



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION NO 126 OF 2016

IN THE MATTER OF AN APPLICATION BY MAURICE ADONGO ANYANGO

FOR AN ORDERS OF MANDAMUS, PROHIBITION AND CERTIORAR

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26

LAWS OF KENYA

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT ACT, 2005

AND

IN THE MATTER OF ARTICLES 22, 23, 27, 47, 50 & 236 OF THE CONSTITUTION OF

KENYA, 2010

AND IN THE MATTER OF SECTIONS 12, 44, 45, 47 AND 49 OF THE EMPLOYMENT

ACT, 2007

AND

IN THE MATTER OF SECTION 27(2) OF THE PUBLIC PROCUREMENT AND

DISPOSAL ACT

AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYATTA INTERNATIONAL CONVENTION CENTRE.....RESPONDENT

EX PARTE

MAURICE ADONGO ANYANGO

JUDGMENT

Introduction

1. The Ex Parte Applicant, Maurice Adongo Anyango had initially taken out proceedings against Kenyatta International Convention Centre (KICC) as 1st Respondent and the KICC Management Board as 2nd Respondent.
2. Following a preliminary objection on joiner of the KICC Board of Management, the Applicant opted to proceed against Kenyatta International Convention Centre as the sole Respondent.

The Ex Parte Applicant's Application

3. By his application dated 6th November 2016, the Ex Parte Applicant seeks the following orders:
 - a) An order of certiorari to remove to this Court and quash the letters dated 21st January 2016 and 30th May 2016 authored by the KICC Management Board interdicting and terminating the Applicant's employment;
 - b) An order of mandamus to compel the Respondent to reinstate the Applicant to his position as Acting Procurement Manager and to compensate him for the period beginning from the date of his interdiction, subsequent dismissal to date;
 - c) An order of prohibition restraining the Respondent from interfering with the Applicant's contract of employment until attainment of the mandatory retirement age of 60 years;
 - d) An order of certiorari to remove to this Court and quash the entire deliberations, investigations, decisions, disciplinary proceedings and/or recommendations leading to the Applicant's dismissal;
 - e) A declaration that the decisions, deliberations, investigations, disciplinary proceedings and subsequent termination letter dated 30th May 2016 are unconstitutional, null and void;
 - f) An order directing the Respondent to pay the Applicant salary arrears.
4. The Applicant sets out the following grounds in support of his application:
 - a) The Applicant's contract of employment has been terminated irregularly;
 - b) The Respondent's Management Board has no mandate to deal with appointment and discipline of management staff who are not board appointees;
 - c) The charges preferred against the Applicant do not exist in law and are applicable to the Accounting Officer/CEO under the Public Procurement Act;
 - d) The Respondent has violated the rules of natural justice by failing to avail to the Applicant the investigation report on the alleged procurement irregularities;
 - e) The Board acted *ultra vires* its legal mandate by usurping the powers of the management *ad hoc* committee charged with the responsibility to appoint and discipline management staff;
 - f) The Applicant has been subjected to illegal proceedings conducted by an unauthorized body;
 - g) The ground for dismissal, being alleged breach of duty as set out in letter dated 30th May 2016,

is not among the grounds stipulated under Section 44(4) of the Employment Act;

h) The actions complained of in these proceedings are in their totality illegal and unreasonable and are in violation of the Constitution, the law and the Respondent's Human Resource Manual.

The Respondent's Response

5. The Respondent's response is contained in a replying affidavit sworn by its Managing Director, Nana Gecaga on 15th December 2016. She depones that during preparations for the 10th World Trade Organization (WTO) Ministerial Conference hosted by the Respondent in December 2015, the Respondent, through its various management organs and staff, noted and received complaints with regard to irregularities in the procurement of goods and services.

6. Gecaga states that during this period, the Respondent's Tender Committee did not meet to approve award of tenders, yet tender awards were made and contracts entered into between the Respondent and various contractors for procurement of goods and services. She cites several tenders awarded without approval of the Tender Committee and irregular payments running into millions of Kenya Shillings. Further, the procurement plan put in place recommended restricted tendering work Kshs. 900 million, without any justification as required by procurement law and procedure.

7. Gecaga depones that the Applicant failed to discharge his responsibility as required by law and the Respondent's policy documents thereby exposing the Respondent to loss and risk. Investigations into the subject procurement process confirmed the irregularities. At the time of the procurement and subsequent investigations, the Applicant was the Acting Procurement Manager in charge of all the Respondent's procurement processes as per his letter of appointment dated 16th April 2016.

8. The Applicant's statutory duties as provided under the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulation, 2006 are cited as follows:

- a) Coordinate the receiving and opening of tender documents;
- b) Maintain and safeguard procurement and disposal documents and records in accordance with the Regulations;
- c) Co-ordinate the evaluation of tenders, quotations and proposals;
- d) Prepare and publish notices of awards and notices of tender acceptance;
- e) Prepare contract documents in line with the award decision;
- f) Maintain and archive documents and records of the procurement and disposal activities for the required period;
- g) Implement the decisions of the procurement, tender and disposal committees, including coordinating all activities of these committees;
- h) Act as a secretariat to the tender, procurement and disposal committees;
- i) Co-ordinate internal monitoring and evaluation of the supply chain function.
- j) Certify invoices from and payment vouchers to suppliers.

9. As head of the procurement unit, the Applicant was the secretary to the Tender Committee. Additionally, by virtue of his job description he was required to:

- a) Ensure that the Respondent's supply chain activities, from pre-qualification of suppliers to

managing the delivered goods and services, were in compliance with laid down regulations, policies and procedures;

b) Ensure procurement of goods and services was in accordance with public procurement regulations and the Respondent's procurement policies;

c) Source and negotiate and with the help of the Legal and Regulatory Affairs Manager, prepare contracts with registered suppliers in line with existing rules and regulations.

10. In light of the issues raised and the adverse implication of several members of the Respondent's top management, including the Applicant, the Respondent took the following steps:

a) Constituted a 7 member *ad hoc* disciplinary committee drawn from members of the Respondent's Board of Directors, bearing in mind the magnitude of the project, the persons implicated and the possible financial liability and implications thereof;

b) Notified the Applicant of the adverse implications vide letter of interdiction dated 21st January 2016, together with documentation in support thereof, and asked him to respond to the allegations raised within 14 days;

11. Gecaga states that the Applicant responded to the allegations vide his letter dated 12th February 2016, admitting that in the entire project worth approximately Kshs. 900,000,000, only one tender committee was held whereat all the tenders were rejected. No other tender committee meeting was held with the consequence that no tenders were approved.

12. By letter dated 15th March 2016, the Applicant was invited to a disciplinary hearing on 22nd March 2016 which he duly attended. At the hearing, the Applicant submitted as follows:

a) That the subject tenders were awarded outside the tender process, without involving the procurement unit and without his knowledge;

b) That he did not participate in the award of tenders or the drafting and awarding of contracts or the payments and that award letters and contracts did not emanate from his office;

c) That he could not produce records with regard to the tenders in question because there were no records to be kept.

13. Gecaga maintains that the Applicant admitted abrogation of his duties as required of him by the law and his job description which amounted to a fair reason for termination of his employment in line with the Employment Act. The disciplinary committee recommended and the Respondent's management terminated the Applicant's employment. The decision was communicated to the Applicant by the Managing Director vide letter dated 30th May 2016, detailing the reasons for the termination.

14. The Applicant exercised his right of appeal as provided under Clause 10.22 of the Respondent's Human Resource Manual. He was invited to an oral appeal hearing before the full Board on 3rd August 2016. The Board upheld the decision to terminate the Applicant's employment.

15. While admitting that the disciplinary process took longer than the stipulated two (2) months, Gecaga explains that the delay was caused by the magnitude of the issues raised. She states that the extension of time was necessary to accord the Applicant due process.

Findings and Determination

16. Although the dispute herein arises from an employment relationship, the Applicant has opted to come to court by way of Judicial Review proceedings. The first question to ask therefore is whether this is the

appropriate way to move the Court.

17. In the submissions filed on behalf of the Respondent on 12th March 2017, reference was made to the decision by my brother **Rika J** in **Republic v Kenya Airports Authority & another Ex Parte Moses Echwa [2015] eKLR** where the learned Judge rendered himself as follows:

“The Court is of the view that the Respondents acted pursuant to a contract of employment between the 1st Respondent and the Applicant, rather than in exercise of a statutory power. To be amenable to Judicial Review, the decision of a public body has to have some public element, and not relate exclusively to private law. Public element is determined by considering if the body’s power, in making the decision, stems from a legal source. This test is referred to as the ‘source test.’”

18. I hold a similar view. I say so fully aware that Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2012 provides for Judicial Review proceedings before this Court. I think however that this Rule should not be used to mar the line between the exercise of statutory power and an employer’s action within a contract of employment which would ordinarily be governed by private law.

19. To my mind, the only instance where Judicial Review proceedings may be applicable in an employment matter is where the Applicant is a constitutional or statutory office holder. To rule otherwise would be to place private and public employers at different levels of responsibility and I find no legal basis for such a proposition.

20. Apart from a robust employment law now in place, the Constitution of Kenya, 2010 guarantees employment and labour rights under the Bill of Rights. The tendency to move employment by public bodies from private law into the realm of public law is therefore an unnecessary maneuver which only causes confusion.

21. The gist of the Applicant’s prayers is that he be reinstated to the position of Acting Procurement Manager. Reinstatement is a premiere remedy available in this Court to be granted in very exceptional circumstances. In **Dr. Joseph Maingi Maitha v Permanent Secretary Ministry of Medical Services [2015] eKLR** this Court held that reinstatement is not available to an employee with a tainted employment record.

22. In my view, once an employee comes through the gate of Judicial Review, the Court misses the opportunity to interrogate not only their employment record but also the reason and circumstances of the termination. These are the factors which would move the Court to grant or decline the covered remedy of reinstatement.

23. Further, there is no chance in Judicial Review proceedings to determine claims in the nature of special damages, such as salary arrears, as claimed by the Applicant.

24. For the foregoing reasons, the application for Judicial Review fails and is dismissed with costs to the Respondent.

25. The Applicant is at liberty to bring a claim under the Employment Act, 2007 and the Employment and Labour Relations Court (Procedure) Rules, 2016.

26. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 31ST DAY OF JULY 2017

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JUDGE

Appearance:

Maurice Adongo Anyango (the Ex Parte Applicant in person)

Ms. Nyambura for the Respondent