



REPUBLIC OF KENYA

Industrial Court of Kenya

Judicial Review 1 of 2013

REPUBLIC.....APPLICANT

-VERSUS-

LAIKIPIA UNIVERSITY COLLEGE.....RESPONDENT

-EX-PARTE-

JOHN KINYUA MBAKA

JUDGMENT

The applicant for judicial review orders John Kinyua Mbaka filed the application for leave to commence these proceedings on 08.08.2012 through Githui & Company Advocates. Upon hearing the application for leave, the Honourable Justice Hellen Omondi granted the leave to commence the motion for judicial review application and further ordered the leave granted to operate as a stay since the challenged action would result in the applicant's employment being affected. The notice of motion was filed on 27.08.2012. The applicant has made prayers for orders:

- a) That the decision of the respondent to surcharge the applicant a sum of Ksh.108,925/= contained in the letters dated 16th May, 2012 and confirmed in the letter dated 1st August, 2012 be brought to this court for purposes of quashing.
- b) That the respondent be prohibited from executing the disciplinary measures contained in the letters aforementioned.
- c) That costs of this application and costs of the summons for leave be borne by the respondent.

The application is based on the grounds stated in its body, the statutory statement on record and the applicant's verifying affidavit sworn on 7th August, 2012 together with the attached documents.

The respondent has opposed the application by filing on 5.10.2012 the replying affidavit of Joseph K. Kairu, the respondent's registrar (Administration, Planning and Development), sworn on 5th October, 2012 together with the attached documents.

The applicant is employed as the respondent's Administrative Assistant and according to the applicant, the office he holds is not charged with procuring the respondent's goods and services. The applicant's

case is that on 26.10.2011, the respondent's campus Director accused the applicant of procuring services without following the laid down procedures. The accusations were conveyed by the Director to the respondent's Principal by the letter dated 26.10.2011 being Exhibit JKM1 on the verifying affidavit. The letter stated that the Director had received a letter dated 17.10.2011 from one Jese Karanja Muchunu demanding to be paid Ksh.108,925/= for branding Nyahururu Town Campus. The letter further stated that the said Jese had alleged that the applicant hired him to do all the work promising him that he would ensure the University paid the said Jese. The demand for payment by the said Jese is Exhibit JKK2 on the replying affidavit and it clearly shows that the applicant indeed asked Jese to undertake the works.

In making such promises to bind the University, the letter dated 26.10.2011 stated that the applicant had not followed the procurement procedures which were well known to him. The works entailed sign writing and the director stated in the letter that in his view, the work done appeared credible and the said Jese was agreeable that the work be inspected by the Maintenance Officer to facilitate processing of the claim. The Principal endorsed on that letter by directing that the work be inspected as suggested to determine if the claim was at prevailing market rates and the applicant be handled in view of the alleged breach of the procedures.

The Maintenance Officer undertook the inspection and by the letter dated 4.11.2011 being Exhibit JKM2 on the verifying affidavit, he returned the finding that the works were professionally done and in view of the font size of the letters and the materials used, the works were based on market rates of such similar works as per the attached invoice. The applicant's case is that the matter rested with the findings of the Maintenance Officer as no disciplinary action was taken against the applicant. It was his further case that the respondent's Director had supervised the works and never raised issues. However, in April, 2012, the respondent's registrar raised issues and demanded that the applicant should face disciplinary proceedings as per Exhibit JKM3 being the show cause letter dated 20.04.2012 addressed to the applicant as follows:

**“Dear Mr. Mbaka,
RE: FRAUD AND CORRUPTION ALLEGATIONS**

It has been reported to this office that on 8th December, 2011 alongside Ms. Alice W. Chiuri, you received Ksh.40,000/= from a student by name Miss Jeniffer Wangari Kahuthi Reg. No. CP12/60929/09 to allow her sit for examinations.

It is alleged that you proceeded to issue her with examination card but failed to issue her with an official University receipt. In addition, it has been brought to our notice that you awarded a contractual engagement to one Mr. Jese Karanja Muchunu as evidenced by a letter dated 17th October, 2011 of Ksh.108,925/= for branding Nyahururu Town Campus in total disregard of the Procurement and Disposal Act and procedures in place.

