



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISCELLANEOUS APPLICATION 680 OF 2006**

**BETWEEN**

**REPUBLIC**

**AND**

**THE MINISTER FOR**

**LOCAL GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE PERMANENT SECRETARY**

**LOCAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**PATRICK M. KARANJA ..... 3<sup>RD</sup> RESPONDENT**

**PETER B. OCHIENG' ..... 4<sup>TH</sup> RESPONDENT**

***EX-PARTE***

**TAIB ALI TAIB ..... APPLICANT**

**JUDGMENT**

**Introduction**

1. Following the 2002 General elections, the ex-parte applicant was nominated as a Councilor in the Municipal Council of Mombasa. He was subsequently elected mayor of that town where he served until his nomination was revoked on by the 1<sup>st</sup> respondent on 17<sup>th</sup> February 2006.

**The Application**

2. By the Notice of Motion dated 20<sup>th</sup> November 2006 filed pursuant to leave granted by the Court on 20<sup>th</sup> November 2006, the *ex-parte* applicant (“the applicant”) seeks the following orders of judicial review;

(1) An order of certiorari to remove to the Honorable Court and quash the decision to disallow expenditure and the issuance of Notice of Intention to Surcharge contained in the Notice of Intention to Surcharge contained in the Notice of Intention to Surcharge dated 11<sup>th</sup> September 2006 and addressed to the Applicant.

(2) An order of prohibition restraining, stopping or prohibiting the respondents or any officers, authority or body acting for or on their behalf from disallowing or surcharging the sums or allowances or expenditure stated in the Notice of Intention to Surcharge dated 11<sup>th</sup> September 2006 and addressed to the Applicant.

3. The Notice of Motion is supported by the verifying affidavit of the applicant sworn on 27<sup>th</sup> October 2006 and the statutory statement dated 27<sup>th</sup> October 2006.

### **The Applicant's Case**

4. The gravamen of the applicant case is that on 16<sup>th</sup> September 2006, he was served with a "Notice of Intention to Surcharge" reference C/36902/84 dated 11<sup>th</sup> September 2006 from the 3<sup>rd</sup> and 4<sup>th</sup> respondents. That notice made reference to an earlier "Notice of Intention to Surcharge" reference No. C/36902/78 dated 20<sup>th</sup> March 2006.

5. The proceedings to surcharge the applicant was the result of an extraordinary inspection carried out in the Municipal Council of Mombasa pursuant to the provisions of **sections 231 and 245** of the **Local Government Act (Chapter 265 of the Laws of Kenya)**. The 3<sup>rd</sup> and 4<sup>th</sup> respondents, the inspectors, were appointed to carry out the inspection.

6. After the inspection they issued to "Notice of Intention to Surcharge" dated 20<sup>th</sup> March 2006 which stated as follows;

***Pursuant to the Extra Ordinary Inspection carried out in the Municipal council of Mombasa as provided for under Section 231 and 245 of the Local Government Act (Cap 265), we have noted that Kshs.152,245.00 (One Hundred Fifty Two Thousand Two Hundred and Forty five shillings only) was expended for purposes which were irregular or contrary to the said Act. We hereby proceed to disallow the said expenditure and issue a notice of intention to surcharge you for the said amount.***

***A schedule detailing the expenditure hereby disallowed is attached to this notice.***

***You have the opportunity to make representations against the disallowed amount before we effect the surcharge. Such representations should be submitted in writing by the 19<sup>th</sup> day of April 2006 to the undersigned.*** [Emphasis mine]

7. The applicant did not respond to the notice as directed and thereafter the Inspectors issued another notice, "***The Notice of Intention to Surcharge***" dated 11<sup>th</sup> September 2006 which stated;

***Reference is made to our Notice of Intention to Surcharge No. C/36902/78 dated 20<sup>th</sup> March 2006 wherein you were required to make representation against the disallowed amount of Kshs.152,245/= before effecting the surcharge. You have not responded to the said Notice and it is therefore concluded that you agreed with the content.***

