Manzi v Teachers Service Commission (Judicial Review E064 of 2022)
[2023] KEHC 21433 (KLR) (Judicial Review) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21433 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E064 OF 2022

JM CHIGITI, J

JULY 28, 2023

BETWEEN

PETER NGUU MANZI ..... APPLICANT

AND

TEACHERS SERVICE COMMISSION ..... RESPONDENT

JUDGMENT

Brief Background

1. The Applicant herein was granted leave to commence judicial review proceedings against the Respondent. Subsequent he filed the Application dated April 30, 2022 which is before the court wherein he seeks the following orders;

    1. An order of *certiorari* do issue quashing the Respondent interdiction letter dated 17th September, 2021

    2. An order of Prohibition do issue prohibiting the Respondent from hearing TSC/DISC/NO.072/09/2021/2022

    3. An order of *mandamus* compelling the Respondent to release the Ex-Parte applicant salary.

    4. An order of *mandamus* compelling the Respondent to lift the Ex-Parte Applicant's interdiction

    5. Costs of this application be provided for.

The Ex-parte Applicants case is that:

2. It is his case that on September 17, 2021, he was interdicted before or without being informed of the reasons for his interdiction.

3. Even after the interdiction, the Respondent cancelled the hearing date several times which according to him was a deliberate abuse and violation of his rights.

4. He believes that the disciplinary, hearing was hurriedly arranged by the Respondent to avert a rebuke of this Honourable Court.

5. He submits that he was an opportunity to be heard before he was interdicted in clear breach of the cardinal principal of natural justice as highlighted in the case of *Richard Ncharpe Layagu vs. IEBC and two others*, Civil Appeal No. 18 of 2013 (2013) eKLR the court said "the Right to be heard is a well-protected right in our constitution and is also the cornerstone of the rule of law."

6. He is aggrieved that he was not given reasons for his interdiction.

7. He argues that the law allows suspension of an employee for a period not exceeding three (3) months and in any event the Respondent's own manual provides that interdiction should not exceed three (3) months.

8. He submits that he suffered psychological and emotional torture for the period he was waiting for the hearing since he went without a salary since he was reduced to begging for food and necessities.

9. He believes that this Honourable Court has powers to grant the orders sought.

The Respondents case:

10. The Respondent filed a Replying Affidavit sworn on September 22, 2022 and Supplementary Affidavit sworn on October 11, 2022.

11. It submits that the Applicant was employed by the Respondent as a Graduate teacher duly issued with TSC No. 397991.

12. The Respondent submits on April 14, 2021, that the Applicant informed the Respondent of alleged insecurity while serving as a principal at Tulianduli Secondary School and accordingly requested for a transfer.

13. Consequently, the Respondent convened an investigations team to ascertain the veracity of the allegations. The team upon investigations noticed that the Applicant had been mismanaging the school's funds.

14. Accordingly, the Respondent through its agents at the Kyuso Sub- County within Kitui County received further complaints from the BOM that the Applicant had presented forged signed cheques and cash withdrawal slips to Equity Bank- Mwingi and Kenya Commercial Bank- Mwingi purportedly signed by two school account signatories on various dates between February 2020 and March 2021 withdrawing a total of Kshs. 642,900.

15. The Respondent initiated investigations that found the Applicant liable for the said allegations leading to an interdict vide a letter dated September 17, 2021which carried all the allegations against him and invited the Applicant to respond to the same.

16. The Applicant indeed responded to the said interdiction letter denying the allegation of desertion but conceded to the allegation of misappropriation of school funds and further committed to repay the same vide letters dated November 12, 2021 and June 21, 2021.

17. The Applicant attended a hearing in person before the Respondent's disciplinary committee panel on September 14, 2022 where he was given ample opportunity to present his case.

18. The Applicant was given a chance to cross examine the witnesses after the Panel found the Applicant guilty of the charges proffered against him and resolved to suspend him for four months with effect from September 14, 2022.

19. The Applicant was accorded a fair hearing and the opportunity to be heard in the *Employment Act*, Code of Regulations for Teachers, 2015.

20. The Respondent submits that the contractual relationship between the parties is guided by the Code of Regulations for Teachers, 2015 among others and that Regulations 139 to 156 of CORT when it came to disciplining teachers.

