



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Misc Appli 613 Of 2005

REPUBLIC APPLICANT

VERSUS

MUNICIPAL COUNCIL OF NAKURU RESPONDENT

EXPARTE

SAMUEL THUO KANGEA SUBJECT

RULING

The applicant in this application **Samuel Thuo Kangea** has sought for orders of Judicial Review to have the proceedings and resolutions/decisions of the Municipal Council of Nakuru passed on 19th July, 2005 and more specifically comprised in minute numbers 68 and 71 be removed to the High Court and quashed.

This application is premised on the grounds stipulated on the body of the application, the statement and supporting affidavit by the applicant. The matters stated therein were further expounded and buttressed by counsel for the applicant during the hearing of this matter.

Briefly the matters that gave rise to this suit can be summarized. The applicant was at all material time the Town Treasurer Municipal Council of Nakuru until sometimes in the month of April, 2002 when he was arrested and charged in Nakuru Chief Magistrate's **Court Criminal Case No. 740 of 2002** with the offence of **obtaining money by false pretence** contrary to **Section 313 of the Penal Code**.

The applicant was after a full trial acquitted of the charge on 5th December, 2002.

Following that Criminal Case the appellant was interdicted from office. It was the applicant's case that the respondent subjected him to further disciplinary mechanism on 29.4.2003 when the Council's Finance, Staff and General Purposes Committee resolved to delete his name from the payroll and referred him to the Ministry of Local Government for re-employment.

This proposal was not acceptable to the Ministry who recommended that the applicant's case be dealt with in accordance with the **Public Service Commission (Local Authorities) Officers Regulations, 1984** and the **Public Service Commission (Local Authorities Officers (Amendment) Regulation 1988**. Thus the respondent passed a resolution on 19.7.05 surcharging the applicant a sum of Kshs.925,000 allegedly lost by the Council.

Further a Full Council Meeting of the respondent **vide minute No. 68** resolved that the applicant be retired on public interest.

This is the genesis of this controversy that has now snow balled into the present dispute. The applicant's complaint was that the said decisions to surcharge him and relive him of his duties were made contrary to the rules of natural justice. The applicant was not afforded an opportunity to appear before either the Finance, Staff and General Purposes Committee or the Special Full Council Meeting to make representations in his defence, or to show cause why such drastic measures should not be taken against him as required by law.

Further Counsel for the applicant argued that the decisions were arrived at contrary to the procedure laid down both under the **Local Government Act Cap 265 Laws of Kenya** and the **Public Service Commission Local Authorities Regulations** especially **part III Regulation 22** of the **Local Authorities Regulations**.

On the part of the respondent, this application was opposed as both lacking in merit and being premature. It was the contention of the respondent that the applicant came to court before he was served with the requisite notice to show cause. If the applicant had read about his dismissal and surcharge from the media, the respondent had no control of the matters reported in the media. The applicant should have followed the laid down machinery of an appeal against the decision of the Council in the normal manner provided for under the regulations. That opinion is still available to the applicant.

According to M/s Chege Counsel for the respondent, the respondent acted within their mandate and took up disciplinary measures as per the regulations. As regards the order for surcharge, this was properly recommended under the **Local Government Act, a Government Inspector** under **Section 236** was appointed to look into the respondent's affairs and that is the team that recommended the surcharge of the applicant.

I have carefully considered the above submissions and all the pleadings. In this case, the issues for determination is whether the decisions by the respondent, the Municipal Council of Nakuru Full Council Meeting passed on 19th July 2005 comprised in **minute Nos.68 and 71** were *ultra vires*, made in breach of the Laws and Regulations and was against the rules of natural Justice.

The principles and circumstances under which the court can grant the orders of *certiorari* are well settled. One aspect one has to distinguish in this matter is that the issue being pursued is not one of contract of employment.

It was submitted that the applicant ought to have retired in the year 2004 when he reached a mandatory age of retirement. Counsel for the applicant emphasized that the applicant does not wish to prolong his stay in office. In this regard it was also argued that the fact that the applicant has an alternative remedy should not be a bar to the granting of an order of *certiorari* (See **David Mugo T/a Manyatta Auctioneers -vs- Republic) C.A No.267 of 1997.**

The matter of concern in this case is whether when the respondent arrived at the decisions complained about due process was followed in the decision making process while noting that in Judicial Review applications the court is not concerned with the merits of the decisions but with the due process.

Was the applicant granted an opportunity to be heard before the respondent arrived at its decisions?

The respondent argued that there was intention to serve the applicant with a notice to show cause. The recommendations contained in the Council's minutes states: -

“Recommendations

He be surcharged for loss of Council money amounting to Kshs.925,000/- paid irregularly by Peter Chiira and Isaac Megoi to Nicona Construction Company. Any money owned to him by the Council be

used to off-set the above surcharged and he be called to pay any difference if any.”

In this case, the applicant should have been given an opportunity to be heard. This is the a position that was articulated in the case of **Onyango Vs Attorney General 1987 KLR**.

“I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly That, however does not free the Commissioner from acting fairly and in my judgment, the Commissioner could not act fairly and he seen to have acted fairly without giving an inmate an opportunity to be heard before imposing loss of the liberty and in this case; it is substantial loss of liberty.”

Similarly in this case, the Council could not have been seen to have acted fairly without giving the applicant an opportunity to present his case before a decision affecting him substantially was arrived at.

As the applicant was not heard before this decision, I make a finding that he is entitled to move the court for orders of Judicial Review. Accordingly the applicant is granted the prayers sought as well as the costs of these proceedings.

It is so ordered.

Ruling read and signed on 24th March 2006.

M. KOOME

JUDGE