These offences are serious breach of discipline which could lead to summary dismissal from University services as they contravene Employment Act, 2007 Clause 44 (4) (g) and your terms of service Clause 5(b) (iii).

The university intends to take serious disciplinary measures against you, but before this is done, you are required to give reasons why disciplinary action should not be taken against you.

If you have any representations to make they should be forwarded to the undersigned within the next seven (7) days from the date of this letter. If no reply is received from you, action will be taken without any reference to you.

**Yours sincerely,
Signed,
Mugo Muriithi
Senior Assistant Registrar (HR)”**

The disciplinary committee held a meeting on 14.05.2012 at 10.30 am to deliberate upon the applicant's

case and the minutes of the proceedings are Exhibit JKK1 on the replying affidavit. The minutes show that evidence of witnesses was taken and the applicant was heard. Upon consideration of the case the committee made decisions which were conveyed to the applicant by the letter dated 16.05.2012 being Exhibit JKM4 on the verifying affidavit. The letter stated, “...**The committee resolved as follows:**

- 1) **That you refund a total amount of Kshs.20,000/= being half of Kshs.40,000/= which you received along with Ms. Alice W. Chiuru. This amount should be paid either in cash or through a banker’s Cheque payable to Laikipia University College not later than 31st May, 2012.**
- 2) **That you refund a total amount of Kshs.108,925/= being the total cost for branding Nyahururu Town Campus. This amount should be paid either in cash or through a banker’s Cheque payable to Laikipia University College not later than 31st May, 2012.**
- 3) **That you be given a final warning for gross negligence of duty contrary to Employment Act Clause 44(4) (g) and your Collective Bargaining Agreement (CBA) Clause 5(b) (iii). You are admonished to order your conduct aright, otherwise if you commit any other offence, severe disciplinary action will be taken against you which may include termination of service.**
- 4) **That if you do not comply as per Nos. 1 and 2 above, you will be dismissed from the University services forthwith.”**

By the letter dated 24.07.2012 being Exhibit JKK3 on the replying affidavit, the applicant appealed against the decision praying that the repayment period be extended in view of the hard economic and financial constraints he was experiencing. Nevertheless, he stated that he, “...**chose to go by the decision of the committee.**” The University Management Board at the meeting held on 1.08.2012 rejected the appeal and the Board’s decision was conveyed to the applicant in the letter of 1.08.2012 being Exhibit JKM5 on the verifying affidavit. The letter directed the applicant to comply and resolve the issues by paying up by 8.08.2012 or face the consequences of dismissal as earlier decided and conveyed to him.

On 5.2.2013, parties agreed to file written submissions and scheduled for oral submissions on 6.05.2013 when by consent the parties decided to wholly rely on their written submissions on record. The applicant’s submissions were filed on 23.04.2013 and the respondent’s submission on 03.05.2013.

The issues for determination are as follows:

1. Whether the respondent breached the rules of natural justice.
2. Whether the respondent acted *ultra vires*.
3. Whether the respondent acted unreasonably and whether the punishment imposed was proportionate.
4. Whether the applicant is entitled to the remedies as prayed for.

On the first issue, the respondent has submitted that the applicant has not showed any statutory or contractual rules of due process that were breached by the respondent in deciding the applicant’s case. The rules of natural justice demand that a party to a dispute is availed chance to state his or her case before an impartial arbiter. In the present case, the applicant was given a chance to state his case, he had a chance to call witnesses and he was accorded a chance to appeal. In his appeal, he accepted the respondent’s decision except the timelines for repayment. It is the court’s considered view that the applicant having been satisfied with the decision made by the respondent he is thereby barred from alleging breaches of the rules of natural justice. The record available show that through the show cause letter the applicant was notified the particulars of the case requiring him to answer and he was given a hearing before the committee. Accordingly, the court finds that the respondent did not breach the rules of natural justice.

