



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 280 OF 2013**

**GERALD OKUMU AOKO .....CLAIMANT**

**VERSUS**

**1. KENYA MARNE FISHERIES RESEARCH INSTITUTE**

**2. ABRAHAM KAGWIMA .....RESPONDENTS**

**R U L I N G**

**INTRODUCTION**

1. The case before the court is the Notice of Motion dated 30/12/2011. It was filed on 1/12/2011 by Gerald Okumu Aoko (applicant) after a successful leave application on 25/11/2011. The Motion seeks:
  - i. That the court issues an Order of Mandamus compelling the respondents to carry out their duty of reinstating the applicant to his job of Chief Accountant.
  - ii. That the court issues an Order of prohibition, prohibiting the respondents herein from contracting, employing or engaging any person into the position of Chief Accountant.
  - iii. That the cost of the application be provided for.
2. The Motion is based on the grounds set out in the statement of facts and the affidavit of the Applicant filed with the exparte application for leave.
3. The Motion is opposed by the respondent through a Notice of Preliminary Objection (P.O) dated 8/12/2011. The grounds for the objection are;
  - i. The court lacks jurisdiction in view of the provisions of Employment Act 2007 and the Industrial Court Act 2011.
  - ii. The applicants case is fatally defective.

**BACKGROUND**

4. The case was initially filed in the High Court at Mombasa and later transferred to this court after the respondent filed the said preliminary Objection. All the pleadings were filed before the transfer of the suit to this court.
5. When the leave to apply for judicial review was granted on 25/11/2011 the court directed that it applies as stay for 7 days. The stay order was extended upto 13/12/2011 when the respondent's aforesaid P.O was argued. The ruling on the P.O was not delivered until 8/3/2013 when the high Court upheld the P.O on the ground of jurisdiction and ordered transfer of the suit to this court. Nothing was said about the stay order and this court presumes that it lapsed on 13/12/2011.
6. The court was not given any update on the current position with respect to the matters which the

applicant wanted stayed. The court does not therefore know whether the vacancy of the chief Accountant was filled after the stay order lapsed or not. If that happened this suit was rendered moot.

### CLAIMANT'S CASE

7. The claimant submitted and averred that he was employed by the respondent on 19/5/2003 as Chief Accountant Job Group R1.12 or "P" stationed at Mombasa Headquarters. He worked in that capacity until 11/9/2009 when he was suspended pending some inquiries on an alleged verbal altercations with cashiers at a meeting held on 9/9/2009 to resolve a dispute involving some payments by the cashiers. According to the claimant, the suspension was to pave way for investigations. The cashiers were dismissed for gross misconduct but the claimant was "reinstated and redeployed" on 31/8/2010. The net effect of the said reinstatement and redeployment was to demote the claimant to the post of Senior Accountant to discharge administration duties in Naivasha station.
8. The claimant reported to the new station but the cashiers successfully challenged their dismissal before the court. On 19/10/2011 the cashiers were reinstated to their employment with full benefits including the salary arrears from the date of their suspension to the date of reinstatement.
9. On 24/11/2011, the claimant brought the present suit possibly after learning about the outcome of the cashiers suit. The main ground of the claimant's suit is that he was condemned unheard contrary to the rules of natural justice. In addition the respondent is being accused of acting illegally by demoting and transferring the claimant. The claimant prayed for reversal of the redeployment and reinstatement to his original position of the Chief Accountant with full pay and benefits.

### RESPONDENT'S CASE

10. The respondent submitted and averred that judicial review is a special jurisdiction which is only available to disputes of public nature and not private contractual disputes. Consequently according to the respondent, this court lacks the jurisdiction to grant the orders sought herein. She further submitted that although the claimant is a public officer, the question in dispute has no public underpinning but is purely contractual in nature being a master-servant relationship. In that regard, the respondent submitted that the suit being one involving employer-employee relationship, the same is governed by the ordinary law of contract and as such the judicial review remedies were not open to the claimant.
11. The claimant cited '**Administrative law**' by **sir William Wade, ninth Edition PP.635-636** to support the foregoing argument that judicial review is excluded from disputes where there rights asserted are contractual or involving contracts of employment.

