



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW NO. 3 OF 2016

**IN THE MATTER OF AN APPLICATION BY THOMAS MASILA MAKENZI FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE KENYA NATIONAL EXAMINATION COUNCIL ACT, 2012

AND

IN THE MATTER OF LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011

AND IN THE MATTER OF THE EMPLOYMENT ACT 2007

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC APPLICANT

AND

THE KENYA NATIONAL EXAMINATION COUNCIL RESPONDENT

AND

THOMAS MACKENZIE EX PARTE APPLICANT

Mr. Abour for Ex-parte applicant

Mr. Obura for Respondent

JUDGMENT

1. The Ex-parte applicant was granted interim orders;

“2 That leave be granted to the Ex-parte applicant to apply for an order of certiorari directed at the Kenya National Examinations Council quashing the decision of the Council dated 29th March 2016 suspending the Ex-parte applicant from his position of Principal Examinations Administrator – Field Administration Division.

3. That leave be granted to the Ex-parte applicant to apply for an order of prohibition directed at the Kenya National Examinations Council prohibiting it from replacing and/or interfering with the Ex-parte applicant’s execution of his duties as Principal Examinations Administrator – Field Administration Division.

4 That leave granted herein to operate as a stay of the decision of the Kenya National Examination Council dated 29th March 2016 suspending the Exparte applicant from his position of Principal Examinations Administrator in Field Administration Division until the and determination inter parties of the substantive notice of motion.”

The relevant order for purposes of the contempt application is prayer 4 which was granted in the following terms.

“4 That leave is granted to operate as a stay of the decision of the Kenya National Examination council dated 29th March 2016 suspending the Ex-parte applicant from his position of Principal Examinations Administrator until the hearing and determination inter-partes of the substantive notice of motion.”

2. The court will hereafter refer to the Ex-parte applicant as the applicant. It is not in dispute that the respondent who had been served with the aforesaid order of the court issued to the applicant a show cause letter dated 15th April 2016 to the applicant and thereafter the respondent retired the applicant in public interest.

3. The applicant argues that the conduct by the respondent was in contempt of the court order staying the decision to suspend him.

4. The respondent on the other hand submits that the court order did not cover the issue of disciplining and retiring the applicant in public interest, which it lawfully proceeded to do.

The respondent relying on the Court of Appeal decision in the case of **Jacob Zebekiah Ochino & another versus George Dura Okomo & others [1989] eKLR, following its own decision in Mwangi Magondu Vs. Nairobi City Commission Civil Appeal No. 95 of 1985)** submitted that, in addition to personal service of the order with penal notice, unless the court dispenses with the requirement and directs alternative method of service be used, the order itself upon which contempt proceedings is based must be unambiguous.

5. The court stated:-

“This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.”

6. From the papers filed on record and the submissions by the parties, the court is satisfied that the orders sought by the applicant were not wide enough, nor couched in clear and unambiguous terms as to prohibit the respondents from disciplining and retiring the applicant in public interest.

7. Accordingly, the applicant has not proved the offence of contempt beyond reasonable doubt and the application is dismissed.

Substantive motion

8. The application by the applicant was filed on 7th April 2016 who sought specific reliefs already set out in this judgment.

The application is supported by a statement of facts made by the applicant and a verifying affidavit sworn by the applicant on 6th April 2016.

From both documents the thrust of the application is that the applicant was the Principal Examination Administrator – Field Administration from September 2014.

9. That the applicant was in charge of supervision and invigilation of all schools and teacher education, examinations and related services since 2013.

10. That in that capacity the applicant dealt with all administrative issues, guiding and supervising all officers and coordinating all field administration services in his section *interalia*.

11. That on 29th March 2016, the respondent served the applicant with a letter of suspension from the position of the Principal Examination Administrator – Field Administration Division with immediate effect. The decision was premised on sections 16(1) & (c) of the Kenya National Examinations Council Act, (KNEC Act) and the Human Resource Policy and Procedure Manual (manual) purportedly to have the applicant to be investigated for alleged malpractices and examination leakages widely reported in the local media. The suspension letter was signed by the chairperson of the respondent.

12. The applicant submits that the purported suspension was unprocedural and in contravention of the KNEC Act 2012 and the Manual of the respondent. That the decision was unlawful and arbitrary and was not supported with facts or concrete evidence linking the applicant to the purported examination malpractices or leakage or at all.

13. That the applicant has not been charged before a court of law with any offence nor has he been asked to answer any charges internally in respect of any allegations on examination malfeasance alluded to in the letter of suspension dated 29th March 2016 or at all.

