



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Misc Civ Appli 97 of 2003

REPUBLIC APPLICANT

VERSUS

ELDORET WATER AND SANITATION COMPANY LIMITED RESPONDENT

EX-PARTE: BOOKER ONYANGO

MESHACK OMONDI AGENG'O

JOHN KWAMBAI ROTICH

JUDGEMENT

This is an application dated 18th April, 2003 by the Applicants for Judicial Review Orders under the provisions of Order 53 Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. The application seeks the following orders:-

- (a) That the Honourable Court do review and quash the Respondent's proceedings and decision dated 21st and 23rd January, 2003.
- (b) That the Honourable Court do issue an order of prohibition against the Respondent to prohibit the Respondent's officers from further harassment and intimidation of the Applicants with regard to the subject matter of this application.
- (c) That the Honourable Court do issue an order of mandamus to compel the Respondent to reinstate the Applicants to their former jobs and to pay them their salary arrears and other lawful benefits due to the Applicants forthwith and to continue paying salaries and benefits regularly thereafter.
- (d) The Court do make such other orders.

The background to this application is that through an

Agency Agreement entered into on 5th June, 2000 between the Municipal Council of Eldoret (hereinafter referred to as "the Council") on the one part and the Eldoret Water and Sanitation Company Limited (hereinafter referred to as "the Company") on the other party, the Council transferred all of its powers and functions as a water undertaker in respect of water and sanitation services under the Local Government Act Cap 265 and the Water Act, Cap 372 (now repealed), Laws of Kenya and in respect of Eldoret

Municipality, to the Company. It was also agreed under Clause 9 in respect of the staff matters as follows:-

“9. STAFF MATTERS

The Company shall absorb all water and sewerage Department staff and shall arrange for remunerative incentive packages for the absorbed staff, shall give the said staff the liberty to join a Workers’ Union of their own choice.”

The three Applicants being employees of the Council were

under the said Agreement duly transferred and absorbed by the Company as its members of staff to discharge the duties and functions they previously carried out in the Water and Sanitation Department of the Council.

By a letter dated 9th October, 2002, the Respondent suspended the 1st Applicant from employment pending disciplinary proceedings for alleged misconduct. The 2nd Respondent was similarly suspended on 30th October, 2002. The 3rd Respondent had been suspended earlier on 30th September, 2002.

The Disciplinary Proceedings were carried out on 3rd and 4th October, 2002. At a Board of Director’s meeting of the Company, held on 19th December, 2002 the Company resolved to terminate the services of the three (3) Applicants on grounds of gross misconduct, loss of trust and confidence. The Company thereafter sent to the Applicants letters of termination of their employment respectively on 23rd January, 2003.

The Applicants being aggrieved with the said decisions filed the present application for judicial review orders. The grounds set out in the Statutory Statement which is the principle pleading are as follows:-

1. That the principles of natural justice were not respected by the Respondent.
2. The decision to suspend and later terminate the Applicants’ services was made in bad faith and with ulterior motives.
3. The Respondent lacked capacity to terminate and/or discipline the Applicants who are employees of the Municipal Council of Eldoret.
4. There was no fair hearing accorded to the Applicants by the Respondents at all levels.
5. The Respondent had no jurisdiction whatsoever to suspend and dismiss the Applicants.
6. The applicants are civil servants seconded and/or transferred to the Respondent.
7. The Respondent is not a legal person.

In opposition to the application, the Respondent filed a

Replying Affidavit sworn by the Managing Director of the Company and also took out a Notice of Preliminary Objection dated 5th June, 2003. At the hearing it was agreed that the grounds or points of law be raised and argued in response to the application. The grounds set out therein are that:-

1. The Respondent is a Private Limited Company against which orders of certiorari, prohibition and mandamus do not lie.
2. The Respondent’s decision, resolutions and actions are not open to challenge by prerogative orders.

3. Employment contracts are governed by a specific legal regime and do not invite prerogative orders.
4. That the whole application in spirit and substance is an abuse of the due Court process.
5. The application offends the provisions of Order LIII Rule 7 of the Civil Procedure Rules and should be struck out.

I have considered the application, the Verifying Affidavit,

Statutory Statement, the Replying Affidavit and grounds in the Notice of Preliminary Objection. I have also considered the submissions and authorities presented by Counsel.

