



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. APPLICATION NO. 276 OF 2010

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF
CERTIORARI AND ORDER OF MANDAMUS**

BETWEEN

REPUBLIC.....APPLICANT

=VERSUS=

PRISCILLA METTO.....1ST RESPONDENT
THE DISTRICT COMMISSIONER-NANDI CENTRAL.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Stephen Tum, (hereinafter, “**the applicant**”) has, under sections 8 and 9 of the Law Reform Act and Order LIII rule 3 of the Civil Procedure Rules, moved the court by Notice of Motion dated 4th November, 2010 for two main orders namely that:-

- (a) An Order of Certiorari removing into this Court for the purpose of quashing, the appointment letter dated 5th October, 2010 of the 1st respondent, **Priscillah J. Metto** as Chief - Kiminda Location, Kapsabet Division, Nandi Central District.
- (b) An order of mandamus compelling the 2nd respondent, the District Commissioner to revoke the 2nd appointment letter dated 5th October, 2010 of **Priscillah J. Metto** and confirm the appointment of the applicant, Chief II – Kiminda Location with effect from the date of appointment on 17th March, 2010.

The applicant stated as grounds in support of the application that:-

- (i) The District Commissioner acted illegally in appointing or installing the 1st respondent;
- (i) The 2nd respondent does not have the Legal Powers to execute the appointment of the 1st respondent to public service;
- (ii) The 1st respondent is an employee of the Teachers Service Commission and a Teacher at Mugundoi Primary School;
- (iii) The action of the District Commissioner is *ultra-vires* the Constitution of Kenya;
- (iv) Two Chiefs of the same rank appointed by the same authority cannot lawfully serve the public;
- (v) The 1st respondent cannot execute the duties of Chief whereas the applicant is legally in office;
- (vi) The applicant has not been suspended or dismissed from public service.

The application is supported by a verifying affidavit of the applicant and a statutory statement lodged by his advocates. The gist of the applicant's case is that he was appointed as Chief II after successfully being interviewed on 13th January, 2010. The results of the interview were conveyed to the applicant in a letter dated 17th March, 2010 addressed to him by the 2nd respondent. The applicant has exhibited a copy of the said letter as "ST1". On 20th April, 2010, the same 2nd respondent re-advertised the same post among others and by his letter dated 5th October, 2010, appointed the 1st respondent to the same position. The said letter is annexed as "ST5".

The applicant pleads that he was never suspended or dismissed and is therefore officially on duty with the full knowledge of the 2nd respondent. In those premises, and on advice of counsel, he contends that the action of the 2nd respondent is arbitrary, illegal and *ultra-vires* and prays that the appointment of the 1st respondent by the 2nd respondent vide his letter dated 5th October, 2010, be brought into this court and be quashed; the 1st respondent be barred from executing the duties of Chief – Kiminda Location and his appointment to the same position be confirmed.

The applicant is of the view that the 2nd respondent's appointment of the 1st respondent as the said Chief was instigated by the 1st respondent who lodged a false complaint of impersonation against him which complaint came a cropper when the applicant was discharged on the recommendation of the 3rd respondent. A copy of proceedings in Kapsabet Principal Magistrate's Court Criminal Case No. 1162 of 2010 is exhibited as "ST 3".

The Notice of Motion is opposed on the basis of a replying affidavit of **Ahmed Mohammed Abdullahi**, the District Commissioner, and Nandi Central District, sworn on 2nd December, 2010. It is deponed in the affidavit, *inter alia*, that the said District Commissioner merely communicated various decisions of his Permanent Secretary, among them, the decisions to re-advertise the same post and the appointment of the 1st respondent to the same. He also pleads that there were public complaints against the applicant's appointment including a forgery complaint which has not been concluded. In the premises, according to **Mr. Abdullahi**, the revocation of the appointment of the applicant, the re-advertisement of the same post and the subsequent appointment of the 1st respondent were done bona fide and not arbitrarily, illegally, or

without jurisdiction.

During the oral submissions in court, counsel reiterated the stand-points taken by their clients in their respective pleadings.

I have considered the applicant's motion on notice and the supporting documents. I have also given due consideration to the replying affidavit and the submissions of counsel. Having done so, I take the following view of this matter. I think it is appropriate to first consider the objection raised by the 2nd respondent in his replying affidavit regarding the competence of the applicant's Notice of Motion before turning to the merits or demerits of the application. The objection is expressed in paragraph 3 of the said affidavit as follows:-

“3. That at the outset, I am advised by counsel on record for the respondent and which advice I verily believe to be correct that the said motion is bad in law and misconceived for the reasons that:-

(i) The issues therein contended arise out of matters within the purview of private employment law as opposed to public law.

(ii) Consequently, there are no issues of public law nature to be adjudicated within the realm of judicial review.

(iii) The order described as (b) is untenable as it infringes on the principle of separation of powers and is unenforceable.”

So, has the applicant improperly invoked the court's judicial review jurisdiction? It is trite that an order of certiorari can issue to quash a decision of an inferior tribunal or body if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or where the decision is clearly against the law. On the other hand, an order of mandamus compels a public body or person to perform a duty imposed upon it or him by law where the public body or person has refused to perform the duty. It cannot be gainsaid that the 2nd respondent is a public officer or public office and when he/it recruits Chiefs or other officers, it performs a public duty. The 2nd respondent is therefore clearly amenable to judicial review orders as sought by the applicant.

As already stated, an order of certiorari can issue to quash a decision of an inferior tribunal or body if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or where the decision is clearly against the law. The applicant contends that he was interviewed for the position of Chief II and was ranked first among the applicants. He was therefore duly appointed to the position by the 2nd respondent in the letter dated 17th March, 2010. The letter was signed by A.M. **Abdullahi**, the then District Commissioner of Nandi Central. The letter reads in part as follows:-

**“Stephen Tum,
Thro'
The District Officer,
Kapsabet Division,
Dear Sir,**

RE: APPOINTMENT AS CHIEF II

I am pleased to inform you that you were successful during the interview held on 13th January, 2010 in this office and you are hereby appointed as Chief II for Kiminda Location with effect from the date you report for duty ...”

The applicant then pleads that soon after his appointment, the 1st respondent lodged a false complaint of impersonation against him culminating in his being charged but which charge was eventually withdrawn by the 3rd respondent and he has not been re-charged. The applicant further avers that the 2nd respondent unilaterally re-advertised the same position he had been appointed to and appointed the 1st respondent in the same position. He swears that the 2nd respondent did so arbitrarily, illegally and in excess of his powers. He further pleads that he has to date not been suspended or dismissed and believes therefore that his appointment as Chief of Kiminda Location still stands.

The 2nd respondent does not deny that the applicant was indeed appointed Chief II of Kiminda Location as he contends. He however, pleads that upon presentation of his certificates, it was observed that one certificate for a Diploma in Human Resource Management was suspect and investigations were carried out culminating in the criminal charge alluded to by the applicant. In addition to the suspect Diploma, so the 2nd respondent avers, there were public complaints against the appointment of the applicant – as the said Chief. After consultation, it was recommended that the applicant’s said appointment be revoked and the same position be re-advertised which ended in the appointment of the 1st respondent in the same position. In his view, those decisions were taken lawfully and not arbitrarily, illegally or in excess of his power.

The 2nd respondent does not suggest that any communication leading to the appointment of the 1st respondent was made to the applicant. It is apparent therefore that since the 2nd respondent wrote the letter dated 17th March, 2010, appointing the applicant to the position of Chief II – Kiminda, he has not communicated with him at all regarding the said appointment. The 2nd respondent may have received complaints about the applicant from members of the public and he may even have consulted his Permanent Secretary. He may even have had bona fide grounds for thinking that the applicant is not fit to hold the position of Chief II. But he should have raised his concerns with the applicant and the applicant would have had an opportunity to explain or otherwise respond to those concerns. In those premises, the decision to revoke his appointment and re-advertise the same post was made against the applicant in violation of the principles of natural justice. The applicant was condemned unheard. It is also clear to my mind that the failure by the 2nd respondent to inform the applicant that his appointment had been revoked was not reasonable. The 2nd respondent was not validly and rationally exercising his powers. And as far as the applicant was concerned, the 2nd respondent was acting arbitrarily. In **Republic –vrs- Commissioner of Co-operatives & Another. [CA No. 39 of 2007 (UR)]**, the Court of Appeal stated as follows:-

“It is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone or confirms a power to exercise such arbitrarily or in bad faith.”

In the case of **Kenya National Examinations Council –vrs- Njoroge & Others [CA No. 266 of 1996] (UR)**, the Court of Appeal outlined the scope of judicial review remedies and held that judicial review is solely concerned with the decision making process and not with the merits of the decision itself. So, having found that the 2nd respondent’s decision to re-advertise and subsequently re-appoint the 1st respondent was made in breach of the rules of natural justice and further that the 2nd respondent exercised his powers unreasonably, arbitrarily and irrationally an order of certiorari should and is hereby issued as prayed in paragraph (a) of the Notice of Motion.

How about the order of mandamus. As already observed, such an order compels a public body or person

to perform a duty imposed upon it by law where the public body has refused to perform the duty. The applicant herein seeks an order compelling the 2nd respondent to revoke the appointment of the 1st respondent and confirm his appointment as Chief II – Kiminda Location with effect from the date of appointment on 17th March, 2010. Having granted prayer (a), prayer (b) of the Notice of Motion is not available to the applicant. I say so because as the Letter appointing the 1st respondent is quashed, there would be no appointment to be revoked. In any event, it is not within the province of an order of mandamus to compel the 2nd respondent to act in any particular manner in the exercise of his functions as long as he validly exercises those functions. For the same reasons, an order of mandamus cannot issue compelling the 2nd respondent to confirm the appointment of the applicant as Chief II – Kiminda Location.

It is now upto the 2nd respondent to exercise his powers in accordance with the rules of natural justice and not arbitrarily or irrationally now that the letter appointing the 1st respondent has been quashed.

I award the costs of this Notice of Motion to the applicant to be paid by the 2nd respondent.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF JUNE 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Mwinamo holding brief for Mr. Kitur for the Applicant.

F. AZANGALALA

JUDGE

8/6/2011