

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Misc Civ Appli 1 of 2005

**IN THE MATTER OF AN APPLICATION BY CLEOPHAS OTIENO OMARIBA TO APPLY
FOR JUDICIAL REVIEW (CERTIORARI AND MANDAMUS)**

AND

**IN THE MATTER OF THE DISTRICT COMMISSIONER – KISII CENTRAL DISTRICT IN
THE MATTER OF APPOINTMENT OF ASSISTANT CHIEF RIOMA SUB-LOCATION
WITHIN KISII CENTRAL DISTRICT**

BETWEEN

REPUBLIC APPLICANT

AND

DISTRICT COMMISSIONER KISII CENTRAL DISTRICTRESPONDENT

AND

TOM MONARI OCHWANGI INTERESTED PARTY

RULING:

The applicant CLEOPHAS OTIENO OMARIBA seeks for an order of certiorari to quash the decision of the District Commissioner Kisii Central appointing Tom Monari Ochwangi the interested party as an Assistant chief of Rioma Sub-location instead of the applicant. He also seeks for an order of mandamus directed to the D.C. Kisii Central District to appoint him as the Assistant Chief of Rioma sub-location as per a letter from the Provincial Commissioner Nyanza Province.

The respondent and the interested party, despite being served, did not enter appearance or file any papers to oppose the application. Hearing therefore proceeded ex-parte.

Court was told that the applicant was invited and attend an interview for a post of assistant chief marani sub-location. The interview was on 30th August 2004. There were several candidates. Later the area D.O. informed him that he was one of those who qualified. He also learnt that the provincial commissioner Nyanza had written to the D.C. directing him to appoint the applicant as assistant chief. (The letter is annexed as COO2). However he was shocked to learn that the District Commissioner instead appointed the interested party. When he went to make inquiry he was arrested and detained in police custody. Mr. Bosire submitted that his fundamental rights were violated.

As I stated the respondents did not make any response. Thus the court has only the applicant's side of the story. It is clear that he was invited for the interview as shown in the letter sent to him dated 19th August 2004 (annexture COO1). It is also clear that after the interview the matter was referred to the provincial commissioner who directed the District Commissioner to appoint the applicant. This was not done. Though it seems as if the appointing authority was the District Commissioner and not the provincial commissioner, the D.C as an appointing authority had a duty to those who attended the

interview to act fairly as a public officer. He must have been the one who wrote to the P.C communicating the results of the interviews. There was therefore no justification why he made an arbitrary decision after that and appoint another person from the one he had earlier recommended. If the decision to appoint the interested party was made during the interview then the appointment would be proper. However this was not the case as shown by the letter from the provincial commissioner. It seems during the interview it was decided that the applicant be appointed and the D.C. wrote to the P.C. to that effect.

The P.C approved but it is clear that there was a change of heart by the D.C. after that and he appointed the interested party without conducting another interview. The applicant was not informed why the change was made. That was wrong. If there was any good reason for the change the court was not told. I therefore find the decision by the District Commissioner to appoint TOM MONARI OCHWANGI as the assistant chief of Rioma sub-location to be null and void and the same is quashed.

The applicant also sought for an order of mandamus directing the District Commissioner to appoint him as the assistant chief as per the direction of the provincial commissioner. As I stated it seems that the person with authority to appoint was the District Commissioner and not the provincial commissioner. If it was the latter he would have done the appointment directly or rectified the situation after his letter was not acted upon. Court was not shown that the D.C. was under any duty to act on the letter by the P.C. and he failed to do so. True the P.C. is more senior than a D.C. but I was not told that there is any legal requirement or duty for the latter to act on any letter from his boss. It was not the P.C. who interviewed the candidates and picked the applicant as an assistant chief. Court was not told that the P.C. made any decision which the D.C. should be ordered to implement. The letter to the D.C. was not an appointment letter. As such the applicant cannot ask the court to order the D.C. to implement the P.C.'s letter unless there was proof that he had authority and powers to appoint assistant chiefs. The instructions by the P.C. was not a decision and as such an order of mandamus cannot issue.

Having quashed the decision by the District Commissioner to appoint the interested party as an assistant chief and having declined to order the applicant to be appointed to the post the ball goes back to the District Commissioner court to decide on how to fill the vacant post but observing the rules of natural justice.

The applicant will have costs of the application.

DATED this 14th day of March 2006

KABURU BAUNI

JUDGE

Cc – Mobisa

Mr. Bosire for Applicant – absent (though he had notice)