The questions that I think this court ought to consider and determine are five-fold:-

- 1(a) Whether the respondent is a Private Limited company which is not amenable to judicial review orders in which case the court would have no jurisdiction, or
- (b) Whether the Respondent is a public body which is amenable to supervision and judicial review orders in which case the court would have jurisdiction.
2. If the answer to the second question is in the affirmative, WHETHER the disputes between the Applicants and the Respondent are of a public law nature or private law nature i.e. employment of contract and termination thereof.
3. Whether the Applicants are entitled to any of the remedies sought herein.
4. Who should pay the costs of the application.

I will deal with each question in seriatim:-

1(a) & (b) Is the Respondent a Private Limited Company which is not amenable to judicial review process or orders? Does the Court have jurisdiction in such a case?

The Respondent, the Eldoret Water and Sanitation Company Limited, produced copies of its Certificate of Incorporation and the Memorandum and Articles of Association. The Company was incorporated on 29th October, 1997 under the Companies Act. In the Memorandum and Articles of shares the Company is said to be a “**Private Company limited by shares**”.

The Company had four (4) subscribers named as follows:-

1. The Municipal Council of Eldoret - 4,997 shares

2. Josiah Kiprotich Magut

His Worship the Mayor

Eldoret Municipal Council - 1 share

3. Philip Kiproop Kiptoo

The Town Clerk

Eldoret Municipal Council - 1 share

4. Slyvanus Okumu

The Town Treasurer

Eldoret Municipal Council - 1 share

From the foregoing, it is clear that the Company is wholly owned by the Council. The other three shareholders are nominal and nominee shareholders by virtue of their offices.

The objects for which the Company was established include the following:-

- “(a) To carry on the business of water and sanitation within the area under the jurisdiction of the Municipal Council of Eldoret and its environs.**
- (b) To exercise overall control over the sources and supply of water in the area of the Council and in particular conserve, redistribute and augment those water resources.**
- (c) To provide and distribute a constant supply of portable water for commercial, industrial and domestic purposes within the area of the Council.**
- (d) To be responsible for the provision, control and maintenance of sewerage and drainage for commercial, industrial and domestic purposes within the area of the Council.”**

It is my interpretation and finding that from the above ownership of the Company and objectives the Municipal Council of Eldoret had decided to discharge its statutory duties of provision of water and sanitation in its area of jurisdiction under the Local Government’s Act through the instrumentality of this Company. Under the Section 178 (1) of the Local Government Act, Cap. 265 a Municipal Council is given power to supply water. It provides:-

“178 (1) A Municipal Council, Town Council, or an urban or area Council may undertake the supply of and establish, acquire and maintain work for the supply of water within its area and with the consent of any local authority within its area of that local authority.”

Under the provisions of the Water Act Cap. 372 (now repealed) and the subsequent Water Act, Act No. A8 of 2002, local authorities including Municipal Councils are water undertakers. In the preamble to the Agency Agreement, it is stated:-

“(i) In terms of the provisions of the Local Government Act Cap. 265 of the Laws of Kenya, the Council is empowered to exercise its functions relating to water and sanitation services and to make By-Laws necessary for or incidental to the exercise of the said functions.

(ii) The Council is desirous of appointing the Company to act as its Agents in the exercise of the said functions upon the terms and conditions hereinafter mentioned.”

The Municipal Council of Eldoret like many other local

authorities has been exercising Statutory duties and functions in supplying water and sanitation services to the residents of Eldoret Municipality. In such a statutory obligation and duty, it cannot delegate or transfer its powers and duties to a Commercial Company i.e. whether private or public which is not wholly owned by the Council. This must of course be done with the authority and consent of the Minister of Local Government besides complying with other laws. The Court shall proceed on the basis that the Minister must have sanctioned the transfer of the Council’s obligations to the Respondent Company and in accordance with the law through the Agency Agreement. This is not an issue before the Court in this matter.

In the light of the foregoing, the Council is statutorily obligated to provide adequate water supply to the residents of its locality under the Local Government Act and as a water undertaker under the Water Act (past and present). Considering that the Company is wholly owned by Council and also the Agency

Agreement makes it clear that the Company is an agent of the Council, I do hereby hold that the said company is a governmental agency and instrumentality. It is part and parcel of the Council whatever name it goes by.

The fact that it is said to be a limited liability Company does not change that it is carrying out duties of a public nature and for the public interest as long as the Agency Agreement shall remain in force. The Company is discharging statutory duties on behalf of the Council and involves the supply of water which touches on the lives, health and livelihood of the public. I do hold that for all purposes and intents and in particular for the purpose of judicial review, the said Company is “**a public body**” or Corporation which is amenable to control and supervision of the High Court of Kenya through judicial review.

