



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 69 OF 2012

**IN THE MATTER OF AN APPLICATION BY SAMUEL NJUGUNA KAHUNGU & 70 OTHERS
FOR ORDERS OF *MANDAMUS* AND *CERTIORARI***

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF EDGEWOOD COMMUNITY-SUBUKIA

BETWEEN

SAMUEL NJUGUNA KAHUNGA & 70 OTHERS.....APPLICANTS

-VERSUS-

PERMANENT SECRETARY

MINISTRY OF INTERNAL SECURITY.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

DISTRICT COMMISSIONER, SUBUKIA DISTRICT.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

MILKA M. THEURI.....SUBJECT

RULING

1. By the Notice of Motion filed on 30th November 2012 the applicants seek the following orders:

(a) that the Honourable Court be pleased to issue an order of *certiorari* to remove into this court and quash the Respondents' recruitment and subsequent decision leading to the appointment of the subject herein as the sub chief of Edgewood Community;

(b) that the Honourable Court be pleased to issue an order of *mandamus* to compel

the Respondents to conduct a fresh recruitment and a subsequent appointment for the post of the area sub chief of Edgewood Community and the recruitment/appointment be within the parameters of the law; and

(c) that the costs of this application be provided for.

THE APPLICANTS' CASE

2. The Petition is supported by the affidavit of Samuel Njuguna Kahungu sworn on his own behalf and on behalf of the other 69 Applicants pursuant to the authority to plead filed together with the application. It is also supported by the Statement of Facts and the Verifying Affidavit both dated 7th November 2012.
3. The applicants are residents of Edgewood Community in Kabazi Location in Subukia Sub-location. Their case is that in March 2012, the Respondents advertised for the position of the assistant chief for this area. One of the requirements for appointment was that the successful candidate must be a resident of Edgewood Community.
4. However, in contravention with this notice, the Respondents appointed the subject who is not a resident of the community. The applicants have opposed her appointment because they feel that she is not a suitable candidate because she does not understand the needs and social integration of the community.
5. They have also challenged the Respondents' decision on the grounds of procedural impropriety, the decision was made in bad faith and the Respondents acted ultra vires.

THE RESPONDENTS' CASE

6. The Hon. Attorney General entered appearance for the 1st, 3rd and 4th Respondents. In response to the Application he filed the Replying Affidavit sworn by Mwangangi Mwanja, the Deputy County Commissioner of Subukia Sub-County, on 8th April 2014.
7. His case was that Edgewood Sub-location was created on 9th September, 2011. Following its establishment, the Office of the President, Provincial Administration and Internal Security put out advertisements for the position of the sub-chief of the area Grade II.
8. The first two advertisements of 4th October 2011 and 6th December 2011 did not attract any qualified candidates. The third advertisement of 25th January 2012 was successful and out of the applicants, five candidates were shortlisted. The subject came in second and her name was forwarded together with those of the other top three candidates to the Provincial Commissioner for consideration. She came second and she was appointed because she satisfied the minimum requirements for the position.
9. The Respondents maintain that due process was followed. They also allege that the subject is a resident of Edgewood Sub-location and owns a parcel of land in that area. Therefore, the court has no reason to interfere with her appointment.

SUBMISSIONS

10. The person who was appointed only owns a small piece of land in the area. In the findings of the District Commissioner she had resided outside the area for the past 10 years. The Respondents disregarded the law. They also failed to take into account the interests of the community. They appointed a stranger who did not understand their needs.
11. The State Counsel submitted that the decision was based on merit and consideration. The subject was interviewed and investigated. The third Respondent looked at the qualifications of all the candidates and determined that the subject was the most qualified.
12. She was of the view that the application is an abuse of the court process. That, some of the applicants unsuccessfully applied for the position. She urged the court to dismiss the application in its entirety.

ANALYSIS

13. The scope of judicial review was stated in the Uganda case of **Pastoli V. Kabale District Local Government Council and Others**, [2008] 2 EA 300 as follows:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....

Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

14. Nyamu, J, as he then was, held in **Keroche Industries Limited vs Kenya Revenue Authority & 5 Others [2007] 2 KLR** that judicial review will only inquire into the decision making process and not the merits of the decisions. The court looks at whether there were elements of illegality, ultra vires, irrationality, procedural impropriety, Wednesbury Principle of unreasonableness, oppression, malice, bias, discrimination and abuse of power by the decision making body.
15. The applicants' argument is that the appointment of the subject as assistant chief was unlawful because she was not a resident of the sub-location. That this was a requisite of appointment as per the advertisement the Respondents had issued. Failure to adhere to their regulations amounted to a procedural impropriety.
16. It was not disputed that the 1st and 3rd Respondents have the powers to make these appointments. Further the procedure for appointment was followed, the position was advertised for, the candidates who applied for the position were shortlisted by the 3rd Respondent and appointed by the Provincial Commissioner. Therefore, the allegations of that the Respondents acted *ultra vires* or unprocedurally have no legal basis.
17. They have however not cited any statute or other legal instrument that provides that in order to be appointed as an assistant chief, a person must be a resident of the area. Accordingly, the person who has the duty to make the appointments, in this instance the Office of the President through the Provincial Commissioner, also has the mandate to determine the minimum qualifications for appointment. This discretion, must of course be exercised within the parameters of law that is it must not be irrational, biased, discriminatory, unreasonable or oppressive.
18. In my view, that one must be a resident of the area in order to be appointed is not founded in law. It is not a legal requirement prerequisite to the appointment which must be satisfied.
19. The Office of the President which is the body authorised by law determines the criteria and credentials of candidates. This court has no powers to interfere with this discretion because it has not been demonstrated that it was exercised arbitrarily.

DETERMINATION

20. In light of the above, I find that the applicants have not demonstrated any illegality on the part of the Respondents. There is no reason for this court to interfere with the appointment of the subject.
21. The application has no merit and it is hereby dismissed.
22. Each party shall bear its own costs.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 29th day of May, 2015.

A. MSHILA

JUDGE