21. The Respondent conducted further investigations and conducted an audit of the school. The Applicant appeared before the Sub-County Director's Office -Kyuso on June 21, 2021 for further investigations.

22. The Respondent subsequently resolved to interdict the Applicant pursuant to Regulation 146 (10) (c) which provides as follows: Where the report of the investigation panel discloses that an offence has been committed, the Board of Management or the County Director or the Secretary shall interdict the teacher using the letter of interdiction set out in the Thirty Fourth Schedule.

23. The Respondent issued an Interdiction Notice dated November 12, 2021 giving the Applicant 21 days to write his statement of defence in readiness for formal disciplinary hearing before his employer.

24. The Applicant duly responded to the allegations vide the letter dated June 21, 2021 where he admitted part of the allegations and gave an undertaking to refund the misappropriated funds.

25. The Jurisprudence on the principle of fair hearing in employment relationship is now settled: In the South African case of *Nampak Corrugated Wadeville v Khoza* (JA14/98) [1998] Zalac 24 (Quoted in by the Court of Appeal in *Judicial Service Commission v Gladys Boss Shollei & another* [2014]) the Court held

> " A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable"

26. In *Anthony Mkala Chitavi Vs. Malindi Water & Sewerage Company Ltd* (2013) eKLR Justice Radido developed the test of procedural fairness as follows:

> " The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee." Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard

and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

27. Furthermore, the Court of Appeal in *Bett Francis Berngetuny & Another vs. Teachers Service Commission and Another* (2015) eKLR held that:

> "The general principles that should guide statutory, domestic or administrative tribunals siting in a quasi-judicial capacity... are incorporated in the Regulations... accusing an employee of misconduct by way of query and allowing an employee to answer the query before a decision is taken satisfies the requirement of fair hearing or natural justice. The Applicant was given a fair hearing since he answered the queries before he was dismissed... If an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise great caution before it interferes with the employer's findings."

28. Guided by the above decisions, the Respondent reiterates that it accorded the Applicant a fair disciplinary hearing in accordance with *Employment Act* and CORT.

29. The Respondent submits that the threshold of procedural fairness envisaged under the *Employment Act* was strictly adhered to and the Applicant's subsequent suspension is a product of a clinical adherence to the law and ought to be upheld.

30. The Respondent further submits that the matter in issue here is a contractual matter concerning employment between the Respondent and the Applicant the Respondent relies on the case *Staff, Disciplinary Committee of Maseno University & 2 Others v Prof. Ochong Okello* (2012) eKLR where the Court of Appeal held: -

> "However, orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the Respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties."

31. In the case of *Kenya Revenue Authority -Vs- Menginya Salim Murgani* (2010) eKLR C.A. at Nairobi, Civil Appeal No. 108 of 2009, the learned judges R.S.C Omollo, P. N. Waki and J. G. Nyamu JJA, referred to *Local Government Board -Vs- Arlidge* (1915)A.C. 120, 132-133, *Selvaraian -Vs- Race Relations Board* (1975) I WLR 1686, 1694 and *Republic -Vs- Immigration Appeal Tribunal Ex-Parte Jones* (1988) WLR 1686, 1694, and *Republic -Vs- Immigration Appeal Tribunal Ex-Parte Jones* (1988)IWLR 477 481 and reiterated that;

> "there is ample authority that decision-making bodies, other than courts and bodies whose procedures are laid down by statute are masters of their own procedure, provided that they achieve the degree of fairness appropriate to their task." It is for them to decide how they will proceed.

32. As cited in the case of *George Wekesa v Multimedia University of Kenya* [20161 eKLR the same position was restated by Hon. J. Nderi in Cause No. 2244/2014 - Nixon Bugo vs. the Alliance for a Green Revolution in Africa as follows: "Courts of law should be very slow to interfere in the internal

disciplinary process at work place unless it is manifestly clear that the action by the Employer derogates materially from the internal disciplinary process and the law".

33. The Respondent submits that the Applicant is not entitled to an Order of Prohibition as sought because if the same is granted, it will amount to undue interference from the courts to perform their administrative duties.

Analysis And Determination

1. Whether this court has jurisdiction.
2. Whether the reliefs sought can be granted.

34. Article 165(5) 3(e) of the *Constitution* confers upon the High Court any other jurisdiction, original or appellate, conferred on it by legislation.

