



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 141 OF 2011

REPUBLICAPPLICANT

VERSUS

PERMANENT SECRETARY

OFFICE OF THE DEPUTY PRIME MINISTER

& MINISTRY OF LOCAL GOVERNMENT.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

EX-PARTE ...JOHN MUTINDA KUNGA

JUDGEMENT

What is coming up for consideration in this judgment is the notice of motion application dated 13th June, 2011 in which the ex-parte applicant, John Mutinda Kunga prays for an order of certiorari to call up into this court and quash the proceedings and decision dated 9th February, 2011 and 22nd February, 2011 made by the Permanent Secretary, Ministry of Local Government and the Public Service Commission to dismiss him from employment. The Permanent Secretary in the Office of the Deputy Prime Minister and Minister of Local Government; the Public Service Commission; and the Attorney General are the 1st-3rd respondents respectively. The application is based on the grounds on its face as follows:-

- a. **The decision by the Respondent is illegal and unlawful for it is ultra and intra vires the Local Government Act and the Public Service Commission Act.**
- b. **The decision is contemptuous of this Honourable Court's order issued on 11th April, 2007 and is intended to scuttle the said order.**
- c. **The decision is unfair, unjust and actuated by malice.**
- d. **The decision goes against the rules of natural justice.**

The application is also supported by the application for leave, a statutory statement and a verifying affidavit of the applicant all dated 2nd June, 2011.

The background to this matter is that the applicant's employment was suspended by the 1st respondent

through a letter dated 19th March, 2007. The applicant moved to this court through Misc. Civil Application No. 418 of 2007 and on 1st August, 2008 Justice George Dulu quashed the decision suspending the applicant. The applicant was subsequently reinstated to the service of the 1st respondent and transferred to Ijara County Council. On 27th March, 2009 he was transferred to Rachuonyo County Council. The applicant then started agitating for payment of his dues for the period he was on suspension. On 25th May, 2009 the applicant received a letter from the 2nd respondent suspending him from employment and informing him that **“it is noted that your suspension has never been lifted.”** Through a letter dated 22nd February, 2011 he was notified of his dismissal from service **“with effect from 19th March, 2007 on account of gross misconduct.”** It is the applicant case that the action of the 2nd respondent is null and void since the procedure used to dismiss him is unlawful. The applicant also argues that his dismissal breached the rules of natural justice in that he was never invited to respond to the allegations made against him. The applicant further argues that his dismissal clearly contravenes the decision of the Court in High Court Misc. Civil Application No. 418 of 2007.

The 2nd respondent opposed the application through a replying affidavit sworn by its Secretary Bernadette Mwhaki Nzioki on 15th February, 2011. The 1st respondent did not file any reply in response to the application.

The 2nd respondent's case is that the applicant had indeed been suspended earlier on but he was reinstated following the court order dated 1st August, 2008. Thereafter while serving as the Town Clerk of Ijara County Council the applicant received Kshs.50, 700/= as land rates and issued a miscellaneous receipt. He however did not surrender the money but instead converted it to an imprest contrary to financial regulations. The applicant was subsequently asked to show cause why he should be dismissed from service for misappropriation of funds but he did not respond to the show cause letter. Although the applicant later refunded the funds, the 2nd respondent found him unfit to hold public office and dismissed him from service. The 2nd respondent denied that the applicant was dismissed on the same grounds which had led to his suspension in 2007.

The applicant found it necessary to respond to the replying affidavit by swearing a further affidavit on 7th March, 2012. Through the further affidavit the applicant informed the court that his letter of dismissal indicates that he was being dismissed with effect from 19th March, 2007 being the date of his initial suspension and that means he was being dismissed for the same reasons that the court had addressed in H.C Misc Civil Application No. 418 of 2007. The applicant argues that the 2nd respondent was trying to confuse the court by claiming that he was dismissed for misappropriating funds belonging to Ijara County Council.

