



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 8 OF 2017

In the matter of an Application by BADAR AHMED for leave to apply for Orders of Certiorari, Prohibition and Mandamus

AND

In the matter of Section 8 and 9 of the Law Reform Act (CAP 26) Laws of Kenya

BADAR AHMED.....APPLICANT

-VS-

CLERK TO THE COUNTY ASSEMBLY WAJIR....1ST RESPONDENT

WAJIR COUNTY ASSEMBLY.....2ND RESPONDENT

J U D G M E N T

1. In his Notice of Motion dated 18th September, 2017 brought under *Order 53 of the Civil Procedure Rules, 2010*, pursuant to the leave granted on 6th September, 2017, **Badar Ahmed (“the applicant”)** seeks the following:-

a) an Order of Certiorari to bring this (sic) Court and a Legal Notice No.1 of 2017 published on 1st September 2017.

b) an Order of Mandamus to compel the 1st Respondent to allow the Ex-parte applicant to apply for the post of Speaker Wajir County Assembly.

2. The grounds upon which the Motion was grounded were set out in its body and in the supporting affidavit of Badar Ahmed, sworn on 18th September, 2017. These were that; the 1st respondent advertised a vacancy of the post of the Speaker of Wajir County Assembly on Friday 1st September, 2017 which was a national holiday (Idd –Ul – Adha); those interested were to pick the relevant documents from the 1st respondent’s office and return them by Monday 4th September, 2017 9.00 am; that the time granted was inadequate and was intended to lock out the applicant considering that 1st September, 2017 was a holiday and the other two days fell on a weekend. That the ex-parte applicant was one of the leading contenders for the Post of Speaker but the 1st respondent maliciously ran the advertisement on a national holiday.

3. In his submissions dated 10th April, 2018, the applicant urged the court to find that the advertisement was placed on a date that had been declared a holiday. That the Legal Notice No.1 of 2017 in advertising a post of Speaker of Wajir County was irregular and ought to be quashed. That while respondents have the administrative powers to do what they deem appropriate, that power ought to be exercised in a manner that is just, reasonable, lawful, efficient and procedurally fair. He relied on the case of **Patoli vs. Kabale District Local Government Council and Others (2008) 2 EA 300**. He urged that an order of mandamus to compel the 1st respondent to allow him apply for the post of Speaker be issued. The case of **Regina vs. Dubshethe ex-parte, Meredith (1950) 2 ALL ER 741** was cited in support of those submissions.

4. Although the respondents were served, they never appeared to defend the Motion.

5. I have carefully considered the affidavits on record and the Statutory Statement. The issues for determination are:-

a) Whether this court should quash the Legal Notice No. 1 of 2017 published on 1st September, 2017.

b) Whether an order of mandamus should issue to compel the 1st respondent to allow the ex-parte Applicant to apply for the post of Speaker Wajir County Assembly.

6. The application was provoked by an advertisement made by the 1st respondent allegedly on the 1st September, 2017 in relation to a vacancy of office of the speaker in the County Assembly of Wajir, *inter alia*, in the following terms:-

“Pursuant to standing order No 3(1) and 27, His Excellency the Governor has vide the Legal Notice No. 1 of 2017 notified that the First Sitting of the Second Assembly shall be held on Thursday 7th September, 2017 at 9.00a.m in the County Assembly Chamber, Wajir Town”.

7. The advertisement was made on a day which was declared a holiday for Muslims but was a normal working day for non-Muslims. The press statement by the cabinet secretary clearly stated that that was a holiday for Islamic believers only and it was not a National Public Holiday.

8. The applicant did not produce the Legal Notice he seems to have been aggrieved with. From the advertisement, that Legal Notice related to a sitting which was to take place on Thursday 7th September, 2017. The sitting has already taken place. What will the quashing of the Notice achieve. This court does not see what the quashing will achieve.

9. In any event, in his prayers, the applicant did not specifically pray that the Legal Notice should be brought to this court for purposes of quashing. He only prayed that it be brought to court. Secondly, a copy of that Legal Notice was not produced. A party who wishes a decision be brought to court for quashing, he must produce the impugned decision or evidence that pertains to that decision and if not, he must explain the failure to do so. In this case, the applicant failed to do so and prayer number 1 of the Motion fails.

10. The second prayer is for an order of mandamus. An order of mandamus commands and directs a person to do a particular thing. In the case of **Kenya National Examination Council v Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996** the Court of Appeal stated:-

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS” Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean” They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

11. What the applicant seeks is to overturn an election that must have taken place on the 7th September, 2017. An order of mandamus cannot issue to reverse that which has already taken place. To my mind what the applicant should have done after failing to secure an order of stay at the ex-parte stage was to lodge a petition to challenge the election of whoever was returned as speaker.

12. From the foregoing, I am of the view that the application has no merit and the same is hereby dismissed. As the respondents did not participate in these proceedings, I will make no order as to costs.

DATED and DELIVERED at Meru this 27th day of June, 2018.

MABEYA

JUDGE