It would be a dangerous and unacceptable proposition that through the Agency Agreement, the Water Department or water services of the Municipal Council which is itself a statutory and public body has been taken outside the jurisdiction of this Court.

The foregoing clearly demonstrates that the Company and the Council are part and parcel of each other whatever objectives they had in the said Agreement which is not for this Court to delve into.

This Court therefore has the jurisdiction to entertain the present application.

2. Whether the disputes or matters between the Applicants and the Respondents are of a public law nature or private law nature i.e. employment of contract and termination thereof

I would like to categorically state that the question of the validity, legality or otherwise of the Agency Agreement is not before this Court. Through the Agency Agreement the Applicants were absorbed by the Company as its employees. They were offered letters of appointments and they took up their employment. They also joined a Trade Union to represent them.

After the Agency Agreement was entered into the Applicants were given respective letters of appointment on 22nd August, 2000 and they duly accepted the said offer of employment by signing at bottom of respective letters of appointment. They duly served their employer until their services were terminated on 23rd January, 2003.

The Applicants were suspended and they appeared before a Disciplinary Committee on 3rd and 4th October, 2002 to answer various charges or accusations of misconduct i.e. dishonesty and fraud. The Company terminated their services after allegedly finding them guilty of the accusations or charges.

From the foregoing the Applicants as employees have a dispute of a contractual nature relating to their employment. However, as stated earlier, the Company is not an ordinary limited liability Company. It is an agency of the Council. It is part and parcel of the Council. The Company is carrying out a statutory duties and is therefore a public body or authority.

I do not see why the Applicants should lose their positions or description as public servants in the circumstances. They do not lose any rights they had under the Local Government Act which vested in them or their offices. It would amount to discrimination if the applicants were treated differently from other officers of the Council who remained behind. It should be remembered that the absorption or transfer is not permanent according to the Agency Agreement. It is terminable or termination is contemplated (See Clause 13.4). What happens to the employees of the Company if there is termination? I do not think that they automatically cease to be employees of the Council or to be public servants.

In the case of **KADAMAS –V- MUNICIPALITY OF KISUMU 1985 KLR 957** which involved employees of Municipality of Kisumu it was held, inter alia, that:-

“1. The public may have no interest in a relationship between master and servant in an ordinary case but where the servant holds an office of great public service, the public is interested and as such the remedy of judicial review may be applied.

2. The employees of the Council a public body were in a class of employees who could be dismissed only if there was something against them to warrant dismissal. The appellants were therefore entitled to apply for an order of prohibition to issue and that prohibition lies.”

In accordance with the principles of stare decisis and precedent I do hold that the application and dispute herein is of a public law nature.

3. Are the Applicants entitled to any of the remedies sought herein?

It is my view that while the Company is a public body and an arm of the Municipal Council, yet the Applicants by taking up their letters of appointment and accepting the terms entered into special and separate terms and conditions. It should be noted that the Board of Directors are senior officials of the Council. The Disciplinary Committee and the Board of Directors are organs of the Company which itself is part of the Council. This Court would be exceeding its mandate if it suggests that the Company and the Board as part of the Council could not institute disciplinary proceedings against its own employees.

The question is was their any breach of the cardinal principles of Natural Justice? I have considered the proceedings and the decision. The Applicants appeared before the Disciplinary Panel, they were asked questions and they answered. Witnesses were called and they were allowed to cross-examine them which they did. Decisions were reserved. Recommendations were sent to the Board of Directors which adopted and resolved to terminate the services of the Applicants.

I do hold that there was due process and the principles of natural justice were not violated. The Applicants were given the opportunity to be heard and they were heard. There are no allegations of unfairness or bias in the decision. In fact I think the claim of breach of natural justice was based on the claim that it is the Council as body which has the right to terminate the services or employment of the Applicants and not the Company. I do not think that is the true position due to the unique arrangements in the relationships of the parties, Agency Agreement and the new contracts of employment.

I therefore find that the Applicants are not entitled to orders of certiorari, prohibition and mandamus as applied for. As a result, the application must fail. It is hereby dismissed.

4. Costs:

The Applicants were public servants who have lost their jobs and the Respondent is a public body that belongs to the tax-payers. On compassionate grounds, I order that each party bears his/its costs.

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF APRIL, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Magare holding for Mr. Tuiyot for the Respondent

Mr. Momanyi for the Applicants