



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

JUDICIAL REVIEW APPLICATION NO. 6 OF 2015.

CAROLYNE NASAMBU SIMIYU ::::::::::::::::::::::::::::::: APPLICANT.

VERSUS

C.D.F. BOARD)

C.D.F. LUGARI CONSTITUENCY):::::::::::::::::::::::::::::: RESPONDENTS.

R U L I N G.

1. The exparte applicant on 24th July, 2015 filed an application brought by way of Notice of Motion under the provisions of sections 8 and 9 of the Law Reform Act and Order 53 rule 3 of the Civil Procedure Rules seeking the following orders:-
 - i. *That a prerogative order of certiorari do issue to remove into this court the decision of the 1st respondent made on 23rd June, 2015 removing the exparte applicant from her position as chair of the 2nd respondent and quash the same;*
 - ii. *That costs hereof be provided for.*
2. The application was anchored on the following grounds:-
 - a. *The applicant is the chairman, C.D.F. Lugari;*
 - b. *That the MP Lugari organized for an impromptu meeting at Lukhokho Primary School;*
 - c. *That the applicant attended the meeting on invitation by the member of parliament;*
 - d. *That it is at the meeting that the M.P. asked members of the public to relieve the applicant of her duties as member of C.D.F. for Lwandeti ward;*
 - e. *That the MP then convened the meeting on 23rd June, 2015 where the applicant was subsequently removed as the chair of CDF;*
 - f. *That a letter dated 24th June, 2015 was done and served on 25th June, 2015;*
 - g. *That no charges had been framed and served on the applicant;*
 - h. *That the applicant had no notice of her discussion at the meeting;*
 - i. *That the applicant was not given chance (sic) to defend herself both at the public rally and meeting on 23rd June, 2015;*
 - j. *That the cardinal principle enshrined in Article 50 of the Constitution flouted (sic);and*
 - k. *That the procedure adopted was unlawful.*
3. The said application was supported by the affidavit of Carolyn Nasambu Simiyu, the exparte applicant. She filed a statement of facts relied upon, the relief sought and grounds upon which the relief is sought.

4. The respondents were served with the application. Mr. Tarus of the Hon. Attorney General's office appeared in court on 9th November, 2015 and expressed his frustration in that the respondents had failed to give him instructions. He sought leave to file an application to cease acting for the respondents, which he never did.
5. The application proceeded without any response from the respondents herein.

The exparte Applicant's submissions

6. Mr. Anziya, learned counsel for the exparte applicant highlighted his written submissions filed in court on 3rd February, 2016. He submitted that the exparte applicant was appointed under Gazette Notice No. 2970 of 24th May, 2013 as the chairman of the Lugari Constituency Development Fund. On 19th June, 2015, the exparte applicant was summoned to a meeting hosted by the Member of Parliament (MP) for Lugari Constituency who hurled abuses at her and ordered the 2nd applicant to remove her as chair of the CDF Lugari Committee. The 2nd respondent convened a meeting on 19th June, 2015 and removed the applicant from office.
7. The 2nd respondent communicated the information to the exparte applicant in writing and to the secretariat of the CDF Board. By a letter dated 29th July, 2015, the Board wrote to the Lugari CDF Committee and informed them that what they had done was illegal and unprocedural as the applicant was not given a chance to defend herself. The applicant was not formally informed of the allegation facing her. Mr. Anziya submitted that the action of the CDF Committee was irregular and the CDF Board advised the said Committee to rescind the decision. They did not do it prompting the exparte applicant to file this matter. He informed the court that the principles of natural justice were not followed. If at all there were allegations against the exparte applicant she ought to have been informed and given a chance to defend herself.
8. Mr. Anziya referred the court to Article 50 of the Constitution which enjoins any party to a fair hearing where there is a dispute, thus failure to comply with the said provisions makes the applicant's removal unprocedural and illegal. The purpose of the judicial review remedy of certiorari is to correct unprocedural impropriety.
9. He relied on the decision of **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR**, on page 4 where the principles were highlighted upon which a court will apply the remedy sought. He prayed that the court finds that the Lugari CDF Committee acted unprocedurally in removing the exparte applicant in their letter dated 24th June, 2015. He prayed that the said letter be quashed.

Issues for determination

1. Was there fair administrative action in this matter?
2. Is exparte applicant entitled to the orders of certiorari?

Fair Administrative action

10. In the present application, the exparte applicant in her affidavit deposes in paragraphs 3 to 6 that on 19th June, 2015 she was summoned by the Member of Parliament (MP) for Lugari Constituency, to attend a meeting at Lukhokho Primary School. While at the meeting she was surprised to learn that she was the subject of the meeting where she was called a thief by the MP who alleged that she authorized illegal payments by Lukhokho Primary School. The MP proposed the removal of the exparte applicant as the area representative of the Community Development Fund.

