

IN THE HIGH COURT  
OF KIRIBATI

MISC. APP. NO. 6 OF 2020 ARISING FROM  
HIGH COURT CIVIL REVIEW NO. 17 OF 2020

BETWEEN      HONG-KAI KWONG  
                    Applicant/Appellant

AND             KIRIBATI HOUSING CORPORATION  
                    Respondent

Hearing:        18 May 2022

Appearances:   Ms Taaira Timeon for the Applicant  
                     Ms Kiata Kabure for the Respondent

Judgment:      20 June 2022

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**JUDGMENT OF HASTINGS CJ**

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[1] This is an application to extend time under O. 61 r. 5 of the High Court (Civil Procedure) Rules 1964 to apply for leave for an order of certiorari to remove the decision of the Kiribati Housing Corporation (KHC) to demote the applicant Hong-kai Kwong.

[2] I heard submissions on whether or not time should be extended, followed by submissions whether or not leave should be granted for an order of certiorari in the event I extended time.

**Background**

[3] The applicant Mr Kwong started work at the KHC in 2000. He held the position of Housing Superintendent on 19 April 2019 when he was sent notice from the Chief Executive Officer of KHC that his contract was terminated. The notice of termination referred to:

- (a) an incident on 21 March 2019 in which a coconut tree cut by an allegedly drunk contractor hired by the applicant nearly fell on someone;

- (b) an allegation that the applicant used an official vehicle for private purposes; and
- (c) several complaints about the applicant not complying with obligations to disseminate information on maintenance and work programmes, to visit worksites, and to monitor and record returned materials. Reference was also made to poor customer service and not meeting targets.

[4] In his affidavit dated 13 May 2020, Mr Kwong stated that he responded to these allegations in a memorandum marked as Attachment B. This memorandum is undated but refers to a “memo received by me on the 6<sup>th</sup> September 2018” which is not in the evidence before me. Attachment B addresses the coconut tree incident and an allegation about a missed site visit. It does not address the allegation about using a vehicle for private purposes nor the complaints about not complying with various obligations. It addresses several issues to which the notice of termination does not refer: lateness to work, complaints about a repair to Director Toromon’s house, a complaint about the poor design housing in Bairiki, and a complaint about a payment to a new contractor.

[5] On 6 May 2019, the Chief Executive Officer sent Mr Kwong a letter which stated in its entirety: “This is to inform you that the termination/cancellation of your contract with the Corporation is been void. You are to be reinstated with immediate effective according to Board’s decision as of OBM09/19.” There is no reference in the letter revoking Mr Kwong’s termination of the reasons why the decision to terminate was reversed.

[6] On 14 August 2019, the Chief Executive Officer sent Mr Kwong a letter demoting him “based on the various disciplinary allegations made against you as previously highlighted in your termination letter and previous disciplinary cases.”

[7] No issue was taken with respect to jurisdiction. It is common ground that decisions of the Board of the KHC are amenable to judicial review. The KHC is a state-owned enterprise listed in the First Schedule of the State-Owned Enterprises Act 2013.

### Extension of time

[8] I will consider the application to extend time first. O. 61 r. 5 gives the Court power to enlarge time “for doing any act or taking any proceeding, upon such terms as the, justice of the case may require”. The decision to demote is dated 14 August 2019. Mr Kwong deposed that he was “depressed and frustrated.” He said he “rushed about one week to go” and the first lawyer he approached was Ms Kabure. He said it took her “2 months to handle my case but there was no progress.” He said he visited her “to ascertain the progress of my case but she went overseas.” He said he removed his case from Ms Kabure at the end of September, and visited Mr Berina two months later on 30 November 2019. He said he noted Mr Berina was “very busy with his campaign.” He said he looked for another lawyer and made an appointment with Ms Timeon on 27 April 2020. He missed that appointment for reasons not stated, but visited her on 30 April 2020. Ms Timeon wrote a letter dated 5 May 2020 to the Chief Executive Officer of KHC demanding payment of the difference between his old salary and the new, lower salary. She gave him one week to respond. There was no response.

[9] The certiorari application was filed on 14 May 2020. This was three months after the expiry of the six-month period specified in O. 61 r. 3 in which such an application may be brought, and nine months after the decision to demote the applicant was made.

[10] Ms Timeon submitted that the delay was caused by the first two lawyers, and relied on *Kanoanie v Ruata* in which the Court of Appeal enlarged time after a delay of ten years because the delay “was occasioned by the default of his then counsel” and because the applicant “was not sleeping on his rights.”<sup>1</sup>

[11] Ms Kabure submitted that the applicant contributed to the delay. She submitted he did not follow up his case regularly with either lawyer; he took the case from the first lawyer after a month and then waited two months before contacting the second lawyer knowing he was busy campaigning; and there is no evidence he actually engaged either lawyer. Indeed, Ms Kabure filed an affidavit in support from one of her firm’s paralegals in which he deposes the applicant has “never been our client.” She also filed an affidavit from the Officer-in-Charge of the KHC who stated that the applicant “knew very well” that the KHC sought Ms Kabure’s advice “in most cases” and that he “knew very well” he had six months to file his

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<sup>1</sup> *Kanoanie v Ruata* [2006] KICA 27 at [13].

application. This is hearsay and is inadmissible. The Officer-in-Charge cannot say what Mr Kwong knew.