35. I have gleaned through the Application, the Replying Affidavit, the Supplementary Affidavit and the rival submissions as filed by the parties herein. The following stand out:

    a. There is an employee employer relationship that existed between the parties.

    b. The Exparte Applicant believes that the disciplinary, hearing was hurriedly arranged by the Respondent to avert a rebuke of this Honourable Court.

    c. He is aggrieved that he was not given reasons for his interdiction and an opportunity of being heard before interdiction.

36. The Applicant believes that the interdiction for over six (6) months, was long since the law allows suspension of an employee for a period not exceeding three (3) months. The Respondent's own manual provides that interdiction should not exceed three (3) months.

37. The Applicant strongly believes that had the disciplinary hearing been undertaken as provided in the law, the Applicant would not have come to court.

38. The Respondent submits that the Applicant was interdicted with effect from September 17, 2021. The contractual relationship between the parties is guided by the Code of Regulations for Teachers, 2015 among others. Regulations 139 to 156 of CORT sets out the procedure that the Respondent is required to comply with in disciplining teachers.

39. The Applicant was accorded a fair hearing and the opportunity to be heard in the *Employment Act*, Code of Regulations for Teachers, 2015.The record shows letters which contain invitations to hearing, investigations findings and proceedings where the Applicant participated in.

40. The Respondent further submits that the matter in issue here is a contractual matter concerning employment between the Respondent and the Applicant.

41. In the case *Staff, Disciplinary Committee of Maseno University & 2 Others v Prof. Ochong Okello* (2012) eKLR the Court of Appeal held: -

> " However, orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the Respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the

performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties."

42. The Exparte Applicant even participated in the Cross examination of witnesses. The grievances that the Applicant seeks to raise in this court have be ventilated before the Employment and Labour Relations Court or at the Court of Appeal. The letter that terminated the services of the Exparte Applicant gave him ninety days to appeal which he not embraces. This court cannot reopen the process at all.

43. The grounds upon which judicial review orders can be granted were explained in the case of *Council of Civil Service Unions versus Minister for the Civil Service* (1985) A.C. 374,410; Lord Diplock spoke of these grounds as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review.
>
> "The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> "By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> "By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> "I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards

the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

44. Section 7 of the *Fair Administrative Action Act*, 2015 provides for the institution of judicial review proceedings as follows: -

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–

(a) A court in accordance with section 8; or

(b) A tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if–

(a) The person who made the decision–

(i) Was not authorized to do so by the empowering provision;

(ii) Acted in excess of jurisdiction or power conferred under any written law;

(iii) Acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) Was biased or may reasonably be suspected of bias; or

(v) Denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) The action or decision was procedurally unfair;

(d) The action or decision was materially influenced by an error of law;

(e) The administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) The administrator failed to take into account relevant considerations;

(g) The administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) The administrative action or decision was made in bad faith;

(i) The administrative action or decision is not rationally connected to–

(i) The purpose for which it was taken;

(ii) The purpose of the empowering provision;

(iii) The information before the administrator; or

(iv) The reasons given for it by the administrator;

(j) There was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) The administrative action or decision is unreasonable;

(l) The administrative action or decision is not proportionate to the interests or rights affected;

(m) The administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) The administrative action or decision is unfair; or

(o) The administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that–

a. The administrator is under duty to act in relation to the matter in issue;

b. The action is required to be undertaken within a period specified under such law;

c. The administrator has refused, failed or neglected to take action within the prescribed period."

Section 11 provides for orders in proceedings for judicial review as follows: -

"(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order–

a. Declaring the rights of the parties in respect of any matter to which the administrative action relates;

b. Restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

c. Directing the administrator to give reasons for the administrative action or decision taken by the administrator;

d. Prohibiting the administrator from acting in a particular manner;

e. Setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

f. Compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

g. Prohibiting the administrator from acting in a particular manner;

h. Setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

i. Granting a temporary interdict or other temporary relief; or

j. For the award of costs or other pecuniary compensation in appropriate cases."

45. In *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) the Supreme court held as follows:

> 75. In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in Judicial Service Commission & another v Lucy Muthoni Njora, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.
>
> 76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to do so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of

the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised."

