



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLI. 476 OF 2008

ORUENJO UMIDHA.....APPLICANT

Versus

THE PERMANENT SECRETARY

MINISTRY OF LOCAL GOVERNMENT & 4 OTHERS.....RESPONDENT

JUDGMENT

Before me is the Notice of Motion dated 10th August 2005 in which John Omenjo Umidhia, the ex parte Applicant seeks an order of certiorari to remove into this court and quash the directive by the 1st Respondent sent through the 2nd Respondent to the 3rd Respondent to surcharge the applicant Kshs.240,000/= allegedly paid as an initial deposit to Bolpark Ltd. by the 4th Respondent for the acquisition of a motor vehicle. The Respondents are named as the Permanent Secretary Ministry of Local Government, The Provincial Local Officer Nyanza Province, The Town Clerk Siaya Municipal Council, Siaya Municipal Council and the Hon. The Attorney. The motion is premised on the statement and verifying affidavit of the Applicant dated 24th June 2005. The Applicant also filed skeleton arguments and a list of Authorities dated 6th November 2007 and 8th October 2008 respectively. Mr. Sumba urged the motion on behalf of the Applicant.

The notice of motion was opposed. Mr. Meso appeared for the 1st, 2nd and 5th Respondents and filed skeleton arguments on 5th July 2008 and grounds of objection on 4th June 2008. At the hearing there was no appearance for the 3rd and 4th Respondents but they had filed a preliminary objection on 2nd December 2005.

The factual background of this case is that the Applicant was as of the year 2003-2004 an elected councilor of Mjini Ward within Siaya Municipal Council and Mayor of the same Council. About 15th July 2003, the Town Clerk and Councillors of Siaya Municipal Council passed a resolution on 27th May 2003 and 27th June 2003 and asked him to vacate the office of the mayor for alleged abuse of office over Kshs.720,000/= which was sanctioned in buying a local motor vehicle from Bolpark Ltd.

The Applicant denies being a signatory to the Council's account neither did he vote for the resolution to buy the car but only witnessed one of the agreements. He then filed SRM 16/03 in Siaya in which he sought an injunction stopping his removal from the said office OF mAYOR and the said order subsists pending determination of the said suit. That the Respondents cannot surcharge him during the pendency of the said suit. He also alleges that the Respondents are in breach of S.231 of the Local Government Act that requires a report by the Inspectors sent by the Minister for Local Government to carry out an inspection at the Council. His second objection is that the said money for which they seek to surcharge

him was recovered by the 4th Respondent since Bolpark Ltd. gave another vehicle to compensate for the Kshs.720,000/= which was initially made as deposit. The applicant exhibited as JOU I the directive of the 1st and 2nd Respondents, the letter of surcharge and pleadings in Siaya SRM 16/03.

Mr. Sumba submitted that the impugned letter dated 7th December 2004 was not received by the Applicant till 27th January 2005 after which the letter of 19th May 2005 was written and that is when the cause of action arose. Counsel argued that procedure in surcharge was not followed and that under S. 236 (3) of the Local Government Act, only those who voted for the expenditure should have been surcharged. Further, that the Applicant was not a signatory to any of the agreement in issue and 3rdly that the money surcharged was recovered. That furthermore the directive was in breach of RMCC 16/03 filed in Siaya Court which had not been determined on merits and in which an injunction order had been granted. That this matter was filed because the letter of 7th December 2004 was seeking to have the recoveries effected immediately.

Reliance was made on HMISC 1731/04 **REP V THE NON GOVERNMENTAL ORGANISATION COORDINATION BOARD** where the court held that the jurisdiction of this court cannot be taken away.

The grounds upon which the 1st, 3rd and 5th Respondent rely on are

- 1) That the injunction order in Siaya SRM 16/03 did not restrain the 1st and 2nd Respondents from surcharging the Applicant;
- 2) The legality of the surcharge is also the subject matter in Siaya 16/03 and therefore the Judicial Review application is an abuse of the court process;
- 3) The resolutions of the 4th Respondent giving rise to the surcharge are matters of fact within the competence of the said Respondent and this court should not interfere;
- 4) The Minister for Local Government is empowered under S. 241 of the Local Government Act Cap 265 Laws of Kenya to give any Local Authority such directives as he thinks necessary as a result of investigation researches or inquiries;
- 5) That the power to give directives under S. 248 may be delegated to any public officer by dint of S.268 of Cap 265 Laws of Kenya;
- 6) That the said powers of the Minister are not subject to the provisions of S.231 of Cap 265.

