



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Miscellaneous Civil Case 322 of 2008

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF
CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF THE 17TH ANNUAL GENERAL MEETING OF THE INSTITUTE OF CERTIFIED PUBLIC
SECRETARIES OF KENYA (ICPSK) HELD ON 9TH MAY 2008 UNDER THE CERTIFIED PUBLIC SECRETARIES OF
KENYA ACT CHAPTER 534 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF THE RESPONDENT’S ELECTION FOR CHAIRMAN AND COUNCIL MEMBER HELD ON 9TH MAY
2008 AT CPS GOVERNANCE CENTER, NAIROBI**

BETWEEN

REPUBLIC..... APPLICANT

AND

INSTITUTE OF CERTIFIED PUBLIC
SECRETARIES OF KENYA..... RESPONDENT

EX-PARTE: MUNDIA NJERU GETERIA

JUDGMENT

The ex parte Applicant, Mundia Njeru Geteria is a member of the Institute of Certified Public Secretaries of Kenya (Hereinafter referred to as KPSK). By the Notice of Motion dated 11/6/08, he is challenging the election of Council members of KPSK during the 17th KPSK Annual General Meeting (AGM) for being ultra vires the Act and Regulations under which the elections were conducted; are null and void having been made by the Respondent in excess of its powers. The Respondents have opposed the application and the issues that arise for consideration are as follows;

- 1) Whether the application is made out of time;
- 2) Whether the Respondent had power to promulgate the 1995 and 2002 By-Laws.
- 3) Whether the said By-Laws are ultra vires the Act.
- 4) Whether Judicial Review orders can issue.

The Notice of Motion is supported by facts contained in the Statutory Statement and verifying affidavit of the Applicant, both dated 27/5/08, a further affidavit dated 15/9/08, submissions filed in court on 2/10/08 and a list of authorities filed in court on 25/2/09. In opposing the Notice of Motion, Joshua Wambua, the Chief Executive and Secretary of the KPSK swore an affidavit dated 15/8/09 and a list of authorities filed in court on 2/10/08.

Briefly, the facts of this case are that on 12/11/08, KPSK gave notice of its 17th AGM to be held on 9/5/08 (MGNI). By then, Mundia was a Council Member and the Council held its last meeting on 30/4/08 (MGN2). Mundia tendered his conditional resignation under By-Law 28 and questioned the legality of the said By-Law by letter of 7/5/08 (MNG 3). He raised the issue of the legality of the said By-Law in the meeting of 7/5/08 but it was not resolved. That the notice for the AGM indicated that there were 4 vacancies available in the Council but the ballot papers were for 6 vacancies and at the AGM, he again raised the issue of the legality of By-Law 28 but it was again ignored on the ground that his resignation from the Council had been accepted though it was factually incorrect he had offered to record his conditional resignation but it was rejected. He further deponed that under S 37 of the Act, it is only the members who can formulate, publish and bring into force By-Laws or KPSK should have notified the Minister to do so. He denied having acquiesced to the legality of the by-laws by taking part in opposing the Notice of Motion. Wambua deponed that under S 37 of the Act, the Minister is empowered to make Regulations prescribing anything required to be done under the Act. That S 7 empowers the Institute to perform certain functions and perform the said functions the institute tabled and adopted their first By-laws on 13/6/1995 at an AGM and they were reviewed at another meeting held on 14.3.02 which included provisions on election of Chairman and Council members. Minutes are Annex B. Mundia was said to have been present at the meeting of 14/3/02. Further amendment to the Regulations was made on 9/5/03 (D) and the Institute has been operating under the said By-laws. Mundia was elected a Council member at the 11th AGM, and later on 5/5/06 at the 15th AGM when KPSK issued the notice of 12/11/2005 for convening of the 17th AGM to be held on 9/5/08. Four council vacancies were declared. On 7/5/08, Mundia presented his nomination papers to the secretary seeking to be lected as Chairman of the Institute but termed it as a conditional resignation (E). That the Respondent sent out an erroneous communication that the vacancies were 4 yet they were 6 and the Chairman informed the members why the change in the number of vacancies. That is when the Applicant raised objection that if he was not elected, he should retain his Council position till 2009 and that the By-laws were illegal and inconsistent with the Act. After deliberations, it was decided that the Applicant had validly resigned from the Council and was a candidate for chairmanship.

