



Case Number:	Judicial Review Case 12 of 2020
Date Delivered:	03 Dec 2021
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Ruling
Judge:	James Rika
Citation:	Beth Mushi Solomon v Kenya National Commission for UNESCO; Inspectorate of State Corporations (Proposed Interested Party) [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW CASE NO. 12 OF 2020

BETWEEN

BETH MUSHI SOLOMON.....EX-PARTE APPLICANT

VERSUS

THE KENYA NATIONAL COMMISSION FOR UNESCO.....RESPONDENT

AND

INSPECTORATE OF STATE CORPORATIONS.....PROPOSED INTERESTED PARTY

RULING

1. There are 3 Applications, all filed by the Ex- Parte Applicant, which come up for ruling today.
2. The 1st is dated 14th May 2020. It seeks orders to have the Respondent's CEO jailed at Lang'ata Women's Prison for contempt of court. The Applicant alleges that the CEO has disobeyed the orders of Hon. Justice Byram Ongaya, given on 23rd April 2020.
3. The orders, granted the Applicant leave to apply for orders of certiorari and mandamus against the Respondent.
4. Further, it was ordered that leave so granted would operate as a stay of implementation of the Respondent's decision, conveyed in a letter dated 16th April 2020, until the substantive Judicial Review Application is heard and determined. The Respondent was barred from taking any other adverse action against the Applicant.
5. In brief, the Applicant was employed by the Respondent State Corporation, as a Legal Officer, through a contract executed on 25th June 2019. She served probation of 6 months. The Respondent proposed to extend the probationary period by another 6 months. Judicial Review Application, is based on the Applicant's objection, to the proposed extension of the probationary period. She seeks in main, that the decision extending probation is quashed, and an order of mandamus is issued confirming her as permanent and pensionable.
6. The orders of 23rd April 2020 therefore stayed this decision.
7. The Application dated 14th May 2020 is supported by the Affidavit of the Applicant, sworn on 15th May 2020.
8. It is opposed through the Affidavit of Dr. Misigo Amatsimbi, Board Chair of the Respondent, sworn on 10th June 2020. The Respondent concedes receipt of the orders of 23rd April 2020. It is explained that there is an on-going probe, into the academic and professional certificates submitted by the Applicant to the Respondent on her recruitment. This probe is being conducted by the Board, alongside the deliberations relating to Applicant's probation. The Applicant cannot perform Board-related duties, as she is the subject of the Board deliberations. The CEO offers secretariat services to the Board. The Applicant has been allowed, pursuant to the orders of the Court, to continue discharging other functions unrelated to the Board. Administrative allocation of duties, cannot be interpreted as adverse action taken against the Applicant by the Respondent, in disobedience to the orders of 23rd April 2020.

9. The 2nd Application is dated 15th June 2021. It is based on a letter to show cause dated 3rd June 2021, issued by the Respondent to the Applicant. The Applicant seeks an order, staying implementation of the letter to show cause. The Application is based on the Affidavit of the Applicant, sworn on 15th June 2021. She states that the orders of 23rd April 2020, which barred the Respondent from taking adverse actions against the Applicant, did not allow the Respondent to issue the letter to show cause.

10. The last Application is dated 5th August 2021. It was triggered by a letter dated 26th July 2021, issued to the Applicant, by the proposed Interested Party, The Inspectorate of State Corporations. The Inspectorate was in the process of auditing the affairs of the Respondent, and issued the letter summoning the Applicant, to shed light on the allegations against her, which are the same allegations made by the Respondent against her. She was to appear before the Inspectorate on 11th August 2021. Parties have not disclosed to the Court, by way of additional Affidavits, what transpired at the Inspectorate on the material date.

11. The Inspectorate filed Grounds of Opposition dated 14th September 2021. Its position is that it has no legal capacity to be sued, as it is an office mandated under Section 18 and 19 of the State Corporations Act, Cap 446 of the Laws of Kenya, to carry out audits and routine inspection of State Corporations.

12. Parties agreed that the 3 Applications, are determined on the strength of written submissions. The Inspectorate however indicated it would adopt its Grounds of Opposition in their entirety, and would not make submissions. The Applicant filed her submissions dated 17th September 2021. The Respondent was advised by the Court on 1st October 2021, to ensure its submissions are on record, but at the time of writing this ruling, the submissions for the Respondent do not seem to be on record.

The Court Finds: -

13. There are orders, issued by the Court, which granted leave to the Applicant to apply for orders of certiorari and mandamus. Leave is to operate as stay of the actions proposed by the Respondent, with respect to the Applicant's probation, academic and professional certificates.

14. Removal of the Applicant from Board functions is understandable, and cannot in the view of the Court, amount to adverse actions taken against her by the Respondent, as contemplated in the orders of 23rd April 2020. The matters under investigation against the Applicant, are before the Board. The Applicant would be conflicted, if she was to continue discharging her routine functions related to the Board. The CEO offers secretariat services to the Board, and there would be no compelling reason, for the Applicant to continue acting as the Corporation Secretary and attending all Board functions. She was assigned other duties, within her job description, as a Legal Officer. ***The orders of 23rd April 2020 were not flouted in this regard, and the Application dated 14th May 2020, filed by the Applicant is declined.***

15. The Application dated 15th June 2021, asking for suspension of the letter to show cause dated 3rd June 2021, carries considerable weight. The matters the Applicant is being called to show cause about, are the same matters which were subject of the orders of 23rd April 2020. The Respondent is trending on very slippery grounds, and had the Applicant applied for the Respondent to be found in contempt of court, based on the letter to show cause, such orders may well have issued. The Respondent has no reason to initiate disciplinary proceedings against the Applicant, while the orders of 23rd April 2020, remain in place. ***It is ordered that pending hearing and determination of the Application for Judicial Review, implementation of the letter to show cause dated 3rd June 2021, is stayed.***

16. The last Application dated 5th August 2021 against the Inspectorate is without merit. The Inspectorate is carrying an audit of the Respondent State Corporation, and its involvement with the Applicant, is purely for audit purpose. The Applicant as an Officer of the Respondent Corporation, is subject to the regulation of the State Corporations Act, and the Mwongozo Policy applicable to State Corporations. The Inspectorate is authorized by the Act to advise the Government on all matters affecting the effective running of State Corporations, and in doing so, is allowed to call for, and inspect, all documents which relate to execution of functions of any State Corporation. The academic and professional certificates of the Applicant are among such documents. If there are adverse findings against her, or adverse decision made by the Inspectorate, there is an appellate mechanism under the State Corporations Act at her disposal. The Inspectorate may in the end, exonerate the Applicant on the allegations that her academic and professional certificates are not authentic. Why seek to bar the Inspectorate from discharging its statutory functions, which in the end, may assist the Applicant, in her substantive Application for Judicial Review"

17. The Court also notes that leave to bring the Judicial Review Application, was granted with regard to the actions taken by the Respondent against the Applicant. Leave cannot be implied and extended against the Inspectorate. ***The Application directed at the***

Inspectorate, dated 5th August 2021 is declined.

IT IS ORDERED: -

a. The Applications filed by the Applicant, dated 14th May 2020 and 5th August 2021 respectively, are declined.

b. The Application filed by the Applicant, dated 15th June 2021, seeking stay of implementation of the letter to show cause dated 3rd June 2021, issued to the Applicant by the Respondent, is allowed.

c. Costs in the cause.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 3RD DAY OF DECEMBER 2021.

JAMES RIKA

JUDGE



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