14. That the action by the respondent contravenes Rules of natural justice since the applicant was not afforded a fair hearing and fair administrative action by the respondent as provided under section 4(3) of the Fair Administrative Actions Act, No. 4 of 2015 that require, that where administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision;

a) *“prior and adequate notice of the nature and reasons for the proposed administrative action.*

b) *An opportunity to be heard and make representations in that regard.*

c) *Notice of a right to a review or internal appeal against an administrative decision, where applicable.*

d) *A statement of reasons pursuant to section 6 of the Act.*

e) *Notice of the right to cross examine.*

f) *Information, material and evidence to be relied upon in making the decision or taking the administrative action.*

g) *Opportunity to attend the proceedings in person or in the company of an expert of his choice.*

h) *A right to be heard.*

i) *Right to cross examine any person who gives adverse evidence.”*

15. It is the applicant's case that the respondent has breached all the above rights of the applicant and therefore has been denied a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair contrary to Article 47 of the constitution of Kenya 2014.

16. The applicant prays for the reliefs sought.

Response

17. The respondent filed a replying affidavit of Mercy M. Karogo the Acting Chief Executive Officer of the respondent. She deposes that the respondent as the employer of the applicant has, where it has evidence of likelihood of failure on the part of the applicant in the performance of his duties, every right to investigate the circumstances of such failure and if found culpable the applicant could be removed from office.

18. That before such investigation and removal, the respondent is entitled to;

a) Suspend the applicant from office vide the respondent's council /board.

b) Inform the applicant in writing of reasons for the intended removal; and

c) Give an opportunity to applicant to defend himself against any such allegations.

19. That the respondent being a government agency had discovered that its operations were flout with persistent inefficiency associated with poor governance and exam leakage much to the dismay and chagrin of stakeholders and members of the public.

20. That on 24th March 2016, the government dissolved the council of the respondent to contain the situation and appointed new council members to infuse confidence in the institution.

21. The new council embarked on a clean-up exercise leading to suspension and investigation of certain officers including the applicant. On 29th March 2016, the council resolved to suspend the applicant with other senior employees to allow investigations into their activities.

22. That on 7th April 2016, the applicant came to court and obtained orders staying the suspension pending the hearing and determination of the application.

That there was no order barring the respondent from taking disciplinary action against the applicant.

23. That by a letter dated 19th April 2016, the applicant was accordingly informed that the suspension had been lifted. He was however sent on leave pending determination of a disciplinary process which had been commenced by an earlier letter dated 15th April 2016 requiring him to show cause why disciplinary action should not be taken against him on account of various misdeeds connected with leakage of examinations.

24. The respondent took issue with the lifting of his suspension and sending him on paid leave.

The respondent filed a response to the show cause letter dated 20th April 2016.

25. The council scrutinized the response by the applicant to the raft of charges against him and found the explanations unsatisfactory. The council took the decision to retire the applicant in public interest with effect from 25th April 2016. The applicant was to be paid his terminal benefits subject to clearance.

26. The respondent prays that the suit be dismissed with costs.

Determination

27. The court has considered the papers filed of record and written submissions by the parties and has flagged the following issues for determination.

i. Whether the claimant was given a fair administrative action in terms of Article 47 of the Constitution of Kenya, 2010 as read with Section 4 (3) of the Fair Administrative Actions Act, 2015.

ii. Whether the respondent violated the Rules of natural justice.

iii. Whether the respondent acted ultravires the KNEC Act and the respondent's manual.

Issue I

28. The court has already found that the applicant did not seek an injunction against the intended disciplinary action against him. The respondent therefore acted properly in lifting the suspension as directed by the court and proceeding with the disciplinary action.

Was the suspension lawful in the first place?

29. The letter suspending the applicant dated 29th March 2016 was issued and signed by the chairperson of the respondent. It is submitted that the letter is null and void *ab initio* because Clause 12:31:16 of the manual provides;

“ILR Council Secretary shall sign all letters of interdiction, suspension, dismissal and termination as well as those for notice to show cause for major offences. However, any of the above letters including show cause and warning letters may be signed by an officer authorized by the council secretary who shall not be below the level of a senior deputy secretary.”

It is submitted that by the aforesaid fact, alone, the suspension was null and void.

30. From the minutes of the Council meeting held on 29th March 2016 it is clear that the Chief Executive Officer who is the secretary to the Council Dr. Joseph M. Karilu was already under police investigation and was one of the officers suspended by the Board on 29th March 2016, including the applicant.

31. Indeed the person recording the minutes of the Board meeting was Dr. John Onjet, member. The secretary was not in attendance.

32. The validity of this board meeting has not been placed in issue by the applicant. The decision to suspend the applicant was made by the board. The chairman only conveyed the message of the board to all those suspended on the day including the CEO and the applicant. The communication by the chairman to suspend officials including the applicant was not in violation of Clause 12:31:6 of the respondent's manual in place by fact only of being signed by the chairperson of the Council in absence of the Chief Executive Officer who is the Secretary of the Council.