Whether the application is brought out of time; under Order 53 Rule 2 Civil Procedure Rules, an application seeking orders of certiorari

to quash a decision should be brought within 6 months. Order 53 rule 2 reads

“Leave shall not be granted to apply for an order of certiorari to remove any judgment. Order, decree, conviction or other proceedings for the purposes of its being quashed unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act, and when the proceeding is subject to appeal and time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

The above provision is made pursuant to S 9 (3) of the Law Reform Act and is similar.

It is KPSK’s contention that since the By-laws were made in 1995 and reviewed in 2002, the time for applying to have them quashed is long overdue and the Respondent relied on the case of *AKU V SPECIAL DISTRICT COMMISSIONER KISUMU (1989) KLR 163* where the court held that section 9 (3) of the Law Reform Act was clear that no leave would be granted unless the application for leave is made inside six months after the date of judgment. In *AGAKHAN EDUCATION SERVICE KENYA V REP (2004) I EA I*, the Court of Appeal reiterated the above position that an order of certiorari could only be sought within 6 months. In that case the challenge was on the decision of Ministry of Education. On the other hand Munda made reliance on the case of *REP V THE JUDICIAL COMMISSIONER OF INQUIRY INTO THE GOLDENBERG AFFAIR* and others ex parte *JACKSON MWALULU MISC. APP.1279/04* where Nyamu, Ibrahim and Makhandia held that the 6 months limitation only applies to formal judgments, orders, decrees, convictions or other proceedings from an inferior court or Tribunal but not any other decision by a tribunal or other body and does not apply to decisions that are nullities. The court observed that Order 53 rule 2 Civil Procedure Rules did not include anything covered by the principle of ultra vires or nullities or decisions made without jurisdiction and I am inclined to agree with the latter decision. Order 53 Rule 2 Civil Procedure Rules must apply to the matters listed hereinunder but a decision which is a nullity ‘ab initio’ is no decision at all and an order of certiorari can lie at any time. In the circumstances, the By-laws/Regulations can not be said to be challenged outside the time allowed but it is upon the Applicant to demonstrate that they are nullities or made without jurisdiction. This court would have jurisdiction to hear and determine the matter.

Ultra vires; S 37 of the Certified Public Secretaries Act of Kenya (CPSAK) mandates the Minister to make regulations prescribing anything or for purposes of giving effect to the Act. It reads;

“The Minister may make regulations prescribing anything which is required to be or which may be prescribed under the Act, and for carrying out or giving effect to this Act.”

From the pleadings on record, the Minister in charge has not promulgated any Regulations under the above section. But the Respondent went ahead under S 7 of the Act and promulgated the impugned by-laws which are conducive to the performance of its functions specified under the said section. The question is whether KPSK had the power to promulgate the by-laws. S 7 stipulates;

“The functions of the Institute shall be –

- a) **To promote standards of professional competence and practice against members of the Institute;**
- b) **To promote research into the subjects of Secretarial practices and finance and related matters and the publication of books, periodicals, journals and articles in connection therewith;**
- c) **To promote the international recognition of the Institute;**
- d) **To advise the Examinations’ Board on matters relating to examination standards and policies;**
- e) **To carry out any other functions prescribed for it under any of the powers of this Act or under any other written law and**
- f) **To do anything incidental or conducive to the performance of the functions specified under this section.”**

I find nothing in the above provision to suggest that the KPSK had power to make the Regulations. The power to promulgate the Regulations is specifically donated to the Minister. If the intention of the legislature was to donate those powers to the Respondent, that should have been specified. Besides, subsidiary legislation has to be gazetted.

S.27 the Interpretation and General provisions Act, Chapter 2 Laws of Kenya provides for gazettelement of all subsidiary legislation. It reads

“S 27 (1) All Subsidiary legislation shall; unless it is otherwise expressly provided in written law, be published in a Gazette and shall come into operation on that day, or that day subject to annulment where applicable. (2)....”

There is no evidence that the impugned Regulations were ever gazetted as required by law. It is not known when they came into force. I will find and hold that KPSK had no power to promulgate any Regulations and whatever is held out as Regulations has not been gazetted and has no force of law. If the Minister had delayed in the promulgation of the Rules the best that KPSK could do is prepare the Regulations, present them to the Minister for approval and gazettelement. As observed by the Applicant, the By-laws purportedly promulgated by KPSK do not even indicate what provisions of law empowered KPSK to make the By-laws and they lack the force of law.

It is Munda’s contention that By-laws 27 – 38 are inconsistent and in conflict with section 9 and the 2nd schedule of the Act. Section 9 of the Act stipulates;

“9 (1) The Council shall consist of

- (a) **The Chairman**
- (b) **Nine members of the Institute elected in the manner provided in paragraph 1 of the second schedule; and**
- (c) **One member appointed pursuant to subsection (2).**

(2) **The Minister may appoint one member of the Council.”**

The second schedule to the Act generally provides for the Council membership, how the Council members shall be elected, their removal, the holding of Annual General Meetings, office of the Vice Chairman and council meetings and the quorum. Paras 27 to 38 of the By-laws promulgated by KPSK deals with Council members, their election, election of the Chairman, and the procedure at the Annual General Meetings. I do agree with Mundia that Paras 27 to 38 of the By-laws is a duplication of what is contained in the 2nd schedule. The By-laws purport to provide for Council Meetings and elections. There are already provisions relating to the Council in the Act and KPSK's promulgation of other Regulations to apply in place of the Act and 2nd schedule is ultra vires the Act. Having found that the Regulations were made without jurisdiction and are ultra vires the Act, there is no need for this court to go into the alleged breaches of the Regulations in relation to the elections of the meeting held on 9/8/09. Since they were held in accordance with the Regulations, it follows that they are a nullity ab initio.

Whether the Judicial Review orders can issue:-The impugned By-laws have been in use by KPSK since 1995 when they were promulgated. Mundia does not deny that fact. He has been a beneficiary of the said Regulations since he has served as a Council Member since their promulgation. He was elected at the 11th General Meeting of 10/5/02 after attending the meeting of 14/3/02 where the By-laws were first reviewed to include provisions on the election of the Chairman and Council Members. Mundia was elected Council Member at the 11th General Meeting under the said By-laws, and he offered himself for re-election at the 14th AGM, did not succeed and again offered himself for election 5/5/06 when he was elected Council Member. He also took part in the elections held on 9/5/08 which were conducted under the said By-laws. By then, he had formed the view that the By-laws were null and void. Since he knew that fact, he should not have submitted to vie for a post under the said By-laws that were ultra vires the Act. I do agree that the conduct of a party seeking Judicial Review orders is an important fact to consider. One who approaches this court for Judicial Review orders must do so with clean hands and in utmost good faith. It seems Mundia only challenged the By-laws when he did not succeed at the elections for the post of Chairman. The question is whether he would have challenged the By-laws had he won the post. I do agree with KPSK that the Applicant is approbating and reprobating and should not be entitled to Judicial Review orders. In **R V KENYA REVENUE AUTHORITY ex parte ABERDARE FREIGHT SERVICES LTD HDWC App. 9410/04**, the court found the Applicant to be guilty of both legal and factual misrepresentations and the court held that the Applicant's conduct disentitled it to the orders of Judicial Review which are discretionary in nature. It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in **EVANS V BARTLAM (1937) 2 ALL ER 649** at page 652 where Lord Russel of Killowen said;

“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit.”

Again in **BANQUE DE MOSCOU V KINDERSLEY (1950) 2 ALL EER 549** Sir Evershed said of such conduct;

“This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold.”

In **ABEDARE FREIGHT** (supra) J. Nyamu held that an applicant could not be allowed to approbate and reprobate at the same time. The Court of Appeal in **BEHAN & OKERO ADVOCATES V NATIONAL BANK OF KENYA (2007)** was of the same view that a party cannot be allowed to blow hot and cold at the same time.

In the instant case, Mundia has only challenged these By-laws which he has been benefiting from because he lost the elections. That is evidence of bad faith and he cannot be entitled to the discretionary orders of Judicial Review because his conduct amounts to an abuse of the court process.

In conclusion, this court has found that KPSK had no powers to promulgate the By-laws and anything flowing from the Regulations it purported to promulgate is a nullity. Prayer 7 of the Notice of Motion is therefore granted and an order of certiorari is issued to quash the said impugned Regulations or By-laws. Mundia is not entitled to the other orders sought for reasons given in this judgment. This court directs KPSK to comply with the law. I direct that each party bears their own costs.

Dated and delivered at Nairobi this 12th day of February, 2010

R.P.V. WENDOH
JUDGE

In Presence of:

Mr. Kibe for Applicant

M/s Mukangi for Respondent, holding brief for Mr. Chacha

Muturi: Court Clerk