. He asserts that the jurisdiction of the court is prematurely invoked as the *ex parte* Applicant has not exhausted all the other statutory remedies before moving the court. It is submitted that the uncontested facts are that the *ex parte* Applicant is a teacher duly registered with TSC the 3rd Respondent herein and that she had already subjected herself to the jurisdiction of the TSC by entering a defence in those disciplinary proceedings. He submitted that all that is awaited is the hearing of those proceedings. He argued that with these two uncontested facts, in light of the provisions of Section 9(2) of the Fair Administration Act the *ex parte* Applicant was asking the court to assume jurisdiction on ongoing disciplinary proceedings between the

employee and the employer. He states that it is only in exceptional circumstances that the court can intervene and cited the Court of Appeal decisions in **Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another [2015] eKLR** and **Geoffrey Muthinja & Another v Samauel Muguna Henry & 1756 Others [2015] eKLR** as well as the decision of Onyango J. in **Judith Mbaya Tsisiga v Teachers Service Commission [201] eKLR**. He urged the court to be persuaded by the decision by Onyango J. and apply the decisions of the Court of Appeal in the matter. The 3rd Respondent supported the preliminary objection and urged that the Court to strike out the judicial review application. Mr. Sitima associated himself with the submissions of Mr. Rugo and adopted them. He stated that there was no scope for a public law remedy for a private law infringement. He urged the court to hold that no exceptional circumstances exist for the interference of the court in the dispute at present. He relied on the case of **Alfred Nyungu Kimungui v Bomas of Kenya Ltd [2013] eKLR** for the proposition that courts should be reluctant to interfere with the managerial prerogatives of employers. He also cited the case of **Mutanga Tea & Coffee Co. Ltd v Shikara Limited & Another [2015] eKLR** in aid of his submissions. He thus urged the court to strike out the JR Application with costs. In opposition of the objection taken, Mr. Juma for the *ex parte* Applicant submitted that this was a classic case where the court should intervene. He cited the case of **Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR** where Mbaru J. when faced with similar circumstances as this case held that where grave injustice might result or where justice might not by other means be attained, a court should intervene. He submitted that the procedure adopted did not accord the *ex parte* Applicant an opportunity to be represented by a union official. He posed the question whether violation of the law qualifies as an exceptional circumstance permitting the court to intervene. He argued that the complainant in this case turned investigator and judge in the case thus denying the *ex parte* Applicant a fair hearing in terms of Article 47 of the Constitution of Kenya. He urged the court to find that the abridgement of these sacrosanct rights is sufficient basis for the Court to intervene and quash the decision to interdict the *ex parte* Applicant. He submitted that the Court of Appeal decisions were distinguishable as was the case before Onyango J. He argued that the *ex parte* Applicant had demonstrated exceptional circumstances exist for intervention and that the preliminary objection should be dismissed and the matter be allowed to proceed to hearing.

2. In a brief rejoinder, Mr. Rugo for the 1st and 2nd Respondents submitted that the case relied on by the *ex parte* Applicant confirmed the preliminary objection was well founded and supported the submissions by Mr. Sitima for the 3rd Respondent. He stated that the choice of forum was not cured as the *ex parte* Applicant had chosen the wrong forum and the wrong invocation of the court's jurisdiction in the JR proceedings should allow the striking out sought. He submitted that parties were obligated to apply the doctrine of exhaustion and that the *ex parte* Applicant has an opportunity to challenge the process at the disciplinary level. He argued that the TSC has statutory powers to take submissions, listen to witnesses and accord any party the opportunity to cross-examine witnesses. He urged the dismissal of the proceedings with costs.

3. In administrative law, the doctrine of exhaustion, also known as the exhaustion of rights doctrine is that in general a plaintiff must exhaust all available administrative remedies before seeking judicial review. For instance, if there is a statutory mechanism or an administrative process that is to be followed, the plaintiff is required to exhaust the available remedies before going for judicial review. In this case, the *ex parte* Applicant is a teacher. She is facing an interdiction which is subject of the Judicial Review Application. Under Section 9(2) of the Fair Administration Act the law provides as follows:-

9.(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

4. This provision of the law is the classic rendition of the doctrine of exhaustion. The doctrine was enunciated in the case of **Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another** (*supra*) where the Court of Appeal (Makhandia, Ouko, M'Inoti JJA) held as follows:-

*This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. **SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME** (*supra*), was a 5(2) (b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:*

“[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

*(See also **KONES V. REPUBLIC & ANOTHER EX PARTE KIMANI WA NYOIKE & 4 OTHERS** (2008) 3 KLR (ER) 296).*

*It is readily apparent that in those cases the Court was speaking to issues of the correct **procedure** rather than of the correct **forum** for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.*

*The basis for that view is first that Article 159(2)(c) of the Constitution has expressly recognized alternative forms of dispute resolution, **including** reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word **“including”** leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.*

5. The *ex parte* Applicant herein has a disciplinary process that is underway before the 3rd Respondent and this is the option that Section 9(2) of the Fair Administration Act provides. The *ex parte* Applicant therefore should have exhausted the remedies provided for under statute before moving this court for judicial review. The purposive interpretation of the law is that parties must pursue the remedies under the statute before invoking the jurisdiction of the court. I allow the preliminary objection and strike out the Judicial Review application. I make no order

as to costs.

It is so ordered.

Dated and delivered at Nairobi this 29th day of November 2018

Nzioki wa Makau

JUDGE