### ANALYSIS AND DETERMINATION

12. The court has read and considered the pleadings and submissions filed by the two sides. There is no dispute that the parties herein were related as employer-employee based on the letter of appointment dated 19/5/2003. It is also not in dispute that the said relationship was suspended on 11/2/2009 and later reinstated on 31/8/2010 but with a demotion and transfer of the claimant from the Head office at Mombasa to Naivasha station. It is also not in dispute that after the demotion of the claimant, the respondent advertised the post left vacant by the claimant's demotion on 29/4/2011. The claimant did not clarify whether or not any recruitment of the new Chief Accountant was done between April 2011 and November 2011 when the suit was brought. There is also no dispute that the claimant is challenging the procedure followed and the reason for his demotion and transfer. The issues for determination are:

- i. **Whether the court has jurisdiction to grant Judicial Review orders.**
- ii. **Whether the orders sought by the claimant ought to issue.**

### Jurisdiction

13. This court was established under Article 162(2) (a) of the constitution of Kenya. Under Article 162(3) of the Constitution the parliament was given the mandate to determine the jurisdiction of this court. Hence under Section 12 (3) of the Industrial Court has the jurisdiction to make the following orders:

- i. **interim preservation orders including injunctions in cases of urgency;**
- ii. **a prohibitory order;**
- iii. **an order for specific performance;**
- iv. **a declaratory order;**
- v. **an award of compensation in any circumstances contemplated under this Act or any written law;**
- vi. **an award of damages in any circumstances contemplated under this Act or any written law;**
- vii. **an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law or;**
- viii. **any other appropriate relief as the court may deem fit to grant.**

Under Section 21 of the Industrial Court, the court has jurisdiction to entertain claims based on Article 165(2) (b) and (d) of the Constitution which include labour rights under Article 41 in the bill of rights. When exercising the foregoing jurisdiction, this court has the power to grant judicial review orders under Article 23(3) of the Constitution. In addition to the foregoing, this court is of the opinion that under Section 7(1) of the sixth Schedule of the Constitution, this court has the jurisdiction to entertain judicial review suits. The said section 7(1) provided that **All** law in force immediately before the effective date of the constitution shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the constitution. It follows therefore that the Law reform Act must be interpreted and applied in line with the guidelines spelt out by the said Section 7(i) of the six Schedule above. For the foregoing reasons, the court finds and holds that this court is seized with the jurisdiction to entertain judicial review suits and to grant any of the relevant prerogative orders that may be sought.

### **Reliefs Sought**

14. It is trite that judicial Review reliefs are squarely founded on the public law. They are reliefs meant to remedy victims of action or omission by public officers or tribunals discharging their official duties or acting in judicial or quasi-judicial powers. The reliefs are issued if it is proved that the public officer has acted in breach of the law, rules of natural justice, ***ultra-vires*** or unreasonably or irrationally. The relief may also be made before the public officer has acted, to prohibit an injury. Lastly the relief may be ordered to compel the public officer (body) to act if he has omitted to act as required by the law.
15. In the present case, the claimant was suspended by letter dated 11/9/2009 on ground that he misconducted himself on 9/9/2009 in the office of Director of the respondent when he was called there for a meeting with cashiers to discuss an irregular cash withdrawals from the respondent's account. From the contents of the said letter the 3 had been served with a show cause letter dated 3/9/2009, which they all responded to before being called for the meeting dated 9/9/2009 at the Director's office when they made exchanges which were offensive instead of sorting out the disputed withdrawals.
16. After one year suspension period the cashiers were dismissed but the claimant was reinstated but on demotion. The claimant contends that he was never accorded a hearing before the demotion and transfer to another station. He does not pray for quashing of the decision but for prohibiting the respondent from hiring a new Chief Accountant and for mandamus to compel the respondent to reinstate him to his original office of the chief Accountant.
17. In this court's view, the dispute before it is manifestly a private law dispute between an employer and employee. The claimant alleges that he was not given any opportunity to defend himself before his demotion and transfer. That is obviously a dispute to enforce a contractual right. He was however served with a show cause letter and thereafter a hearing at the Director's office before suspension and subsequent demotion. It has not been shown that the employer had no good

reason for demoting the claimant. Unlike the case of dismissal where the burden of proving reason for dismissal and fair procedure is squarely on the employer, there is no such obligation when it comes to demotion or transfer. In this case the employer might have had the right to demote the claimant if he had lost trust in the claimant's ability to supervise the cashiers.

18. The foregoing notwithstanding, the relief sought were not available to the claimant under the employment Act or at the common law because it was a private law dispute founded on purely contractual rights. As correctly submitted by the defence, judicial review remedies are not available in disputes arising from mere contractual relationship between employers and employees. Consequently the court finds that the order sought cannot issue in favour of the claimant (employee) against the respondent (employer). In addition and as earlier observed, the claimant did not indicate whether or not the vacancy of the chief Accountant was still available at the respondent. Even if the vacancy existed the court cannot compel the employer to reinstate the claimant because it is already over 3 years since the demotion.

19. As a way of parting shot, the court is surprised that the counsel appearing for the parties did not properly draw their pleadings to give them the special form for Judicial Review pleadings. Even want of form is not fatal proceedings should be properly intituled in order to give them their proper identity.

### **DISPOSITION**

20. The suit is dismissed with no order as to costs.

**Dated, Signed and delivered this 3<sup>rd</sup> October 2014.**

**O. N. Makau**

**Judge**