



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISCELLANEOUS APPLICATION 499 OF 2009

THE REPUBLIC.....APPLICANT

VERSUS

1. THE ATTORNEY GENERAL

2. SAMWEL KAZUNGU KAMBI

3. C.D.F. BOARD

4. MINISTER FOR PLANNING & NATIONAL DEVELOPMENTS

.....RESPONDENTS

AND

EX-PARTE:

- | | | |
|--------------------------------------|----------|------------------|
| 1. ELIAS KALAMA TSORI | - | CHAIRMAN |
| 2. RAPHAEL KATANA | - | TREASURER |
| 3. DUNCAN MASAI NDEGWA | - | SECRETARY |
| 4. JOHNSON KAHASO CHARO | - | MEMBER |
| 5. KUPATA ELIJA MVOI | - | MEMBER |
| 6. NANCY JUMWA | - | MEMBER |
| 7. JANET MWAJOTO | - | MEMBER |
| 8. DANIEL R. KALAMA | - | MEMBER |
| 9. SULEIMAN FONDO | - | MEMBER |
| 10. FRANCIS KARISA | - | MEMBER |
| 11. CLL. ALPHONSE MWAYAA | - | MEMBER |
| 12. CLL. DARRINGTON MWACHINGA | - | MEMBER |
| 13. BENYOKA MKAMBA | - | MEMBER |

JUDGMENT

On 22nd October, 2009, I granted **Elias Kalama Tsori, Raphael Katana, Duncan Masai Ndegwa, Johnson Kahaso Charo, Kupata Elija Mvoi, Nancy Jumwa, Janet Mwjoto, Daniel R. Kalama, Suleimani Fondo, Francis Karisa, Cll. Alphonse Mwayaa, Cll. Darrington Mwachinga and Benyoka Mkamba** (hereinafter “*the applicants*”) leave to apply for orders of **mandamus, certiorari** and

prohibition to bring into this court for the purpose of examining and satisfying itself of the propriety, regularity and legality of the orders made by the Honourable M.P. for Kaloleni Constituency, Hon. Samwel Kazungu Kambi (hereinafter “*the 1st respondent*”) for dissolving, disbanding, annulling and re-appointing/re-constituting the C.D.F.C. for Kaloleni Constituency.

Pursuant to the said leave, the applicants lodged this Notice of Motion on 30th October, 2009 seeking the following orders:-

- (i) An order of prohibition prohibiting the 1st respondent from reconstituting and or replacing and/or conducting the C.D.F. business pending hearing and determination of this application or further orders of the court.**
- (ii) An order of mandamus/certiorari directing the order dissolving, annulling the C.D.F.C. for Kaloleni Constituency be moved to the court for the purpose of determining its proprietary, regularity, legality and quashing the same or declaring the same null and void *abnito*.**

The main grounds for the application are that if the respondent proceeds to re-appoint and reconstitute/replace and reconvene the C.D.F. Committee for Kaloleni, the applicants stand to suffer irreparable loss and damage and the application may be rendered nugatory; that the action of dissolving the C.D.F. Committee for the said constituency was without the sanction of the Law and contrary to the rules of Natural Justice and that the said decision of the 1st respondent was whimsical and capricious. The Notice of Motion is supported by an affidavit sworn by the 1st applicant, Elias Kalama Tsori, a statutory statement of facts and a verifying affidavit sworn by the same applicant. In the supporting affidavit it is deponed, *inter alia*, that on 14th October, 2009, the 1st respondent announced that he had disbanded, annulled or dissolved the C.D.F.C. for Kaloleni Constituency for misuse of funds meant for a water project in the constituency, a fact which was not true. It is also deponed that whereas the 1st respondent has power, under the C.D.F. Act to appoint C.D.F.C. members, he has no power to disband, dissolve, annul or replace and/or reconstitute the C.D.F.C. and that even if he had such power, the rules of Natural Justice would have to be followed which rules were breached by the 1st respondent. Annexed to the said affidavit are various exhibits including a publication in a Newspaper of 17th October, 2009 titled “*C.D.F. team under probe over deal.*”

The application is opposed by the 1st respondent who has filed a replying affidavit in opposition to the Notice of Motion. He has deposed, *inter alia*, that under the C.D.F. Act, he has an overall supervisory role over C.D.F. projects in his Constituency and in that regard he received complaints from members of the public regarding poor implementation of the said water project. He visited the project site and confirmed those complaints and advised the C.D.F. committee not to pay the contractor which advice was

ignored and the contractor was paid before the project was completed. The respondent has further deposed that he lodged a complaint with the police who are still investigating the matter. He swears that he then consulted the National C.D.F. Board Secretariat who directed that the C.D.F. committee members step aside from office temporarily to facilitate forensic and proper investigations of the said C.D.F.C. members. The 1st respondent acknowledges that he suspended the C.D.F. committee honestly believing that he was protecting the public from clear misappropriation of Public Funds. Annexed to the replying affidavit are copies of two letters: one to the National C.D.F. Board from the 1st respondent and another from the said Board to the 1st respondent. The latter reads in part as follows:-

“We are reliably informed that the previous C.D.F.C. is being investigated in relation to their management of C.D.F. funds. We are therefore accepting the appointment of the new C.D.F.C. members as a temporary measure awaiting the outcome of the investigations. Please note that the previous committee members will be reinstated in the event that they are cleared after the said investigations.”