The starting point is the letter of suspension dated 23rd April, 2009 addressed to the applicant by Mr. Sammy Kirui, the Permanent Secretary of 1st respondent. The said letter which is titled “suspension” is as follows:-

“On 19th March, 2007 while you were the Clerk, Municipal Council of Migori, you were suspended from duty on allegations of:

- i. Defrauding of Kshs.3,710,001/= which you withdrew cash from the bank to pay various statutory creditors but which were never acknowledged by the would be recipients.**
- ii. Withdrawing from LATF account Kshs.1,800,000/= purportedly to pay Provident Fund and staff salary. No receipt from Provident Fund was attached and the staff never signed the pay roll.**
- iii. Defrauding Kshs.1,535,949/= in respect of the Roads Maintenance Levy Fund. No supporting document was attached to the payment voucher.**
- iv. Violation of tendering procedures in which the Council lost kshs.998,000/= payment made to various firms but whose goods were never supplied to the Council.**

Your representations contained in letter dated 24th March, 2007 was considered but found unsatisfactory.

It has further been reported that on 21st January, 2009 in your current station you received Kshs.50,700/= from a client in terms of plot rates. You issued an MR receipt for the same but without a duplicate carbon copy. You never handed over the money to the cashier nor accounted for it leading to Councilors locking your office due to lack of trust and confidence in you.

It is noted that your suspension has never been lifted. Consequently, you are required to hand over your duties to your Deputy and report to the Provincial Local Government Officer. Thereafter you are required to be reporting twice a month to the Provincial Local Government Officer until your disciplinary case is finalised. The conditions of suspension shall continue to prevail as conveyed in this office letter No.S/130269/1/3 of 19th March, 2007.

In the meantime, it is intended that you be dismissed from service on account of gross misconduct and surcharge you all the funds you have so far misappropriated.

However, before the intended action is taken, you are hereby required to show cause why you should not be dismissed. Your representations if any, should be received in this office within fourteen (14) days from the date of this letter failure to which you shall be dismissed without further reference to you.”

Looking at the said letter it is clear that two clusters of accusations were leveled against the applicant. The first set of accusations involved his activities as the clerk of the Municipal Council of Migori. Those allegations led to his suspension on 19th March, 2007. It should be noted at this stage that this is the suspension which Justice George Dulu quashed through his judgment of 1st August, 2008. The second accusation is that of misappropriation of Kshs.50,700/= while he was the clerk of Ijara County Council. This happened after the applicant had been reinstated following the court order.

Through the suspension letter which is the subject of these proceedings, the applicant is informed that **“it is noted that your suspension has never been lifted.”** This particular view of the 2nd respondent is confirmed through the letter of dismissal which informed the applicant that he had been dismissed with effect from 19th March, 2007.

Looking at the evidence placed before the court, it is clear that the 2nd respondent misrepresented the facts to the court. The claim that the applicant was dismissed because of the incident that took place in Ijara in 2009 is not true. This is one of the reasons for his dismissal. However, among the reasons given for his dismissal was what happened in Migori in 2007.

Ideally, an employer–employee dispute is a matter for the private law arena. Sometimes, however, an employer can surrender its dispute into the public law jurisdiction by proceeding in a manner that is utterly unjust, unfair and unreasonable. In my view, this is what the respondents have done in the case before me. The 1st and 2nd respondents may have had good reasons for dismissing the applicant. That, however, is not of concern to this court. What is of importance is the fact that the applicant was dismissed despite a clear court order quashing his suspension in 2007. The respondents never appealed against the decision of the court. What they did was to overturn the decision of the court by dismissing the applicant on the same grounds even after pretending to have complied with the court order by reinstating the applicant. This act was done in bad faith and was unreasonable, irrational and an abuse of power. It is a clear disrespect for the rule of law and such activities must be discouraged. For this reason alone the applicant’s notice of motion succeeds.

This application has been allowed due to a clear contravention of a court order by the respondents. For avoidance of doubt, the respondents are at liberty to commence fresh and legal disciplinary proceedings

against the applicant in relation to the incident which took place in Ijara in 2009. The respondents will meet the costs of this application.

Dated, signed and delivered at Nairobi this 19th day of April , 2013

W. K. KORIR,

JUDGE