On the second issue, the applicant has submitted that the respondent did not have power to surcharge the applicant because there were no agreed or statutory powers to surcharge. The court has considered the submission and holds that an employer in public, private or other sector has inherent authority to recover by way of a surcharge any loss that is attributable to the established misconduct or poor performance of the employee. The respondent is a public body and the applicant is a public officer. The court finds that the Public Officer Ethics Act, 2003 applied to the applicant. Some pertinent sections of the Act provide as follows:

“8. A public officer shall, to the best of his ability, carry out his duties and ensure that the services that he provides are provided efficiently and honestly.”

“10. (1) A public officer shall carry out his duties in accordance with the law.”

“15. (1) A public officer shall take all reasonable steps to ensure that property that is entrusted to his care is adequately protected and not misused or misappropriated.

(2) A person who contravenes subsection (1) shall be personally liable for losses resulting from the contravention.”

The court further considers that the financial regulations governing public financial management must have applied to the parties. Accordingly the respondent did not act *ultra vires* to initiate the disciplinary process and to impose the punishment as was done in this case.

The applicant submitted that the respondent acted unreasonably because the respondent benefited from the works provided by one Jese and the respondent could not recover the payment it made to Jese from the applicant as the applicant did not benefit from the works or receive the payment. The court has considered the submission and finds that the same goes to the merits of the case and is outside the judicial review jurisdiction which looks at the procedural propriety or impropriety as against the alleged offensive decisions of omission or action in issue. Further, the applicant did not raise such issue in his appeal and thereby waived his entitlement to raise it in subsequent proceedings questioning the respondent’s decision. The respondent cannot therefore be found guilty of unreasonableness in these proceedings.

On the test of unreasonableness as enunciated in the principles in **Associated Provincial Picture Houses –Versus- Wednesbury Corporation (1948) 1KB 223**, the court finds that the applicant has not established unreasonableness on the part of the respondent. The applicant has not shown anything the respondent was to take into account and failed to do so or anything the respondent was not supposed to consider yet was considered. The respondent in this case has not been shown to have acted recklessly during the administrative disciplinary proceedings.

The applicant appears to submit that since the respondent benefited from the works that it paid for, the applicant should not have been surcharged. Such argument holds only to the point of superficial weighing of the circumstances of the case. However, considerations of good governance at the work place and especially in public institutions demand that employees exercise permissible authority in the discharge of their respective duties. It is serious misconduct for employees to act beyond the authority vested in the office they are appointed to hold or to act in. It is more so in instances whereby in reliance upon the pretended authority of an employee, third parties act to shift their positions in the supposition that they are properly transacting with the employer of such pretentious employee. In such cases, the employer, like in the present case, is entitled to honour the third party’s valid claims in view of the ensuing predicament and within the household, to initiate disciplinary action whose most crucial role, in the opinion of the court, is to frown and deter such serious malady on the part of the concerned employee.

Thus, this court shall frown at maladministration at the workplace and will consistently encourage employers to impose firm, fair and proportionate punishments against the culprits in the employment relationship. In this case, the respondent imposed the punishment of recovering the payment it incurred as a result of the applicant’s unauthorized actions. The court has also noted the applicant’s preponderance of acting outside authority in the other subsequent case on record in which he had failed to record and

account for money handed to him being a student's payment for fees. Whereas misconduct should be acted upon promptly by the employer, the delay in this case is excusable as the respondent may have been entitled to gloss over the initial misconduct relating to the works but for the successive similar misconduct on the part of the applicant involving the fees and which pointed to undesirable notoriety. In the circumstances, the court finds that the punishment as imposed by respondent against the applicant was proportionate and the delay was not as inordinate as to occasion substantial injustice. It is the holding of the court that the delay was a procedural impropriety and where procedural impropriety does not go to jurisdiction or occasion manifest injustice, like is the case in this matter, the decision made is not liable to quashing as the decision is not null or void.

On the final issue, the court finds that the applicant has not raised any substantial grounds and justification for the court to grant the remedies of judicial review orders as prayed for. Accordingly, the court finds that the application is a good candidate for dismissal.

The court has considered that the parties are still in the employment relationship and finds that every party should bear their own costs to promote amicable and stable future relationship between the parties.

In conclusion, the application is dismissed with orders that each party shall bear own costs of the proceedings.

Signed, dated and delivered in court at Nakuru this Friday, 10th May, 2013.

**BYRAM ONGAYA
JUDGE**