



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC CIVIL APPLICATION NO. 27 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORERS OF CERTORARI BY MORRIS KIWINDA MBONDENYI

AND

IN THE MATTER OF THE EMPLOYMENT ACT 2007

AND

THE FAIR ADMINISTRTRIVE ACTIONS ACT 2015

AND

IN THE MATTER OF THE KENYA SCHOOL OF LAW

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI AND PROHIBITION BY WAY OF JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

v

THE BOARD OF KENYA SCHOOL OF LAW.....RESPONDENT

AND

MORRIS KIWINDA MBONDENYI.....EX PARTE APPLICANT

JUDGMENT

1. On 2 June 2015, the Board, Kenya School of Law (Respondent) offered Morris Kiwinda Mbondenyi (*ex parte* applicant) employment as a Deputy Director for a period of 4 years.
2. Around 3 April 2017 the *ex parte* applicant applied for 35 days leave and the application was approved by the Respondent. The *ex parte* applicant resumed duty around 2 May 2017.
3. The *ex parte* applicant had in the meantime presented himself for nominations for the position of Member of Parliament, Mwatate Constituency under the Jubilee party and won. He was to fly the party ticket in the general elections of 8 August 2017.
4. On 18 May 2017 the Respondent brought to the attention of the *ex parte* applicant a Circular OP/CAB.20/7A from the Chief of Staff and Head of the Public Service dated 5 May 2016 directing that all public officers intending to vie in the general elections submit letters of resignation on or before 8 May 2017 (10 May 2017 for independent candidates).
5. The *ex parte* applicant responded to the Respondent indicating that in his understanding the Circular, prompted by and pursuant to a judgment of this Court (differently constituted) in *Eric Cheruiyot & 7 Ors v Independent Electoral and Boundaries Commission & 7 Ors*

(2017) eKLR, did not require his resignation until he was formally nominated by the Independent Electoral and Boundaries Commission.

6. Upon receipt of the *ex parte* applicant's letter, the Respondent wrote to the Chief of Staff and Head of Public Staff drawing his attention to the *ex parte* applicant's letter and advising that the Respondent endorsed the interpretation of the judgment as urged the *ex parte* applicant.

7. On 26 May 2017, the *ex parte* applicant applied for leave again, which application was approved by the Respondent. The leave was to expire on 7 July 2017.

8. Upon the expiry of the leave, the *ex parte* applicant applied for leave without pay on 7 July 2017 to run up to 11 August 2017 and the Respondent approved the leave.

9. On 14 September 2017, the Respondent wrote to the *ex parte* applicant to inform him that after a meeting of the Finance and General Purposes Committee on 2 September 2017, it had been recommended that he be *deemed to have resigned effective from the date he was gazetted as a candidate in the 8th August 2017 elections. Any payments made to him from that date henceforth should be recovered.*

10. Although the letter was signed by the Secretary of the Respondent, he wrote another letter to the Chief of Staff and Head of the Public Service that he had signed the letter under protest. He also sought guidance on how to deal with the *ex parte* applicant's request to resume duty.

11. In a reply on 19 September 2017, the Chief of Staff and Head of Public Service advised the Secretary of the Respondent that the *ex parte* applicant should wait the advertisement of the position of Deputy Director and if interested apply afresh.

12. When the *ex parte* applicant was informed of the position, it appears he took the position that his contract had been terminated contrary to the decision in the *Eric Cheruiyot* case and he sought a review from the Respondent. On 4 October 2017, the Respondent wrote to the Chief of Staff and Head of Public Service seeking guidance.

13. The Secretary of the Respondent also wrote a letter to its Chairperson on 5 October 2017 seeking similar guidance and in a response on 30 October 2017 (?), the Chairperson indicated that she would place the issue before the full Board.

14. The Board met and through a letter dated 2 February 2018, the *ex parte* applicant was informed that the decision that he was deemed to have resigned would remain (unchanged).

