



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO.25 OF 2018

IN THE MATTER OF APPLICATION BY IRENE CHESANG FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION, MANDAMUS, INJUNCTIVE ORDER, DECLARATORY ORDER ANY OTHER ORDER TO MEET ENDS OF JUSTICE

AND

IN THE MATTER OF ORDER 53 RULES 1,2,3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF EMPLOYMENT ACT CAP 226 LAWS OF KENYA (REVISED 2012)

AND

IN THE MATTER OF ARTICLES 41 (a) & 162 (2) (a) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF EMPLOYMENT AND LABOUR RELATION COURT (PROCEDURE) RULES 2016

AND

IN THE MATTER OF THE HUMAN RESOURCE ADVISORY COMMITTEE (HRAC), RURAL ELECTRIFICATION AUTHORITY

BETWEEN

REPUBLIC

EX-PARTE

IRENE CHESANG.....APPLICANT

- VERSUS -

THE HUMAN RESOURCE ADVISORY COMMITTEE,

RURAL ELECTRIFICATION AUTHORITY.....1ST RESPONDENT

RURAL ELECTRIFICATION AUTHORITY.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th November, 2018)

JUDGMENT

The notice of motion was filed on 03.09.2018 through Arusei & Company Advocates. The motion was under order 53 rule 1(1), (2), (4), order 53 rule 3 and 4, section 8(2) and 9 of the Law Reform Act Cap 26 Laws of Kenya, section 12 of the Employment and Labour Relations Act, 2011 and rule 28 of the Employment and Labour Relations Court (Procedure) Rules 2016, Articles 162(a) and 41 of the Constitution of

Kenya, 2010. The applicant prays for:

- 1) An order of certiorari to issue to remove in to the Honourable Court and to quash the decisions of the 1st and 2nd respondents to subject the ex-parte applicant to a disciplinary process commenced vide the notice to show cause letter dated the 22.08.2018 by the respondent's Chief Executive Officer and the subsequent processes leading to the invitation of the ex-parte applicant to appear before the 1st respondent committee on the 03.09.2018 to answer the alleged disciplinary issue or issues.
- 2) An order of certiorari to issue to remove into the Honourable Court and to quash the Notice to show cause dated 22.08.2018 issued to the ex-parte applicant by the 2nd respondent's CEO to quash the sittings of the 1st respondent (HRAC) of 03.09.2018 or any other date thereafter and to quash the entire disciplinary process against the ex-parte applicant commenced by the 1st and 2nd respondents as the same was tainted with illegality, irrationality, procedural impropriety, error of law in initiating and pursuing the process, tainted with unfairness, non-observance of the rules of natural justice and above all non observance of the respondent Human Resource Policy & Procedure Manual 2017.
- 3) That an order of prohibition to issue to remove into the Honourable Court and to prohibit the 1st and 2nd respondents from commencing and continuing with the disciplinary processes commenced on the 22.08.2018 vide a notice to show cause letter and all other subsequent processes including the 1st respondent sittings of the 03.09.2018 or any therefore and to prohibit the respondents, their agents and employees from further subjecting the applicant to any illegal, unlawful disciplinary process, from harassing the ex-parte applicant and from subjecting the applicant to a process that no reasonable authority addressing itself to the facts and the law before it would have made such a decision to commence and pursue disciplinary process.
- 4) An order of mandamus to issue to remove in to the Honourable Court and to compel the 1st and 2nd respondents, their agents, and employees to recall the notice to show cause letter dated 22.08.2018 and notice to attend 1st disciplinary sittings dated 28.08.2018 and scheduled for the 03.09.2018 or any other date thereafter and to follow the law to observe procedural rules, rules of natural justice, the Employment Act, the Constitution of Kenya and the respondent Human Resource Policy & Procedural Manual 2017, section 11, rules 11.1, 11.2, 11.3, 11.4, 11.154, 11.15, 11.16, 11.17, 11.18, 11.19, 11.20, 11.21 and 11.22.
- 5) The costs of the application to be in the cause.

The application was based on the grounds stated in the application, the statutory statement and the verifying affidavit of Irene Chesang and her supplementary affidavit filed on 14.09.2018.

The respondent opposed the application by filing on 12.09.2018 the replying affidavit of David Gitonga, the respondent's General Manager, Research Strategy and Planning, and filed through Hamilton Harrison & Mathews Advocates.

