



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 422 OF 2012

REPUBLICAPPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

NICHOLAS OKUMU LUBONDI.....INTERESTED PARTY

EX-PARTE

FRANCIS KIMANI MWAURA

EPHANTUS GITONGA

JAMES NJUGUNA

SAMSON WAMBUGU NGENGI

JUDGEMENT

Francis Kimani Mwaura, Ephantus Gitonga, James Njuguna and Samson Wambugu Ngengi who are the 1st-4th ex-parte applicants are employees of the City Council of Nairobi (the respondent) working in the electrical engineering department as engineers. Nicholas Okumu Lubondi, the interested party is also an employee of the respondent. Through a letter dated 8th April, 2010 the interested party was deployed by the Town Clerk, Mr. Philip Kisia to act as the Assistant City Engineer (Electrical). On 2nd October, 2012 the City Engineer one Mr. S.K. Mburu appointed the 1st ex-parte applicant herein to replace the interested party. That meant that the interested party had been removed from office. The decision of the City Engineer was, however, reversed by the Town Clerk Mr. P T. Odongo through a letter dated 31st October, 2012 in which the deployment of the interested party vide letter dated 8th April, 2010 was reaffirmed.

The applicants subsequently moved to court and obtained leave to commence judicial review proceedings. This court granted leave on 18th December, 2012 and directed the interested party to vacate the office of the Assistant City Engineer (Electrical) with effect from the date of the grant of leave.

Through the notice of motion dated 20th December, 2012 the applicants seek orders as follows:-

1. **THAT an order of Certiorari be and is hereby issued to remove into this Honourable Court**

- and quash/set-aside the decision of the City Council of Nairobi appointing Nicholas Okumu Lubondi as the Assistant City Engineer (Electrical).**
- 2. THAT an order of mandamus be and is hereby issued requiring the City Council of Nairobi to appoint a duly and properly qualified person other than Nicholas Okumu Lubondi to fill the position of the Assistant City Engineer (Electrical).**
 - 3. THAT an order of prohibition be and is hereby issued directed at the City Council of Nairobi prohibiting the said City Council of Nairobi from permitting and/or allowing Nicholas Okumu Lubondi discharge the functions of the Assistant City Engineer (Electrical).**
 - 4. THAT the costs of the Application be provided for.**

In brief, the applicants' case is that the appointment of the interested party to act as an Assistant City Engineer (Electrical) offends the provision of the Engineers Act No. 43 of 2011 and in particular sections 47, 48 and 49. The applicants argue that the appointment of the interested party to the said position is therefore unreasonable, unlawful, illegal, absurd, and deprives the applicants of an opportunity to be appointed to the same position.

The applicants also argue that the decision of the respondent contravenes the provisions of the respondent's scheme of service which provides that for one to be employed as an engineer, he must have a Bachelor of Science degree in engineering from a recognized university.

The respondent and interested party opposed the application through a replying affidavit sworn on 15th January, 2013 by the respondent's Deputy Director of Human Resource Management, Ms Halima Tsala. They argue that the applicants' case is based on a letter issued un-procedurally by the City Engineer since the transfer and deployment of officers falls under the jurisdiction of the Town Clerk. It is further their case that the interested party was appointed to the said position in an acting capacity and the applicants' application is therefore misplaced. They argue that the applicants ought to have sued the Public Service Commission whose duty it is to promote the respondent's employees. They also argue that an application for an order of certiorari must be filed within six months from the date of the decision being challenged. In their view the application before this court therefore breaches the six months rule since the same was filed after over two years from the date the interested party was appointed to act as an Assistant City Engineer (Electrical).

In my view there are two issues for determination by this court. They are whether there is a competent application before this court and whether the respondent acted ultra vires in appointing the interested party to act as an Assistant City Engineer (Electrical).

