



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Misc. Case. 810 of 2005

REPUBLIC OF KENYA.....
....APPLICANT

VERSUS

THE MUNICIPAL COUNCIL OF NAKURU)

THE PERMANENT SECRETARY

MINISTRY OF LOCAL GOVERNMENT
....RESPONDENTS

EX-PARTE ISAAC
MATONGO MOGOI

RULING

This is an application by way of Judicial Review which is brought by the Applicant Isaac Matonyo Mogoi under Order LIII Rule 1, 2 and 3 of the Civil Procedure Rules

The Applicant has Sought for an order of Certiorari to bring to the High Court to quash the proceedings of the Municipal Council of Nakuru together with proceedings, resolutions, decrees and directions contained in minute 68 and 71 of a Special Full Council meeting held on 19th July, 2005 which required the retirement of the Applicant in public interest.

Secondly, the Subject sought for a prohibitory orders against the 1st Respondent prohibiting the Nakuru Municipal Council from either jointly and severally with their Officers, Agents, Employees or others from surcharging the Subject the sum of Kshs925,000/- or any other sums whatsoever.

This application is premised on the grounds stipulated in the body of application which grounds were more specifically expounded in the Supporting Affidavit sworn by the Applicant.

Briefly these are the further arguments that were brought by Counsel

for the Applicant during the presentation of the Applicant's case. The gist of which can be summarized as follows:-

The Applicant was an employee of the Municipal Council of Nakuru as an Assistant Town Engineer from

1996. Sometime in February, 2002, the Applicant together with other Senior Officers of the Respondent were arrested and arraigned in court on 15th February, 2002, whereby they were charged with criminal offences before the Nakuru Chief Magistrate's Court, Criminal Case No.328 of 2002. However the Applicant was acquitted on 16/6/05 of the charges whereupon he wrote to the Respondent to convey to it the out come of the Criminal case and demanded his unpaid dues and reinstatement back to work. This request was as per the letter dated 21st June, 2005.

The Applicant further argued that he did not receive a response to his letter but instead learnt from the Print Media that he was retired from employment in public interest and as the media report alluded to a report of a Special Full Council meeting whereat it was resolved that he be retired, he obtained a copy of the minutes of the meeting of 19.7.2005 and found the resolutions that required him to be retired on public interest and further he be surcharged the sum of Kshs.925,000/-

This is the genesis of this controversy that has snowballed into the present dispute. The Applicant's complaint was that the said decisions to retire him was made contrary to the rules of natural justice as he was not given an opportunity to respond to any allegations in the letter by Town Clerk addressed to him dated 5th July, 2005, informing him of the decision of retirement was received on 16th August, 2005. Thus the Applicant did not get an opportunity to defend himself by way of showing cause and this fact was duly brought to the attention of the Respondent vide the Applicant's Advocate's letter dated 17th August, 2005.

The Applicant in this case was not subjected to the due process as provided for under the Public Service Committee Act, Local Authorities regulations and therefore sought for the orders of Judicial Review.

On the part of the Respondent, this application was opposed as both lacking in merit as the Counsel for the Respondent contend that the

Applicant was duly notified and was given an opportunity to respond to the allegations stated in the letter but he refused or neglected to show cause why disciplinary action should not be taken against him.

According to the Respondent, the Applicant failed to take the opportunity to exculpate himself from the charges stated in the letter. Counsel argued that the Respondent's recommendation should not be quashed as the Applicant failed to follow the laid down procedures as stipulated in the Local Authorities Regulations. It was also noted that the fact that a wrong charge was cited in the letter indicating that Applicant was facing a criminal charge of altering a document when indeed he was facing the charge relating to theft of money. The Applicant should have taken the opportunity to explain his position and even explain about the different charges he was facing had he taken the opportunity to show cause as indicated in the letter of 5th July, 2005.

Moreover, according to Counsel for the Respondent the charges that the Applicant was supposed to respond to arose from a report by the Local Government Inspectors report who recommended that the Applicant was involved in the loss of the Council's money. The decision was therefore within the Council's mandate after the Applicant failed to respond to the charges. It was submitted that his remedy lies in his right of appeal (i.e. within the Public Service Commission or by filing a suit in the High Court to challenge the surcharge or even for damages.

I have carefully addressed my mind to all the Submissions, the issue as I see it is for this Court to establish whether the Applicant is entitled to the orders sought and to do so it is important firstly to ask myself whether the Respondent is a public body against whom the Order of certiorari can issue.

If the answer is in the positive and indeed it is, I also have to find out whether the decision by the Council which is sought to be quashed, the decision contained in the minutes of the Full Council Meeting held on 19th July, 2005, whether the Council acted outside its mandate or breached the rules of natural justice in the course of their decision making process.

The principles applicable and the circumstances under which the Court can grant the remedy is well settled. It is well settled law that in Contracts of Employment the remedy should lie in damages for unlawful dismissal.

In this case the Applicant is complaining of the proceedings that was used to arrive at the decision of the Special Full Council Meeting that is sought to be quashed, and more specifically failure to communicate to the Applicant, to deliver to him the letter dated 5/7/2005, where he was supposed to show cause.

In **Miscellaneous Application No.316 of 2001, Antony John Kibirithi -vs- the Land Registrar Kilifi District & 3 Others**. E.M. Githinji, J.(as he then was) expressed himself thus:-

“It is trite law that in Judicial Review Applications the court is not concerned with the merits of the decisions but with the decision-making process.”

According to my own understanding of this dispute there are two processes that was set in place to deal with the Applicant arising out of the Criminal charges that he was facing.

There was a further disciplinary process that was set up pursuant to the recommendations by the Local Government Inspection Report. The two processes are distinct and thus what I have to satisfy myself is whether there was a breach of the law and whether the rules of natural justice were observed. Was the Subject given adequate opportunity to respond to the allegations contained in the letter dated 5/7/2005 which culminated in the decision of the Full Council Meeting of 19.7.2005, whereby the Applicant was retired in public interest.

It is clear that this letter was not received by the Applicant until about 10/8/2005, and therefore he was not able to respond as by that time the Council had already passed the resolution. This can be seen from the Applicant’s letters addressed to the Respondent seeking clarification about a media report. This to me is a clear indication he had not seen the letter dated 5/7/2005 by the time the decision of 19.7.05 was arrived at.

In this regard therefore the Applicant is entitled to move the court for orders of the Judicial Review as there was failure on the part of the Respondent to give the Applicant an adequate opportunity to respond to the letter dated 5/7/2005. There is no evidence that the respondent had taken the trouble to serve the letter personally to the applicant to enable him respond.

Accordingly I hereby allow the prayers sought but for purposes of clarity, and as indicated in this decision, what this Court is allowing for quashing is the decision of the Council contained in the minutes of the Full Council Meeting of 19/7/2005 which decision was arrived at without the Council having an opportunity to hear the Applicant’s response to the allegations. This therefore, reverses the position so that the Applicant is properly served with the charges and he is given an adequate opportunity to respond before any decision can be taken against the Applicant.

It was argued that the Court cannot interfere with the Respondent’s mandate of running of the Municipal Council and therefore I wish to clarify that the quashing of the decision does not amount to a reinstatement of the Applicant, if the Applicant was on suspension or interdiction, the status quo remains until the proper disciplinary procedure is followed and the rules of Natural Justice.

The application is allowed with costs to the Applicant.

Ruling read and Signed on 24/2/2006.

MARTHA KOOME

JUDGE

24TH FEBRUARY, 2006