15. The turn of events forced the *ex parte* applicant to move the Court on 8 March 2018 seeking leave to commence judicial review proceedings and leave was granted on 9 March 2018, as a result of which the *ex parte* applicant filed a motion on 14 March 2018.

16. On 9 April 2018 the Court gave directions as to the filing of responses and submissions.

17. The Respondent filed a replying affidavit sworn by its Chairperson in opposition to the proceedings on 18 April 2018 and the *ex parte* applicant filed his submissions on 7 May 2018 (outside the agreed timelines).

18. When the proceedings came up on 10 May 2018 for highlighting of submissions, the Respondent had not filed its submissions and the Court directed it to file and serve the same before 18 May 2018 (the submissions were filed on 21 May 2018).

19. The highlighting of submissions eventually took place on 3 July 2018 and the Court has keenly perused them.

Evaluation

20. The fulcrum of the *ex parte* applicant's case appear to be the *validity* of the Respondent's decision to *deem* that he had resigned as contextualised from the *Eric Cheruiyot* decision.

21. The Respondent in turn seem to have based their decision and/or reason to *deem* the *ex parte* applicant as having resigned on the Circular by the Chief of Staff and Head of Public Service and interpretation of the stay order by the Court of Appeal in *Eric Cheruiyot & 7 Ors v Independent Electoral and Boundaries Commission & 7 Ors* (2017) eKLR.

22. This was a case of different interpretations of the Circular OP/CAB.20/7A and the *Eric Cheruiyot* decision and the stay orders thereof.

23. In short, what the *ex parte* applicant is calling upon the Court is to determine whether the Circular and interpretation given to it had sufficient legal backing to merit treating the *ex parte* applicant as having resigned but through the *judicial review* route.

24. Under section 45 of the Employment Act, 2007, one of the primary grounds upon which an employee can challenge the decision of an employer to terminate his employment is the *validity* of the reason(s).

25. *Valid* is defined in Black's Law Dictionary, Tenth Edition as *legally sufficient; binding...meritorious*.

26. The other primary ground is the *fairness* of the decision.

27. On the procedural aspects, sections 35 and 41 of the Employment Act, 2007 provide the minimum protections.

28. Ordinary employment disputes are at the first instance supposed to be determined in terms of and within the context of the Employment Act, 2007 as the Act has set out elaborate protections ensuing to employees before termination of contract.

29. Judicial review is a *sui generis* proceeding which has now been given constitutional underpinning but as was stated in ***Municipal Council of Mombasa v Republic and Another (2002) EKLR***

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...

30. Further, orders of judicial review are discretionary and may not be granted even where grounds exist (see *Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270*), and the Court may not have the wide latitude granted it under the Employment and Labour Relations Court Act and the Employment Act, 2007.

31. For in granting the order of *certiorari* as sought by the *ex parte* applicant, the Court will effectively be granting the remedy of reinstatement in an ordinary employer/employee dispute without having recourse and consideration of the factors outlined in section 49 of the Employment Act, 2007. Some of those factors require presentation and subjecting of evidence to interrogation.

32. Although *judicial review* is generally available in employment disputes, it is a route which should be used as an exception and not the avenue of choice especially for ordinary employees subject to employment law of general application.

33. In the view of the Court, the *ex parte* applicant should have utilised the ordinary avenues provided in law for challenging the Respondent's decision instead of the circumscribed route of *judicial review*.

Conclusion and Orders

34. In consideration of the above and bearing in mind that the *ex parte* applicant is not yet shut out by the law of limitation, the Court declines to allow the motion and it orders that the motion be dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 2nd day of November 2018.

Radido Stephen

Judge

Appearances

For *ex parte* applicant Mr. Ambani instructed by Mwangi Wahome & Co. Advocates

For Respondent Mr. Nthiga instructed by Waruhiu K'Owade & Nganga Advocates

Court Assistant Lindsey