[12] Ms Kabure also submitted there was reputational risk to both her and Mr Berina if time were to be enlarged based on the content of Mr Kwong's affidavit.

[13] In *Batee and Beroi v Trustee for Jehovah's Witness Church*, the Court of Appeal stated the test for granting leave out of time as follows:<sup>2</sup>

...leave will not normally be granted unless the applicant shows (i) an acceptable explanation for the delay, and (ii) that in all the circumstances it would be fair and equitable to extend time. Significant questions in approaching the exercise of the discretion will be the magnitude of the delay, the reasons for it, any prejudice suffered in consequence, and the strength of the appellant's case. In the end, however, there is an overriding requirement to do what is just.

[14] In *Batee*, the applicant waited four months between learning of the High Court decision and lodging an appeal, and a further four months before serving the papers on the respondent. In the present case, the applicant visited the first lawyer at the end of August, within two weeks of the decision to demote him. There is no explanation for the passage of two months between withdrawing the case from the first lawyer and visiting the second lawyer. The case remained with the second lawyer for the next five months which included the Christmas break before the applicant engaged the third, present lawyer. Although various causes might be attributed to these delays, the accumulated delay is not great, and it cannot be said, having sought the assistance of three lawyers in the nine months between demotion and application, that the applicant was sitting on his rights.

[15] Nor do I think there is much prejudice to the respondent caused by the delay. The respondent continued to pay the applicant a reduced salary throughout the delay, and continues to pay him that salary. The applicant's case is reasonably arguable. The advantage of permitting those arguments to be heard to my mind outweighs any prejudice to the respondent.

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<sup>2</sup> *Batee and Beroi v Trustee for Jehovah's Witness Church* [2005] KICA 12 at para. 16.

[16] For these reasons, the application to enlarge time is granted.

### **Certiorari**

[17] I now turn to the application for certiorari. Ms Timeon submitted that the Board of the KHC breached natural justice when it decided to demote the applicant. She submitted that the applicant was given no notice of the decision and no opportunity to explain why he should not be demoted. Ms Kabure submitted that the Board's revocation of its termination decision and its replacement with a demotion decision meant that the applicant was given the opportunity to be heard, and was heard. She submitted that the reference in the demotion letter of 14 August 2019 to "the various disciplinary allegations made against you as previously highlighted in your termination letter and previous disciplinary cases" as reasons for the demotion meant that the Board took into account the applicant's response to those allegations when it revoked the termination and substituted it with a demotion.

[18] There are two reasons why I am not convinced by Ms Kabure's submissions. First, the applicant's responses set out in the undated Attachment B do not align with the reasons for termination in the letter of 19 April 2019, with the exception of the coconut tree incident. As a result, I do not know if in fact the applicant had the opportunity to address all of the allegations taken into account by the Board when it decided to terminate his employment. There is also nothing in the letter of 14 August 2019 to indicate that the Board took into account any of the applicant's responses. It only refers to the allegations.

[19] Second, and more importantly, even if the applicant had the opportunity to address all of the allegations taken into account by the Board, the purpose of being given the opportunity to address the allegations was to explain why he should not be terminated. As Ms Kabure submits, this seems to have convinced the Board not to terminate his employment. Being given the opportunity to explain why he should not be demoted is, however, a different kettle of fish. Employment is not at stake; but remuneration and status are. These require a much more nuanced response, even if the decision to demote is based on the same alleged incidents. Some of the allegations with respect to termination may be more or less relevant to demotion, or may take on a different hue. In other words, the purpose of the opportunity to respond is different, and the applicant did not have that opportunity with respect to his demotion.



[20] Ms Kabure relied on obiter comments of Muria CJ in *Naon v Otintai Hotel Board of Directors*.<sup>3</sup> In that case Muria CJ declined an application to extend time for leave to apply for certiorari, and said even if he had granted the application to extend time, he would not have granted certiorari because the applicant remained employed with the same employer on the same salary without loss of benefits. I take that obiter comment as an indication of his view of the strength of the applicant's case which is relevant to the second *Batee* criterion. In this case of course, the applicant was demoted, not transferred, was paid less, and the consequences of his position that he was not given the opportunity to address the allegations in the context of his demotion as distinct from his termination remains an open, and arguable, question.

[21] For these reasons, I grant the application for certiorari. The decision of the Board of the KHC to demote the applicant, which was conveyed in its letter of 14 August 2019, is set aside.

[22] I award costs to the applicant.



Hon William Kenneth Hastings  
Chief Justice

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<sup>3</sup> *Naon v Otintai Hotel Board of Directors* [2013] KHC 38.