As to whether there is a competent application before this court, the respondent and interested party submitted that the application before the court is bad in law since it seeks to quash a decision which was passed over two years before the application was filed. They submit that the applicants breached the six months rule which clearly provides that an application for an order of certiorari must be made within six months from the date of the decision being challenged. The applicants argued that the decision they are challenging is the one contained in the letter of P.T. Odongo dated 31st October, 2012. I must state that I addressed this issue comprehensively in my ruling of 18th December, 2012. In the said ruling, I concluded that the application did not breach the six months rule since the decision being challenged is that contained in the letter dated 31st October, 2012. I have nothing else to add on this issue.

The second issue is whether the respondent acted illegally and unlawfully in appointing the interested party to act as an Assistant City Engineer (Electrical). The applicants' argument is two pronged. Firstly, it is argued that the respondent breached the clear provisions of sections 47, 48 and 49 of the Engineers Act which protects the term "engineer" and prohibits engagement in engineering business unless one is a registered engineer. The said provisions also prohibit employers from employing a person offering professional engineering services or works if the person is not registered under the Act.

According to the Engineers Act No. 43 of 2011 for one to be registered as a professional engineer he must be registered as a graduate engineer and must have obtained practical experience as provided under the

Act. A simple interpretation of the Act reveals that one cannot become an engineer unless he is a graduate engineer.

It is not disputed that the interested party does not hold a degree in engineering. From the provisions of the Act, he cannot qualify to be an engineer. There is evidence that he is pursuing a postgraduate degree in building engineering but unless and until he graduates and seeks registration with the Engineers Registration Board, he cannot qualify to be an engineer.

The submission by the applicants on the issue of the qualification of the interested party is however deceptive. It is noted that the Engineers Act which came into operation on 14th September, 2012 repealed the Engineers Registration Act, Cap 530. Under the repealed Act the requirements for qualification to be registered as an engineer were found in Section 11(1) which provided that:-

“11. (1) Subject to this Act, a person shall be entitled, on making an application to the board in the prescribed form and on payment to the board of the prescribed fee, to be registered under this Act and to have his name entered in the register as a registered engineer if he is-

(a) a member of an institution of engineers the membership of which is recognized for the time being by the Board as furnishing a sufficient guarantee of academic knowledge of and practical experience in engineering; or

(b) a person who -

(i) is the holder of a degree, diploma or licence of a university or school of engineering which may be recognized for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering; and

(ii) has had not less than three years' practical experience of such a nature as to satisfy the Board as to his competence to practise as a registered engineer:

Provided that not less than two years of the practical experience required by this subparagraph shall have taken place after obtaining the academic qualification specified in subparagraph (i).”

The repealed Act gave room for registration of holders of diploma certificates as engineers. The interested party holds such a certificate and was indeed registered as a graduate technician engineer by the Engineers Registration Board in 2004. Based on this registration, the interested party was given an electrical installation licence under the Energy Act by the Energy Regulatory Commission. That means the respondent did not breach any law by engaging the interested party. All the actions relating to the interested party took place prior to the enactment of the Engineers Act. The respondent cannot therefore be accused of having breached any law. If the respondent fails to comply with the Engineers Act, then it is the responsibility of the Engineers Registration Board to take the necessary action.

The applicants also submitted that in appointing the interested party to act as an Assistant City Engineer (Electrical) the respondent breached the Scheme of Service for Officers of Local Authorities. The respondent and interested party did not respond to this argument. I do not want to delve into the contents of the scheme of service due to what I am about to say. In my view, the issue as to whether the respondent has employed the wrong person to do a certain job is a matter that falls under the jurisdiction of the Industrial Court as provided by Section 12 of the Industrial Court Act No. 20 of 2011. Such an issue falls into the category of employer–employee disputes and Parliament has provided a dispute resolution mechanism for such disputes. This is not a matter for a judicial review court.

For the reasons stated above the application fails and the same is dismissed with costs to the respondent and interested party.

Dated, signed and delivered at Nairobi this 21st day of May , 2013

W. K. KORIR,

JUDGE