The 3rd & 4th Respondent's preliminary objection was to three fold;

- 1) That the Suit offends the provisions of S. 238(1) of the Local Government Act;
- 2) The Plaintiff/Applicant is non suited to the 3rd and 4th Respondent;
- 3) The suit is incompetent to the extent to which it seeks to move into this court for purposes of quashing a decision contained in a letter of 7th December 2004 which is against provisions under order 53 Rule 2.

I have considered the application, affidavit in support thereof, grounds of opposition, the preliminary objection and submissions of both Counsel. Order 53 Rule 2 requires that an application seeking an order of certiorari be filed within 6 months of making the decision. The impugned decision is contained in the letter dated 7th November 2004. It was received on 26th January 2005 as indicated by the stamp "**RECEIVED**".

I do agree that the time started to run from 26th January 2005 when the letter was received and the Application should have been filed within 6 months that is, by 25th July 2005. The Chamber Summons seeking leave was filed on 29th June 2005 and I do find that it was within the time allowed under Order 53 Rule 2 Civil Procedure Rules and the preliminary objection on that point must fail.

One of the grounds upon which the Applicant challenges the letter of 7th December 2004 is that he never signed the agreement for sale nor did he vote for the expenditure for the purchase of the vehicle as a result of which he is surcharged provided by S.236 (2) of the Local Government Act. He also claims that the sums subject of the surcharge have been recovered. These are the disputed facts which go to the merits of the decision made by the Permanent Secretary. For example the Applicant relies on minutes of the 4th Respondent as evidence. The minutes of 27th June 2003 indicate that the Applicant had admitted to having signed the sale agreement from which the surcharge arises. These minutes are not challenged. These are facts which are in dispute because the Applicant was not telling this court that he did not sign the sale agreement. That can only be canvassed in SRMCC 16/03 which is a body that investigates and determines disputed facts.

It is common ground that in Judicial Review, the court is only concerned with the process by which the decision was arrived at but not the merits. The Applicant is asking this court to venture into a jurisdiction that does not belong to it.

I agree with the decision on **R V SECRETARY OF STATE FOR HOME DEPARTMENT ex parte SWATI** where the court declined to grant leave to the Applicant to commence Judicial Review proceedings for reasons that he had come before the wrong forum by Judicial Review instead of an appeal process which could consider facts of why he was denied entry in the United Kingdom.

Whether the surcharge is in breach of S.231 of the Local Government Act. The Section reads;

“S.231(1) The Minister may from time to time appoint one or more persons as Local Government Inspectors to conduct extra ordinary inspections and examinations of the accounts and records of local authorities and an inspector so appointed may institute such inspection or examination (hereinafter referred to as an extra ordinary inspection) into any aspect of the accounts and records of any Local Authority that he deems necessary.

(2) where an inspector institutes an extraordinary inspection he shall notify the local authority concerned and the Controller and Auditor General of the institution of such inspection.

(3) At the conclusion of an extraordinary inspection, the inspector shall prepare and sign a report of his findings and furnish one copy to the Controller and Auditor General and one copy to the Minister who shall report to the local authority on any matter which in his opinion should be drawn to their attention to enable them to comply with any law or lawful instruction or to enable the administration of the Local Authority to be carried out in a secure and efficient manner.”

I have read the letter dated 7th December 2004 and there is no evidence that the Minister ever appointed inspectors for purposes of conducting an extra ordinary inspection following which a surcharge could be ordered. If there had been such an inspection, then the Applicant should have moved this court for the quashing of the said inspection report and the surcharge that may have arisen therefrom. Under S. 245 of the Local Government Act, the Minister may appoint any Public Officer to conduct investigations, searches and inquiries to assist any Local authority in carrying out its functions. S. 248 provides that pursuant to S. 245 of the Act, the Minister may give directions to any Local Authority as a result of investigations, inquiries and researches. Without any evidence of an extra ordinary inspection having been conducted, it seems the letter to the Applicant was written pursuant to S. 245 and 248 where the Minister has wide powers in overseeing the running of Local Authorities. Breach of S.231 of the Local Government Act does not arise.

Judicial Review is a discretionary remedy and sometimes the courts will not grant it even when it is

deserved. The only ground relied upon that the impugned decision is illegal has not been proved. In the present case the Applicants relies on disputed facts which can only be resolved through adducing of oral evidence in the Siaya Court but not by affidavit evidence in a Judicial Review application. This matter will be more effectively dealt with and the issues resolved in the Siaya case and the result is that this court declines to grant an order of certiorari to quash the directions in the letter dated 7th July 1004. The Notice of Motion is hereby dismissed with costs to the Respondent.

Dated and delivered this 21st day of November 2008.

R.P.V. WENDOH

JUDGE

Present

Mr. Kirori holding brief for Mr. Meso for the Respondent