REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW CASE NO.188 OF 2011

IN THE MATTER OF AN APPLICATION BY MIGUNA MIGUNA FOR LEAVE FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE SERVICE COMMISSIONS ACT, CAP 185 OF THE LAWS OF KENYA
AND ARTICLES 22, 23, 47, 50, 234 AND 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF MIGUNA MIGUNA
BETWEEN
MIGUNA MIGUNA …………........………………...APPLICANT

VERSUS

THE PERMANENT SECRETARY, OFFICE OF THE PRIME MINISTER……......………..1ST RESPONDENT

THE ATTORNEY GENERAL....……………2ND RESPONDENT

RULING

Miguna Miguna is not an ordinary folk; he was a key aide and the Prime Minister's advisor on Coalition affairs. As we all know, life is full of conundrums. Before his suspension he was described as focal, fearless and sometimes reckless in his approach to issues. He is a man who exhibits mental and emotional feat in his defence of issues and principles which dear to him. He is a man who is likely to ask sharp, propping, confrontational and sometimes sardonic questions. When he was in good books, with the Prime Minister, he came across as the son and the heart of the Prime Minister. He is a man who anticipated every question against the Prime Minister and responded instantly in complete grammatical articles salted down with analogies but sometimes lacked wicked wit. He is going to go down as an absolutely historic figure for his defence and attack on the politicians of this country. He is credibly energetic, thoughtful, and a great speaker. He often writes and publishes authoritative articles which are entertaining, serious, informative and perhaps provocative. To his detractors he is unpleasant, portrays delicate temperament, and lacks humour and diplomacy.

All in all, he is a man who has a relentless sense of fighting back, who writes imminently readable articles

but who appears to be unpredictable and ready to fight. He is not a man who is likely to slip out of his office, struck up conversation in the corridors and in the streets with acquaintances, normal folks and reporters. He is described, as a man living in a mental darkroom. When all is said and done he is a man who attracts a lot of criticism and admiration. He is a brilliant and intelligent advocate who is willing to engage on any party who crosses his line with a lot of vigor and energy. He is a lawyer of 15 years experience as a Barrister, solicitor and mediator in Canada. He is a man who confronts and addresses his mind to issues which violates his rights and that of the public with a lot of passion and dedication. As is normal in life, he is the hunted and aggrieved party in this case. Typically for a lawyer of his caliber, ably represented by **Mr. Nelson Havi** Advocatehe took up a fight against the person who was so dear to him a few months ago. One may say he is not fighting the person he ably protected from real and perceived enemies but he is pursuing a personal right which he feels was infringed by the State.

On 16th day of March 2009, he was appointed by His Excellency the President of the Republic of Kenya as an advisor on coalition affairs. The letter of appointment was written and signed by Ambassador Francis Muthaura Permanent Secretary to the Cabinet and Head of the Public Service. The appointment was for a contract period of three years with effect from the date he was to assume duties. The applicant was attached to the Secretariat for the Cabinet Committee on Coalition coordination in the Office of the Prime Minister. According to the letter, the applicant was ordered to report to the Permanent Secretary Office of the Prime Minister for further instructions. It was also indicated in the said letter that the duties and responsibilities in relation to Coalition Affairs would be communicated by the Permanent secretary Office of the Prime Minister.

Through a letter dated 19th March 2009, the applicant acknowledged receipt of the letter but did not accept the terms as he complained that his terms of service should be equivalent to that of Prof. Kivutha Kibwana who was serving in the same capacity as an Advisor to the President on Coalition Matters. In the said letter, the applicant requested that the terms of his employment be amended and a fresh letter of appointment containing all the terms that Prof. Kivutha Kibwana had been provided with be given to him. He served in the capacity of advisor of the Prime Minister on Coalition affairs until 4th August 2011 when he received a suspension letter signed by the Permanent Secretary Office of the Prime Minister. In the said letter the Permanent secretary stated that he had been instructed by the Prime Minister that the applicant be suspended from performing his duties with immediate effect for gross misconduct which include among others;

(1) Refusal to sign Local Agreement Forms despite several appeals

(2) Harassment, intimidation and use of abusive language to colleagues.

(3) Misrepresenting the office of the Prime Minister

The letter imposed two conditions upon the applicant which are as follows:

(1) While on suspension the applicant will not be entitled to any salary until the case against him is finalized.

(2) The applicant was required to hand over all Government property under his custody to the Secretary's administration.

Being a lawyer, the applicant moved to court complaining that the respondent failed to serve him with a warning letter detailing the particulars of the allegations and according him a fair and adequate opportunity to respond to the allegations. He also complains the suspension letter was issued without warning and it was not humane and dignified manner as it was released or leaked to the media more than 20 hours before it was delivered to him thereby grossly violating his rights and prejudicing the outcome of any such claimed investigations on the allegations leveled against him. He also complains the suspension letter did not provide grounds known to law as it did not disclose specific particulars including

dates, places and identities of aggrieved third parties or the nature of the complaint if any, against him.