The 4th respondent, the Minister for Planning & National Development has also opposed the Notice of Motion on the basis of Grounds of Opposition filed by the office of the Attorney General who is also a nominal respondent in the Notice of Motion.

When the application came up before me for hearing on 22nd April, 2010, counsel agreed to file written submissions which submissions were duly in place by the 23rd June, 2010. I have considered the application, the pleadings filed and the submissions of counsel. I have also given due consideration to the authorities cited to me. Having done so, I take the following view of the matter. I think it is appropriate to first consider the objections raised by the Learned Litigation counsel before turning to the merits or demerits of the application. The first objection is that the Notice of Motion offends the provisions of Order LIII Rule 1 (2) of the Civil Procedure Rules as the facts relied upon are not in the verifying affidavit but in a supporting affidavit. Reliance was placed on the Court of Appeal decision in **Kenya Revenue Authority – v – Owaki [2000] LLR 3476 (CAK)** where it was held, *inter alia*, as follows:-

“The application for leave was grounded on the matters set out in the statement accompanying the application and in the verifying affidavit. The statement is required by Rule 1 (2) of Order LIII of the Civil Procedure Rules to set out the name and description of the applicant, the relief sought and the grounds on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case.”

The facts in this case are not in the statutory statement as were the facts in the Owaki case but are in a “*supporting affidavit*”. The supporting affidavit is additional to the verifying affidavit which itself does not have the facts relied upon. The position in this case is therefore different from the position obtaining in the Owaki case. It cannot be said that the facts in the supporting affidavit are inadmissible as the only defect in the supporting affidavit is the failure to describe it as a verifying affidavit. I am therefore bound to consider the facts in the supporting affidavit as the same in my view amounts to a

verifying affidavit. There is after all no limit to the affidavits that may verify the facts.

The second objection is that the applicants seek to quash an order which is non-existing. This objection, in my view, has not been well taken, given the admission of the 1st respondent that he indeed suspended the applicants as members of the Kaloleni Constituency Development Fund Committee.

I turn now to the merits or demerits of the Notice of Motion. The applicants seek judicial review orders of certiorari, mandamus and prohibition. With regard to the prayer for an order of prohibition, it is plain that the same is not available to the applicants. They seek an order prohibiting the 1st respondent from reconstituting and/or replacing and or conducting the C.D.F. business pending hearing and determination of this Notice of Motion or further orders of this court. As the prayer suggests, the applicants appreciate that the order of prohibition looks to the future. In that regard annexure “SKK II” annexed to the replying affidavit of the 1st respondent is pertinent. I have already referred to the said annexure. It is a letter dated 27th October, 2009 from the Constituencies Development Fund Board Secretariat addressed to the 1st respondent. The letter states, in part, as follows:-

“We are therefore accepting the appointment of the new C.D.F.C. members as a temporary measure awaiting the outcome of the investigations.....”

So, it is clear that what the applicants seek to prohibit has already occurred. The 1st respondent has already re-constituted a new C.D.F.C. for Kaloleni Constituency albeit temporarily. That act cannot be prohibited since it has already happened.

How about the prayers for certiorari and mandamus?

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. The applicants contend that they were suspended or replaced or otherwise sent packing without being given an opportunity of being heard. They however, acknowledge that the 1st respondent has, under the C.D.F. Act, power to appoint members under known criteria but that he has no power to suspend, dismiss or otherwise terminate the services of any member and even if he had such power he can only exercise the same in accordance with the rules of Natural Justice. In principle, the applicants cannot be faulted. However, the 1st respondent has alleged the commission of a criminal offence which offence, he says he has reported to the police who are carrying out investigations. The applicants indeed admit that they have recorded statements with the police but proclaim their innocence. If the 1st respondent suspected the commission of an offence by the applicants, he had a duty, like any other responsible citizen, to report to the relevant authorities which in this case, happen to be the police. That duty is imposed on all citizens, including the applicants. The applicants themselves had the same duty if they suspected the commission of a crime by one of their number. The duty to report suspected criminal conduct or act does not entail giving the suspect a notice to show cause. Having suspected the applicants with the commission of an offence which would affect

the core business of the C.D.F. Committee, the 1st respondent swears that he suspended the applicants based on his “*conviction and desire to protect the public from what is clearly misappropriation of public funds*”. Who would have done so if indeed the applicants had committed an offence?

The material availed to the court does not show that the 1st applicant’s decision was made without or in excess of jurisdiction or that the rules of natural justice were not complied with. After all, the applicants have the guarantee from the Constituencies Development Fund Board secretariat that “*they will be reinstated in the event that they are cleared after the said investigations*”. These facts distinguish this case from the cases cited by the applicants.

How about the prayer for an order of mandamus? 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 is apparent that the applicants in their Notice of Motion do not seek any order compelling any of the respondents to perform any duty imposed upon them by Law. That being the position the applicants cannot be given what they have not asked for.

In the end the applicants have not persuaded me that the reliefs of certiorari, prohibition and mandamus are available to them. Their Notice of Motion is therefore dismissed with costs.

It is so ordered.

DATED AND DELIVERD AT MOMBASA THIS 25TH DAY OF AUGUST 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Arome holding brief for Mr. Bosire for the Plaintiff and Mr. Ondari holding brief for Mr. Njoroge for the Respondents.

F. AZANGALALA

JUDGE

25TH AUGUST 2010