



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Miscellaneous Civil Application 84 of 2009

IN THE MATTER OF AN APPLICATION BY PATRICK KASYUKO YULU FOR
LEAVE TO APPLY FOR AN ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF DECISION OF COUNTY COUNCIL OF MASAKU, CLERK TO COUNCIL

AND

IN THE MATTER OF THE DECISION BY LOCAL GOVERNMENT INSPECTORS OFFICE OF
THE DEPUTY PRIME MINISTER AND MINISTRY OF LOCAL GOVERNMENT

RULING

1. The Chamber Summons dated 27.3.2009 is premised on Order LIII Rule 1(2) of the Civil Procedure Rules and what is sought is leave to apply for orders of certiorari and prohibition to quash and prohibit the decision of the Clerk, County Council of Masaku to dismiss the Applicant from service and notice of intention to surcharge him in the sum of KShs. 159,220/= allegedly expended for irregular purposes. The leave, it is prayed, should also operate as a stay of the decision to surcharge the Applicant and the intended action to be prohibited until the determination of the issues in contest.
2. I have perused the Statement of Facts and the Verifying Affidavit accompanying the Application for leave and I gather that the Applicant had been employed as a Clerical Officer by the County Council of Masaku and on 24.10.2008, the Clerk to the Council wrote to him and expressed concern that miscellaneous receipt books numbers 8901 – 8950 and 1400-1450 which were in the Applicant's custody had not been surrendered for accountability purposes and that in spite of requests to do so, the Applicant had neither surrendered the receipt books nor the monies collected using them. The Applicant in the said letter, dated 24.10.2008 was given an opportunity to respond to the concern raised and act on it before close of business on 27.10.2008.
3. On 27.10.2008, the Applicant responded to the letter of 24.10.2008 and stated inter - alia that he had surrendered the receipt books to one Teresia Muinde, Revenue Officer together with monies that he had collected using the receipt book number 14001 – 14050. That since doing so “*between 8th August 2008 and 15th August 2008*” he had not seen the receipt books again. That as regards receipts book No. 8901 – 8950, he had returned the same to a deceased Internal auditor, Mrs Muoki in 2006 and that between 2006 and 2007 the monies unaccounted for in those receipt books were deducted from his salary and therefore the issue was no longer live.
4. On 3.11.2008 the County Clerk wrote to the Applicant and suspended him from his duties for reasons that it was unexplained how much money had been collected using receipts numbers 8901-8950 and he was informed that the matter would be investigated further. That as regards receipts numbers. 14001- 14050 since the same remained unsurrendered together with whatever funds were collected using them, the Applicant was offered an opportunity to explain his conduct while he was under suspension.
5. On 4.11.2008, Local Government Inspectors gave notice of intention to surcharge the Applicant under powers conferred by Section 231(1) and 245(1) of the Local Government Act. The surcharge arose from unsurrendered cash

collection from receipt books numbers 14001-14050, totalling Kshs. 85,500/=, cash from cheque No. 000062 - Kshs. 35,400/= and unsurrendered/ outstanding imprest totalling Kshs. 38,320/= all making a grand total of Kshs. 159,220/=.

6. By his letter dated 14.11.2008, the Applicant challenged the surcharge and explained that he had accounted for all the monies he had received to Ms Teresia Muinde, Revenue Officer and that the Country Treasurer was aware of the fact. Instead of being given a response, he stated that by letter dated 19.2.2009 he was dismissed from service and he was given 42 days to appeal to the Public Service Commission.

7. The specific grounds on which the Application is brought are;

a) "That the suspension and subsequent dismissal of the Applicant through Respondent's letters of 3.11.2008 and 19.2.2008 is contrary to the Provisions of the Public Service Commission (Local Authority Officers) Regulations, 207 in that Applicant was never convicted with any criminal offence or committed any serious offence or any at all per the applied Regulation and as such was suspended and dismissed contrary to the provisions of Law, and as such the suspension and dismissal is unlawful and unfair.

b) That the investigations was carried out by same local authority officers who had directly or indirectly dealt with the Applicant's case and there was no impartiality as per provisions of Regulations 35(6) of Public Service Commission (Local Authority Officers) Regulation, 2007 and the Council acted ultravires the Regulation.

c) That the Applicant was not fairly treated and the error attributed to the Applicant was not considered nor was there proper investigations as all officers who had received money and books from the Applicant and who are known to the Respondents through Applicant's reply were not summoned the Applicant given opportunity to cross-examine them and as such the investigation was and is incomplete, unfair and contrary to the rules and natural justice as the Inspectors are yet to respond to the Applicant's reply as requested.

d) That the Applicant was not afforded an opportunity to explain anything when he appeared before the Investigators and County Council Officers and the Rule of Natural Justice were breached.

e) That County Council Clerk and Local Government Inspectors investigated the Applicant at the same time but separately over the same subject matter and before full decision was reached by both parties, the County Council Clerk dismissed the Applicant instead of awaiting for the findings of Local Government Inspectors and failure to wait for such outcome has resulted in applicant be condemned unfairly and on incomplete investigation and contrary to the Law relied upon.

f) The Applicant's explanation that he acted reasonably and in belief that his action was authorized was authorized by law was not considered and his action was a good ground to exculpate the Applicant.

g) That the punishment imposed on the applicant is contrary to the Law and more so as it is based on Criminal conviction which do not exist as against the applicant and as per Regulations relied upon.

8. I have considered the Application before me and my view is as follows:-

9. Firstly, I am of the clear mind that the Applicant should exhaust all the lawfull channels available to him before undertaking the present exercise. I say this because he was given 42 days to file his appeal to the Public Service Commission, and it is unclear if he has done that. This court cannot properly find whether he was denied a chance to be heard before he exhausts that channel. In any event I am not convinced that before his dismissal he was not heard. I have carefully reproduced the correspondence exchanged with the Clerk to Council and this court cannot look to the merits of the eventual decision but the process thereto. At each stage, he was clearly given a hearing and I insist that the appellate process has not been exhausted.

10. Secondly, the dismissal letter dated 19.2.2009 was copied to the Local Government Workers Union which I am aware has its own way within the law of dealing with aggrieved members. Why has the Applicant not pursued that avenue where again he has another chance to be heard? Again this court should not interfere or intervene until that process has been exhausted.

11. Thirdly, the Applicant is aware of the Public Service Commission (Local Authority Officers) Regulations and he has generously referred to Regulation 25(1) and 35(6) thereof. That is a good reason why he should take his appeal forth to the Public Service Commission and pursue rights and processes known to those Regulations before seeking the intervention of this Court.

12. What I am in essence saying is that the Applicant explained his conduct and concluded that no monies were lost in

his hands. His superiors thought otherwise and there are other avenues that he should pursue and his present application is wholly premature and the court cannot on the basis of the material before it either find a reason to state that rules of natural justice have been breached or that there is reason to prohibit the Council or any other body from performing its administrative functions.

13. I see no merit in the Application for leave and will instead

dismiss it. No order as to costs.

14. Orders accordingly.

Dated at **Machakos** this **28th** day of **May 2009**.

Isaac Lenaola

Judge

In the presence of; Mr Makau for Applicant

Isaac Lenaola

Judge