It is also the case of the applicant that the 1st respondent is not his appointing authority and isnot his supervisor as he reports directly to the Prime Minister. It is further the case of the applicant that he is a public officer of the rank of a permanent secretary duly appointed by the President of the Republic of Kenya and is entitled to monthly salary, allowances and benefits. He contends that regulation 24 of the Public Service Regulation require that he may be suspended from public office only if convicted of a serious criminal offence or if there are pending proceedings for his dismissal.

Regulation 23 of the Public Service require that in the event of interdiction he will be entitled to not less than half the salary, allowances and benefits pending the outcome of the investigations surrounding any such interdiction. It is therefore the case of the applicant that the decision of the respondent is unconstitutional as it has denied him the right to fair administrative action and due process of the law as guaranteed by the Constitution. He also accuses the applicant of having acted *ultra vires* their jurisdiction as the 1st respondent has no power to suspend him having been appointed by the President of the Republic of Kenya, there was no power under statute and at all to suspend the applicant's salary, allowances and benefits without following due process. He also accuses the 1st and 2nd respondents of having acted unfairly, in bad faith and maliciously in suspending him from public office and withdrawing his salary and other benefits when he had not been charged and convicted of a serious criminal offence. As a result the applicant seeks the following orders;

(1) An order of certiorari be issued removing into the High Court and quashing the entire decision of the 1st and 2nd Respondents made on the 4th day of August, 2011 purporting to suspend the Ex-parte Applicant, suspending the Ex-parte Applicant's salary, allowances and withdrawing benefits due to the Ex-parte Applicant.

(2) An order of prohibition be issued, prohibiting the 1st and 2nd Respondents from suspending the Ex-parte Applicant's salary, allowances and from withdrawing benefits due to the Ex-parte Applicant.

(3) An order of mandamus be issued, directing and compelling the 1st and 2nd Respondents to pay the Ex-parte Applicant's salary, allowances and restore benefits due to the Ex-parte Applicant.

(4) The costs of this application be provided for.

The position of the Respondent is that the applicant's appointment was not by the Public Service C omission but by the President under section 107(4(e) of the repealed constitution. That section 107(4) of the repealed constitution removes from the Public Service Commission the power to exercise disciplinary control over the persons appointed under the said section. That the applicant's appointment was not regulated by the Services Commissions Act Cap 185 and the Regulations made therein pursuant to section 13 of the Act. That that position is confirmed by the letter dated 17th august 2011 by the Public Service Commission of Kenya. The said letter confirms that the applicant was appointed advisor coalition affairs to the Prime Minister as a personal staff and not as a civil servant employed by the Commission.

It is therefore contended that the applicant's reliance on regulations 23 and 24 of the public Service Regulations is wrong and based on a misunderstanding of the law. That the applicant's appointment having been contractual was supposed to be on local agreement terms. As the applicant has refused to sign his local agreement terms form, the respondent was justified and or entitled to suspend him for gross misconduct. It is also contended that the applicant is being paid house allowance, domestic house allowance and his medical cover is still in force. It is also contended that the applicant's failure to sign the local agreement terms is contrary to section 9(2) and (3) of the Employment Act 2007.

Mr. Havi learned counsel for the applicant submitted that the applicant was appointed under section 107(1) of the repealed constitution which vested the power of appointment and exercise of disciplinary control over public officers in the Public Service Commission. He contended the procedure for exercise of the said power is set out in the Public Service Commission Act Cap 185 Laws of Kenya and the Regulations made thereunder.

On the other hand, it was submitted on behalf of the respondents that the appointment of the applicant was for a contract period of three years and that the relationship between him and the respondents was purely contractual. It is also contended by the respondents that the applicant's appointment was not by the Public Service Commission but by the President of the Republic of Kenya. In evidence a letter dated 17th August 2011 from the Public Service Commission is exhibited in support of the claim that the applicant is not a civil servant or a public officer subject to the Public Service Commission.

It is clear that applicant was appointed through a letter dated 6th March 2009 from the Officer of the President indicating that the appointment was made by the President of the Republic of Kenya. The letter of appointment did not originate from the Public Service Commission and the writer of the said letter did not purport to act on behalf of the Public Service Commission. The appointment was correctly and clearly made by the President of the Republic of Kenya. It was for a contract period of three years and the applicant was appointed as an advisor to the Prime Minister on Coalition matters. It is therefore clear in my mind that the applicant was not appointed as a public servant or a civil servant. He was appointed as a personal staff of the Prime Minister and his position was a political position which could be terminated or abolished any time, depending on the circumstances.

The second issue is whether this court has jurisdiction to quash the decision of the respondents made on 4th August 2011 suspending the applicant from his duties and suspending his salary and allowances. It is clear in my mind that the applicant was not given the reasons for his dismissal as per his expectations but the letter had given three grounds for the suspension. According to the applicant he can only be suspended upon a conviction for a serious criminal offence or pending proceedings for his dismissal.

It was submitted by **Mr. Havi** that neither of these two requirements existed at the time of the purported suspension on 4th August 2011. Consequently, he termed the purported suspension as null and void and amenable to be quashed for illegality. It is clear from the letter of suspension that the applicant's suspension was for amongst others his failure to sign the Local Agreement terms forms. It is contended the failure to sign the Local Agreement terms forms meant that the applicant did not accept the offer of appointment dated 6th March 2009 and that his continued service was on a month to month contractual basis.

The second reason for the suspension is due to harassment, intimidation and use of abusive language employed by the applicant. He is also accused of misrepresenting the office of the Prime Minister. It is true all the three grounds are allegations which need to be verified and proved to the expectation of the applicant and to the eyes of a reasonable tribunal. The letter of suspension was followed by a letter dated 4th March 2011 but which was received by the applicant on 17th August 2011 giving details of the allegations contained in the letter of suspension. It is also true the said letter was received by the applicant after the present matter was filed and was pending for determination before court.

The applicant did not answer or address his mind to the issues raised in the said letter. The said letter is claimed to have commenced proceedings for dismissal of the applicant and required his response to the same. It is the case of the applicant that the said letter does not cure the illegality of the decision taken on 4th August 2011 as a conviction of commencement of dismissal proceedings must precede a suspension. It is clear in my mind that both letters were addressed to the applicant and contained serious and grave issues which are irreconcilable as regards the employment of the applicant in the Officer of the Prime Minister. No doubt mistakes, even grave mistakes, will be made in the process of undertaking disciplinary action but such mistakes cannot be used to stop the disciplinary process against applicant.

The clear intention of this application is to stop and/or halt the disciplinary process commenced against

the applicant. If the employment of the applicant in the Officer of the Prime Minister is untenable, for the reasons stated in the two letters then it was the legitimate duty of the respondent to commence disciplinary proceedings in order to determine whether it is possible for the applicant to continue with his employment in the same office. It is for the applicant to justify the continuation of his employment in the Officer of the Prime Minister and answer the charges leveled against him. If the respondent can be stopped from completing the disciplinary process, it can be stopped from undertaking the process as a whole. That cannot be allowed because if it were to be allowed, then there would be no need in having disciplinary mechanism to be subjected to the employees found in contravention of the employment rules and regulations.

Undoubtedly there will be interventions by the court if the process is found to be wanting and such interventions might well become the order of the day if ordinary disciplinary processes is stopped midway without any basis. It is the duty of the court to stop a process started with ulterior motive or one based on outright illegality or one which is defective *ab initio*. In this case, there is a disciplinary process commenced against applicant, which was not concluded and determined. There is no evidence to show that the respondent took unreasonable time to conclude the process. The applicant came to court less than two weeks after the commencement of the process. In conclusion it is my decision that the applicant's appointment was not by the Public Service Commission but by the President of the Republic of Kenya. He was appointed to a political office which was not underpinned by the statute or by Public Service regulations. The applicant cannot expect to be subjected to a process outside his employment contract.

It is also my decision that the respondents had the powers to commence disciplinary mechanism against the applicant. There is no evidence to show that the process is unreasonable and/or illegal. It was an exercise to determine the suitability of the applicant to be an advisor of the Prime Minister. It is not the duty of the court to intervene in the disciplinary process against a personal staff of the Prime Minister. The respondent is yet to carry out full investigations since into the issues that may have caused the applicant's suspension.

In my humble opinion the suspension of an employee for purposes of conducting an investigation relating to the allegations that touch and/or concern the employee is a normal practice in any institution. Given the nature of the applicant's employment and circumstances leading to his suspension, I doubt whether it can be the basis of this court's intervention by way of judicial review except where it is sufficiently proved that the suspension is contrary to statute and public law. There is no evidence that the applicant suffered any loss or substantial injury because he approached court too soon and before answering the allegations leveled against him. I cannot determine the truth or veracity of the said allegation. In any case there is no delay committed by the respondent in determining and finalizing the disciplinary process. The applicant may be exonerated and returned to his position as an advisor of the Prime Minister.

On the other hand, if after finalization of the investigations, it is found that there are sufficient grounds to terminate the applicant's services, he will be entitled to all his terminal benefits.

In conclusion, it is my decision the orders sought cannot be grated for reasons given. I decline to issue the orders sought. However, due to the nature of the applicant's employment, I direct the 1st respondent to commence and conclude the disciplinary process on or before 30th December 2011. In the event, the applicant's services is terminated, he shall be paid all his dues as per the terms of his employment. Each party to bear own costs.

Dated, signed and delivered at Nairobi this 15th day of December 2011.

M. WARSAME
JUDGE