33. What is in issue is whether it was sufficient to rely only on the written response by the applicant to the notice to show cause without inviting him to a disciplinary hearing to give him a chance to defend himself before retiring him in public interest.

34. The applicant has extensively dealt with this issue in the supplementary affidavit of the applicant and in his written submissions.

35. In this regard Clause 14:3:6 of the respondent's manual provides for the procedure for retirement in public interest thus;

“This will normally apply to an officer on permanent and pensionable terms who commits an offence which renders him/her unsuitable for retention or when their performance and or general conduct has deteriorated to an extent which render him unsuitable for retention.”

36. It is clear from this Clause that before making a decision to retire an officer such as the applicant, the respondent must first make a finding upon proof, that the officer has committed an offence which renders him unsuitable, failure in performance or deterioration of general conduct. This will necessarily require due process to satisfy such retirement in public interest.

37. Clause 12: 20: 2 of the respondent's manual provides for disciplinary procedure thus;

“while enforcing discipline, the Council will ensure that an employee's rights to fair hearing which includes a chance to defend himself as provided for under Chapter Four of the Constitution, (2010) is observed.”

38. In this respect, Clause 12: 30 of the manual provides for establishment of a disciplinary committee. The purpose of the committee is obviously to conduct disciplinary hearings in accordance with the manual.

39. Section 4(3) of Fair Administrative Actions Act, 2015, which operationalized Article 47 of the Constitution of Kenya, 2010 provides for essentials of a fair hearing to include;

- i. The right to be given notification of hearing.
- ii. The right to be given indication of any adverse evidence.
- iii. The right to be given opportunity to respond to the evidence.
- iv. The right to an oral hearing.
- v. The right to representation of choice.
- vi. The right to question witnesses.
- vii. The right to be given reasons for the decision.
- viii. Disclosure of information to allow adequate preparation of the defence case.

40. The court notes that, whereas, the respondent is aware of these requirements and acknowledges as much under paragraph 7 of the replying affidavit of Mercy M. Karogo, the Acting chief Executive Officer of the respondent, none of these requirements except merely, asking the applicant to make a written response to a raft of charges made against him in the notice to show cause dated 15th April 2016 were met by the respondent in dealing with the disciplinary case against the applicant.

41. The notice to show cause was responded to by the Advocates for the applicant by a letter dated 20th April 2016 questioning the propriety of continuing with the disciplinary process while the matter was

pending in court.

42. The Advocate also raised the issue of lack of cogent facts, on which the charges against the applicant were made. The applicant denied all the charges and demanded that the respondent do follow the procedure in the manual in conducting the intended disciplinary hearing.

43. The court relies on the Court of Appeal decision in **Speaker of the National Assembly Vs. Karume (2008) eKLR (EP) 425** where it observed;

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

44. In this regard, the respondent acted contrary to the provisions of Section 4 (3) of the Fair Administrative Actions Act, 2015, and violated its own manual as demonstrated in this judgement.

45. Although the applicant was remiss in the crafting of the interim orders sought, which gave the respondent a loophole to pass through, the court notes that where there is pending suit before court on substantially related matters, it is prudent and an act of good faith to await the outcome of the court proceedings, otherwise a party may be presumed to have acted in haste to defeat the cause of justice, even though he/she may not be guilty of contempt of court.

46. In light of the findings above, the court finds that, the respondent violated one of the rules of natural justice by not giving the applicant a fair hearing before retiring him in public interest.

47. Furthermore, the conduct by the respondent was ultravires its own manual and express provisions of the Fair Administrative Actions Act, 2015.

Remedies

48. The applicant in the substantive notice of motion dated 8th April 2016 and filed on the same date sought an order of certiorari directed to the respondent to quash the decision of the Council dated 29th March 2016 suspending the applicant from his position of Principal Examinations Administrator – Field Administration Division.

49. That suspension has since been lifted upon issuance of interim orders.

50. The issue of retirement in public interest was canvassed by the respondent in the replying affidavit and by the applicant in the further affidavit. These submissions are relevant for the determination of the second order sought.

“That the Honourable court be pleased to issue an order of prohibition directed at the Kenya National Examinations Council prohibiting it from replacing and/or interfering with the applicant’s execution of his duties as Principal Examination Administrator – Field Administration Division.”

51. The applicant was removed from office and retired in public interest on 25th April 2016. The horse has since bolted from the stable as it were.

52. The only remedy available to the applicant is to file a civil suit for damages for the unlawful and unfair termination of his employment by the respondent in view of the findings of the court herein.

53. In this respect, the court notes that, in employment matters, the choice of the suit to be instituted is of great importance in determining whether or not ultimately one gets appropriate or any relief.

In view of the peculiar findings by the court in this application, each party to bear their own costs of the suit.

Dated and delivered at Nairobi this 4th day of November 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE