



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

JUDICIAL REVIEW MISC APPLICATION NO. 7 OF 2016

REPUBLIC.....APPLICANT

VERSUS

EGERTON UNIVERSITY.....RESPONDENT

AND

PETER WANGAI.....EX PARTE APPLICANT

JUDGMENT

1. The Court granted Peter Wangai (*ex parte* applicant) leave on 15 July 2016 to commence judicial review proceedings against Egerton University (Respondent).
2. On the same day, the *ex parte* applicant filed a motion seeking
 1. *THAT this honourable court be pleased to issue judicial review order of certiorari to remove to this court to quash the letter dated 6th July 2016 REF: EUAF/13251/93 authored by the respondent herein to the applicant referenced dismissal from services, dismissing the applicant from the service of the respondent with effect from 6th July 2016.*
 2. *That costs be borne by the respondent in any event.*
3. The motion was called out on 25 July 2016, but the Respondent though served was not represented, and the Court directed it to file and serve a response/replying affidavit before 1 August 2016. The *ex parte* applicant was granted liberty to reply.
4. The Court at the same time gave directions as to the filing of submissions which were to be highlighted on 8 September 2016.
5. The *ex parte* applicant filed his submissions and a further affidavit on 8 August 2016.
6. The Respondent on the other hand filed a replying affidavit sworn by its Vice Chancellor on 29 August 2016, and the affidavit was stated as being a response to the *ex parte* applicant's application seeking leave to commence judicial review proceedings.
7. On 31 August 2016, the Respondent filed submissions in respect of the application for leave to commence judicial review orders.

8. When the motion came up for highlighting on 8 September 2016, the Respondent informed the Court that it had been under a misconception when it filed responses/submissions to the application seeking leave rather than the substantive motion.

9. After listening to oral submissions, the Court varied the directions/orders of 25 July 2016 and set new timelines for filing of responses and submissions with a directive that the submissions be highlighted on 3 October 2016.

10. The Respondent in compliance filed submissions, and a replying affidavit sworn by its legal officer on 15 September 2016.

The parties complied with the new timelines and the submissions were highlighted as scheduled.

12. The Court has given due consideration to the application, statutory statement, affidavits filed by both parties and the submissions made in writing and orally.

13. Before delving into the substance of the case at hand, the Court wishes to note that the *ex parte* applicant, a medical doctor and advocate of the High Court has had protracted legal battles with the Respondent over his employment as a Senior Lecturer, and which battles have previously gone up to the Court of Appeal. This Court in fact delivered a judgment in one such legal battle in Nakuru Petition No. 6 of 2015.

14. The gravamen of the *ex parte* applicant's cause of action is a dismissal from his employment by the Respondent through a letter dated 6 July 2016. The dismissal followed upon a disciplinary process in which the *ex parte* applicant participated.

15. Among the grounds relied upon by the *ex parte* applicant to advance his case are that the Respondent's Council Staff Disciplinary Committee had no powers to dismiss him or any other employee for that matter and that his right to fair administrative action was violated.

16. The practice and procedure of judicial review in this country is well developed and the legal principles widely known. It is a *sui generis* procedure.

17. The Constitution 2010 has now given judicial review constitutional anchor in Article 23(3)(f).

18. The Respondent in its submissions raised concerns as to whether the judicial review route is the most appropriate where a cause of action is primarily one of unfair termination of employment or wrongful dismissal.

19. This concern is not founded on virgin a legal landscape because it has been explored even by the Court of Appeal.

20. In *Gabriel Mutava & 2 Ors v Managing Director Kenya Ports Authority & Ar* (2016) eKLR, the Court of Appeal addressed the question of appropriate procedure in causes of action such as the one presented here.

21. The Court was of the view that Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialise the jurisdiction of the *Constitutional Court* by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialise *constitutional litigation*.

22. I would endorse the said *ratio* but with a substitution of the terms *Constitutional Court* with the *Employment and Labour Relations Court* in its statutory mandate and *constitutional litigation* with *judicial review litigation*.

23. The Court of Appeal further endorsed a holding in *Bahadur* (1986) LRC that The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that and not under the Constitution.

24. The Court went on to cite authoritative expositions of the law as set out in the cases of *Daniel N Mugendi v Kenya University & 3 Ors* (2013) eKLR, *Alphonse Mwangemi Munga & Ors v African Safari Club Ltd* (2008) eKLR, *Speaker of the National Assembly v James Njenga Karume* (1992) eKLR and Petition No. 14, 14A, B & C of 2014, *Communications Commission of Kenya & 5 Ors v Royal Media Services & 5 Ors*.

25. Considering the cited exposition of the law, this Court comes to the conclusion that the procedure followed by the *ex parte* applicant in challenging his dismissal was not appropriate and the issue, therefore becomes one of the appropriate orders to make.

26. The Court has options. It can order that the present proceedings be converted or deemed to be an ordinary Statement of Claim, or strike out it as opposed to dismiss the judicial review proceedings.

27. The *ex parte* applicant's cause of action has not yet been caught up with the limitation as prescribed in section 90 of the Employment Act, 2007, and therefore he is not likely to suffer any injustice save in costs were the Court to strike out the instant proceedings so that he can move the Court through the principal means of resolving an employment dispute.

28. In effect, the Court strikes out the instant proceedings with costs to the Respondent.

Delivered, dated and signed in Nakuru on this 25th day of November 2016.

Radido Stephen

Judge

Appearances

For ex parte applicant

in person

For Respondent

Mrs. Kairu instructed by Sheth & Wathigo & Co. Advocates

Court Assistant

Nixon