***Consequently, we proceed to issue you with a Certificate of Surcharge for Kshs.152,245/=***

***Enclosed please find;***

(1) ***Certificate of Surcharge Ref No C/36902/02 dated 11<sup>th</sup> September 2006.***

(2) *Notice of Surcharge Ref. No. C/36902/83 dated 11<sup>th</sup> September 2006.* [Emphasis mine]

8. The applicant's contention is that he was not given an opportunity to be heard before the certificate of surcharge was issued as he was not served with the first notice. The applicant only received the second notice which referred to the first notice. Ms Aullo, counsel for the applicant, submitted that this was a breach of the rules of natural justice.

### **Respondent's Case**

9. The respondents did not file any replying affidavit to contest the averments in support of the application. The respondent however argued that on the material before the court, the applicant has not made out a case to warrant granting the orders of judicial review.

10. Ms Masaka, counsel for the respondent argued that by acknowledging receipt of the second notice, the applicant thereby had notice of the first notice. In the circumstances, he had the opportunity to contest the surcharge and thus he was not denied natural justice.

11. Counsel further submitted that in any event the evidence before the court was overwhelming and that the inspectors were entitled to surcharge him and the applicant could still contest the surcharge before inspectors based on the second notice.

### **Determination**

12. The only issue for determination in this case is whether the applicant was given an opportunity to be heard before the decision to surcharge him was taken. The right to be heard is a fundamental and basic right and cannot be taken away however hopeless one's case or cured by holding that the decision would be proper or right.

13. The consequences of lack of service subjected the applicant to adverse action. Under the provisions of **section 240(1)** of the *Local Government Act*, the sum certified by the Inspectors must be paid within 30 days of certification or the appeal therefrom being finalized. **Section 240(2)** of the Act entitles the Inspectors to take recovery proceedings in any competent court if the sum certified is not paid.

14. The averment of lack of service of the first notice was not controverted. Once service is contested or denied by the applicant, it was the obligation of the respondents to demonstrate that the notice was duly served on the applicant. In the circumstances I find and hold that the applicant was not served with the notice dated 20<sup>th</sup> March 2006.

15. The first notice, as I have emphasised, was intended to inform the applicant of the right to be heard before the surcharge could be effected. The second notice was issued after a decision was made without giving the applicant an opportunity to contest the charges. The drawing of the certificate of surcharge was conclusive of the fact that a decision has been made in the applicant's absence.

16. The fact that there may be overwhelming evidence against the applicant can never be a reason to skirt or evade the rules of natural justice. The applicant ought to have been given an opportunity to contest the charges against him.

### **Conclusion**

17. In the circumstances, I would call into the High Court the *Notice of Intention to Surcharge* dated 11<sup>th</sup> September 2006 addressed to the applicant and quash the same.

18. Since I have quashed the *Notice of Intention to Surcharge*, it cannot be enforced and it is therefore unnecessary to issue an order of prohibition as prayed. The *Notice of Surcharge* dated 20<sup>th</sup> March 2006 remains in force and the applicant will now have the opportunity to make representations as why he

should not be surcharged and that is why I have not commented in any manner on the merits or otherwise of the case against the applicant.

19. I therefore make the following orders:

**(1) An order of certiorari be and is hereby issued to remove into the High Court and quash the decision to disallow expenditure and issuance of Notice of Intention to Surcharge contained in the Notice of Intention to Surcharge dated 11<sup>th</sup> September 2006 addressed to the *ex-parte* applicant.**

**(2) The respondents shall bear the costs of this application.**

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of May 2012.**

**D.S. MAJANJA**

**JUDGE**

Ms Aullo instructed by Orengo and Company Advocates for the *ex-parte* applicant.

Ms Masaka, Litigation Counsel, instructed by the State Law Office for the respondents