At all material times the applicant is employed by the 2nd respondent as a Chief Human Resource Officer. By the letter dated 21.12.2012 she was appointed as Assistant Human Resource Officer; by the letter dated 21.04.2015 she was promoted to the post of Human Resource Officer; and by the letter dated 13.04.2018 she was appointed Chief Human Resource Officer.

By a show cause letter dated 22.08.2018 it was alleged that it had been reported to the 2nd respondent's CEO that the applicant had provided to the 2nd respondent a forged degree in Bachelor of Science in International Business Administration from the United States International University. The letter stated that after verification from the University the document was found to be forged and the fraud contravened section 44 (4) (g) of the Employment Act, section 11.16 of the 2nd respondent's Human Resource Policy & Procedural Manual (HRPPM); and it amounted to contravention of section 354 of the Penal Code. The letter called upon the applicant to show cause why disciplinary action which may include dismissal and or prosecution on account of forgery and falsification of documents should not be taken against the applicant. The applicant was to reply within 72 hours failing disciplinary action would be taken against her without further reference to her.

The applicant replied by the undated letter being exhibit IC 2 on the verifying affidavit stating that the allegations were false and malicious because she held a legitimate degree in Bachelor of Science in International Business Administration from United States International University and she attached a copy for confirmation. She further stated that she had been diligent and hard working in the service of the 2nd respondent as per the promotions earned over the years.

The claimant takes issue with the letter to show cause because it was signed by the 2nd respondent's CEO instead of the Head of Human Resource as per rule 11.18.10 of the 2nd respondent's HRPPM. The rule provides that the Head of Human Resource shall issue the officer with a show cause letter stating the particulars of the alleged misconduct and invite him or her to respond in writing to the allegations and the grounds, if any, on which he or she relies to exonerate himself or herself. Further, the applicant's case is that under rule 11.18.9 in event of a major vent or gross misconduct, the 1st respondent may direct that the culprit be required to show-cause why a severe disciplinary action should not be meted against him. Thus, the applicant's case is that by signing or issuing the show-cause letter, the 2nd respondent's CEO clearly usurped the authority or powers of the 1st respondent and the Head of Human Resource.

The applicant further laments that she was given a short period of time being 72 hours to reply to the show cause letter and which was contrary to rules 11.4 of the HRPPM which provides that the 2nd respondent shall be guided by the following principles in handling disciplinary matters:

- a) The rules of natural justice.
- b) Procedural fairness, where an officer must be allowed adequate opportunity to prepare and present his or her case.

- c) The deciding authority must be unbiased when hearing and making decisions.
- d) Decisions must be based upon logical proof or evidential material.
- e) Fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- f) Every officer to whom disciplinary action is taken has a right to:
 - Written reasons for any disciplinary action that is taken against him.
 - Prior and adequate notice of the nature and reasons for the intended disciplinary action.
- g) An opportunity to be heard and to make representations in that regard.
- h) An opportunity to attend proceedings in person or in the company of an expert of his choice, cross examine persons who give adverse evidence against him and request for adjournment of proceedings where necessary.
- i) Notice of the right legal representation, where applicable.
- j) Notice of a right to an appeal or review against a disciplinary decision.
- k) Information, materials and evidence to be relied upon in making a decision or taking a disciplinary action.

The applicant's further case is that the proceedings are irrational and unreasonable because the applicant has a degree in Bachelor of Science in International Business Administration from the United States International University and the certificate and evidence of studies leading to award of the degree are exhibited accordingly.

By the letter dated 28.08.20018 the 2nd respondent's CEO invited the applicant to appear before the Human Resource and Advisory Committee on 03.09.2018 at 9.00am to explain the issues raised in the show-cause letter of 22.08.2018.

The replying affidavit has opposed the application upon the following grounds:

- a) The applicant had applied by a letter dated 15.01.2015 for the position of Human Resource Officer. In that letter she indicated that she had graduated from the United States International University (USIU) with a bachelor's degree in International Business Administration (Finance Option) in 2000.
- b) The applicant was ranked 2nd best in interviews for Principal Human Resource Officer held in early 2018. The 2nd respondent's Board then decided to substantively appoint her to the position of Chief Human Resource Officer as per the letter dated 13.04.2018.
- c) In July and June 2018, the 2nd respondent undertook a human resource audit. The employee's academic certificates had to be verified by the relevant learning institutions. On 10.07.2018 USIU wrote to the 2nd respondent confirming that the applicant pursued a degree in Bachelor of Science in International Business Administration and was awarded the degree in April 2018. That contradicted the information the applicant had provided to the 2nd respondent that she had graduated from USIU in 2000 having obtained a Bachelor's degree in International Business Administration (Finance Option).
- d) By the letter dated 06.08.2018, the 2nd respondent wrote to USIU to confirm whether the applicant had obtained a Bachelor's degree in International Business Administration on 17.06.2000 as per the attached copy of the certificate the applicant had provided in the initial application for employment with the 2nd respondent. The applicant had earlier given to the 2nd respondent a letter by USIU dated 09.06.2001 stating that the applicant was a student at the university pursuing course work leading to Bachelor of Science degree in International Business Administration in Finance for the period covering September 1997 to December 2000 and she had graduated with on 17.06.2000.
- e) USIU wrote to the 2nd respondent the letter dated 07.08.2018 indicating that the applicant joined USIU in May 1997 to April 2018 when she completed her degree requirements for Bachelor of Science Degree in Business Administration with a concentration in Management. Further the degree certificate forwarded was a case of forgery.
- f) The University of Nairobi had written to the 2nd respondent the letter of 23.08.2018 forwarding the degree certificate and transcripts the applicant had used to apply for post graduate studies (masters degree programme). The certificates and transcripts showed that the applicant had graduated in 2000.
- g) In view of the foregoing information the 2nd respondent concluded that the applicant had engaged in apparent forgery of academic documents and the show-cause letter was issued.
- h) The 2nd respondent's HRPPM at section 11.2.1 provides that the CEO will handle and determine disciplinary matters of staff in grades REA4 to REA9. The applicant being in grade REA 5 the CEO had power to handle her disciplinary case including issuing

the show cause letter. It was therefore not procedurally improper, illegal, *ultra vires*, or irrational for the CEO to issue the show-cause notice to the applicant. The letter was not vague and it was clear on the specific allegation leveled against the applicant and the applicant replied. In any event the applicant never asked for further information or details to enable her answer to the show-cause letter and the letter was sufficient on the particulars of the allegations leveled against the applicant. In the circumstances, the stay orders stopping the disciplinary hearing of 03.09.2018 ought not to have issued because the scheduled hearing was proper in law.

The Court has considered the pleadings, the affidavits, the exhibits and the submissions on record. Findings on the matters in dispute are made as follows:

- 1) The 2nd respondent's CEO was entitled to issue the show cause letter against the applicant in view of the provisions of HRPPM at section 11.2.1. Under the section an appeal against the CEO's decision in handling the disciplinary case of the designated officers such as the applicant shall lie to the 2nd respondent's Board. The Court's considered opinion is that if the applicant was indeed dissatisfied with the manner the 2nd respondent's CEO was proceeding including matters about issuance of the show cause letter and the alleged short time of 72 hours to reply, the claimant ought to have appealed to the Board. In that vein, the grievances about the usurpation of authority in issuing the show-cause letter, shortness of time to reply and the want of particulars of allegations in the show-cause letter will collapse.
- 2) The Court further finds that the show-cause letter set out all relevant material facts or details or particulars to enable the applicant to reply in self exculpation. The applicant has failed to establish the material deficiency in the show cause letter.
- 3) The Court returns that the applicant has not established that the 72 hours provided were short in any material respect to enable her effectively reply to the allegations. As submitted for the respondents, the applicant does not say that she asked for more time and it was declined. The Court has considered the nature of the allegations and returns that the response required was to show validity or veracity of the applicant's academic certificate and in that regard, the Court finds that the reply was such that the applicant was reasonably expected to have such information readily available and the 72 hours allowed to reply were more than adequate as the time allowed was sufficient.
- 4) In the circumstances the applicant's allegations that the respondents had been unreasonable will collapse and the allegations that Article 47 and 41 of the Constitution of Kenya 2010 had been contravened are found unfounded and not justified at all.
- 5) The stay orders will now lapse and the respondents are entitled to continue with the disciplinary case against the applicant from where it had stopped and in accordance with the contract of service (including provisions of the 2nd respondent's HRPPM) and relevant provisions of law.
- 6) The respondent has succeeded and is entitled to costs of the suit.

In conclusion the judicial review application by the notice of motion filed on 03.09.2018 is hereby dismissed with costs.

Signed, dated and delivered in court at Nairobi this Friday 16th November, 2018.

BYRAM ONGAYA

JUDGE