11. In paragraph 7 of her affidavit, the exparte applicant claims that effecting payments is a process that is done by several persons.
12. In paragraphs 8 and 10 of her affidavit, the exparte applicant avers that the decision of 19th June, 2015 was ratified by a Committee meeting of 23rd June, 2015. She received her removal letter on 25th June, 2015.
13. The exparte applicant avers in paragraph 11 of her affidavit that the National Board responded to her letter dated 25th June, 2015 which she annexed as CS-3.
14. A perusal of the said letter addressed by the Constituencies Development Fund Board Secretariat to the CDF secretary, Lugari Constituency, dated 15th September, 2014 (sic), expressed displeasure at the manner in which the exparte applicant was removed from office. The letter in part noted that the exparte applicant was not issued with a notice notifying her of the allegations against her. She was not given sufficient time to enable her prepare for her defence. The minutes of the CDF, Lugari, meeting of 7th July, 2014 (sic) did not indicate if the exparte applicant responded to the allegations raised against her as such recording was not made.
15. The said letter stated that the procedure used by the Lugari CDF Committee to remove the chairperson was grossly unfair and did not meet the required threshold. The CDF Board Secretariat was thus unable to effect the request for it to take further action in the matter.
16. The last paragraph of the said letter referred the CDF Lugari Committee to report the issue of the alleged forgery to the Criminal Investigations office. The respondents having not filed any response leave the word of the exparte applicant uncontroverted. There was no indication from the respondents to show if at all they reported the issue of the alleged forgery to the Criminal Investigations Department.
17. The CDF secretariat expressed a lot of displeasure and did not support the manner in which the ex-parte applicant was removed from office. The CDF Secretariat washed its hands off the actions of the CDF Board Lugari Constituency and left a sour taste in its mouth, so to say.
18. Article 47 (1) and (2) of the Constitution of Kenya provides for the right to fair administrative action in the following words:-
 1. *Every person has the right to administrative action that is expeditious, efficient, lawful , reasonable and procedurally fair;*
 2. *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”*
19. Article 232 (1) (e) of the Constitution provides for accountability for administrative acts. On the other hand, article 50 of the Constitution provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
20. In Halsbury’s Laws of England, 5th Edition 2010 Vol. 61 at Para 639, It states as follows with regard to the right to be heard:-

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or

contract to conduct themselves in a manner analogous to a court.”

21. The Court of Appeal in the case of **Onyango Oloo Vs. Attorney General [1986-1989] EA 456** stated as follows:-

“..... in the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, conclusions of which are sent to the decision making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings. It is not to be implied that the rules of natural justice are excluded unless parliament expressly so provides and that involves following the rules of natural justice to the degree indicated courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character denial of the right to be heard renders any decision made null and void ab initio.”

22. In the case before me, there is no indication that the exparte applicant appeared before the CDF Lugari Committee to defend herself against any allegations of wrong doing. The actions of the said Committee were unilateral and arbitrary to the rules of natural justice and fair administrative action. The Committee failed to account for its actions contrary to article 232 (1) (e) of the Constitution.

23. The court in the case of **Joseph Mbalu Mutaya vs. Attorney General & Another [2014] eKLR** cited with approval the House of Lords decision in **Board of Education Vs. Rice (1911) A.C. 179** where lord Loreburn LC said:-

“that a decision making body should not see the relevant material without giving those affected a chance to comment on it and, if they wish controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication, that to act in good faith and listen fairly to both sides is a duty lying upon everyone who decides anything’.”

24. After an analysis of all the material brought before this court, the submissions of the exparte applicant’s counsel and decisions he relied on, I am satisfied that there was a breach of fair administrative action in the present case in contravention of article 47 of the Constitution.

Is the exparte applicant entitled to Judicial review orders of certiorari?

25. It is trite law that Judicial review proceedings do not deal with the merits of the decision but by the decision making process.

In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001**, the Court of Appeal held:-

***“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it*”**

26. In the case of **Kenya National Examinations Council vs. Republic Exparte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** it was held that:-

“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons”

27. Having found that the exparte applicant was not informed of the allegations made against her and not having being given an opportunity to defend herself, I am of the considered view that she is entitled to the orders sought.

28. I therefore make the following orders:-

1. *I hereby issue an order of certiorari bringing into this court and quashing the decision of the Constituencies Development Fund, Lugari Committee made at its meeting of 23rd June, 2015 and the letter to the exparte applicant dated 25th June, 2015 communicating the said decision;*
2. *The 2nd respondent will bear the costs of the application.*

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **28TH** day of **APRIL**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Applicant.**

..... **for the Respondent .**

..... **Court Assistant.**