46. In order for the court to get through examination of Section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is, reasonable or fair and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. In order to establish whether or not there was reasonableness or fairness, I have done a merit analysis and found the following:

    i. The Applicant was informed of all the allegations that were levelled against him in the letter marked "LK-4" and dated September 17, 2021.

    ii. The Applicant acknowledged receipt of the letter and even proceeded to conceded to the allegation of misappropriation of school funds and further committed to repay the same vide letters dated November 12, 2021 and June 21, 2021. As seen in the letter marked "LK-5".

    iii. The Respondent constituted an investigations team that found that the Applicant was liable for the said allegations as set out in the Investigations Report that is marked "LK-3".

    iv. The applicant was invited for the hearing before the Respondent's disciplinary committee panel on September 14, 2022, as set out in the letter marked "LK-6".

    v. He attended the disciplinary hearing session in person and was given an opportunity to present his case and to cross examine witnesses. This is clear from the proceedings.

    vi. Upon consideration of the case and the evidence presented to the Panel, the Respondent found the Applicant guilty.

47. This court is fully aware that it is not sitting as an appellate court as a result of which it cannot delve into the correctness or otherwise of the findings of the Respondent. Its focus was on the procedural framework that the Respondent subjected the Applicant to during the disciplinary hearing. After the finding, The Applicant was given an opportunity to lodge an appeal within 90 days which he squandered.

48. Regulation 156 (4) Code of Regulations for teachers, 2015 stipulates that where a teacher is aggrieved by the decision of the Commission in a disciplinary process, the teacher may apply for review to the Teachers Service Review Committee within ninety days from the date of the letter communicating the decision. The Respondent issued to the Applicant a letter dated September 22, 2022 in line with regulation 156 (4) Code of Regulations for teachers, 2015.

49. The Applicant has not tendered any evidence to prove any irrationality or procedural impropriety in the manner the Respondent preceded over the matter.

50. The foregoing accords with the due process as set out in Section 7 of The *Fair Administrative Action Act* and I find no reasons to fault the Respondent.

51. I am satisfied that the Respondent adhered to the due process dictates as stipulated under Part XI of the Teachers Service Commission Code of Regulations for teachers, 2015 and in particular to the investigations, invitation into the hearing and during the hearing.

52. The prayer for an Order of Prohibition prohibiting the Respondent from hearing TSC/ DIS/NO.072/09/2021/2022 is overtaken by events and the same is dismissed. The Applicant also sought for an order of *mandamus* compelling the Respondent to release the Ex-parte Applicant's salary to issue.

53. The Applicant believes that this Honourable Court has powers to order compensation of Kshs. 500,000/- for the injury suffered by the Applicant as a result of the Respondent's illegal conduct.

54. In the same letter 22.9.22, the Respondent informed the Applicant,

> " N.B. 1. Salary overpayment will be recovered from you as per the payroll records.
>
> 2. Kshs. 642,900 will be recovered from you and remitted to Tulanduli Sec. Sch in Kyuso sub county, Kitui County."

55. Regulation 148 (l)A of Code of Regulations for teachers, 2015 stipulates that a teacher shall be paid half salary during the period of interdiction except in the following cases- (a) chronical absenteeism: (b) desertion of duty; (c) having been jailed or held in legal custody; (d) misappropriation or mismanagement of public funds; (e) fraudulent claims and receipt of funds; (O) use of false certificates; (g) forgery, impersonation, collusion.

56. The Applicant has not placed before this court the evidence that would enable this court to issue an order of *mandamus* to compel the Respondent to release the Ex-parte Applicant's salary. In any event The Respondent indicated that "salary overpayment will be recovered from you as per the payroll records. Kshs. 642,900 will be recovered from you." It is my finding that in so acting, the Respondent acted within Regulation 148 (l)A of Code of Regulations for teachers, 2015.

57. The Applicant also sought for:

A. An order of *mandamus* compelling the Respondent to lift the ex-parte and

B. Applicant's Interdiction.

58. The court is unable to appreciate what the Exparte Applicant is seeking from the court. The Respondent does not admit the prayers. No evidence has been placed before the court that would have assisted this court to understand the reliefs as drafted. The best the court can do in the circumstances is to dismiss them. They do not fall within the judicial review purview as provided for under Section 11 of The *Fair Administrative Action Act* and I do proceed to dismiss them.

Order:

The Application dated April 30, 2022 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

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JOHN CHIGITI (SC)

JUDGE