



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 685 of 2005

REPUBLICAPPLICANT

VERSUS

MANDERA TOWN COUNCIL THRO' THE TOWN CLERKRESPONDENT

AND

EX PARTE: ABDOW ISSACKAPPLICANT

JUDGMENT

On 8th July, 2005 the applicant was granted leave of the court to bring an application for Judicial Review seeking an order of mandamus to issue against the Mandera Town Council through the Town Clerk, to comply with the directions which were given to the Council by the Permanent Secretary, Ministry of Local Government vide a letter dated 14.10.2003 to reinstate the applicant herein to his duties at the aforesaid council.

The substantive motion was filed on 27th July, 2005 and is dated 22nd July, 2005. The application was supported by a verifying affidavit sworn by the applicant, Abdow Isaack dated 17th May, 2005 and a statement of facts dated the same date. The requisite notice to the Registrar had been filed on 12th May, 2005.

The application was opposed and a replying affidavit was sworn by Sospeter Ndolo Musembi the Clerk to Mandera Town Council. Both parties also filed skeleton arguments.

The applicant was represented by Mrs. Guserwa Advocate while the Respondent was represented by Omboga advocates.

Briefly, the facts leading to these proceedings are that the applicant was employed by the Respondent in 1963. At the time of employment, his personal documents indicated that he was born in 1942. His Identification Card also reflected the date of birth as 1942. The applicant was therefore issued with a retirement notice for September, 1997 having attained the age of 55 years. Realizing that the date of birth was incorrect, the applicant went for age assessment by a medical officer who assessed his date of birth as 1947 or 1948. The applicant swore an affidavit before a magistrate as to his age and he was reinstated to work and worked till 2002. As per the new assessment, he should have retired in October, 2005. On 8th July, 2002 the Respondent issued the applicant with a 6 months notice to retire by end of 2002 after attaining the age of 55 years. It is the plaintiff's contention that he had not yet attained the age of 55 years. He reported to the Local Government Ministry, which directed that he be reinstated by their

letter dated 14th October, 2003. The Respondents declined to comply with the said directive. The applicant contends that he was not given a hearing before the notice and the Respondent held a committee meeting on 22nd January, 2004 which confirmed his retirement and yet he was not notified nor did he attend the meeting in which the said decision was made. As a result, he contends that the tenets of national justice were not observed. It was further submitted that the letter of 14th October, 2003 from the Local Government Ministry was a directive to the Respondent but not a advisory and the Respondents' action to retire the applicant prematurely was therefore unlawful. The applicant relied on the following authorities.

1. **ONYANGO v. AG 1987 KLR 711** where the court held that those who make decisions that affect others should act fairly.
2. **NYONGESA & OTHER v. EGERTON UNIVERSITY 1990 KLR 692** where students were expelled without prior notice and that court reinstated the students and held that failure to give notice to the students or hear them breached rules of natural justice.

Counsel called for an order of mandamus directing the Respondents to obey the Local Government directive to reinstate the applicant.

Sospeter Ndolo Musembi, the Clerk to the Mandera Town Council swore an affidavit in reply. He contends that the applicant had been employed by Mandera County Council till he got his notice to retire in 1997 but upon being reinstated he went to work for Mandera Town Council and it is not clear how he came to start working with the Respondent Town Council.

Firstly, it was submitted that the Council performs its functions through committees which make resolutions which become binding on the Local Authority and that the letter addressed to the Town Clerk dated 14th October, 2003 is written without authority and cannot purport to direct the Council on what to do.

Thirdly it is submitted that the applicant was wrongfully reinstated by people who did not have authority to do so because the applicant had given a date of birth at the time of employment to be 1942 and there was no basis for altering the date. Counsel submitted that the Council resolved to review monies earned by the applicant since 1998 after reinstatement and it is believed that is why this application was filed to circumvent any action to recover the said sums.

According to the Respondents, the manner in which the applicant purported to change his age was suspected to have been falsified as the authority was not party to the age assessment.

Fourthly, it is the Respondent's submission that the Respondent is a legal entity, it can sue and be sued and for anybody to purport to act for the Council, he must have written authority as provided by Section 129 (4) of the Local Government Act.

This court must clarify right from the on set that the only prayer sought in this application as per the Notice of Motion dated 22nd July, 2005 and the statutory statement dated 10th May, 2005 is one of mandamus. In her opening Submissions in court, Ms. Guserwa, counsel for the applicant submitted that they seek orders of mandamus and certiorari. The court can only consider and grant the prayers sought in the notice of motion and statutory statement. There was no prayer for certiorari and the court will neither consider granting it or grant it at all.

Before deliberating on the merits of the application I need to consider the scope of Judicial Review. The Supreme Court Practice 1997 Vol.531/1-14/6 states

“The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which he application for Judicial Review is made but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to

ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual Judge to that of the authority constituted by law to decide the matters in question.

The court will not, however, on a Judicial Review application act as a “ court of appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction... The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under guise of preventing the abuse of power be guilty itself of usurping power.”

In the present case the main challenge is the manner in which the applicant was removed from employment without allegedly being given audience by Town Clerk and the committee that decided his fate that is, that he be retired in 2002 instead of 2005.

The facts leading to the said decision to retire the applicant may indeed seem genuine as the applicant cannot have forgotten his age only to remember it when issued with a notice to retire. His age was then assessed, an affidavit sworn and he was reinstated. The circumstances of his reinstatement in 1997 were suspect.

The Respondent has raised an issue that, it is the County Council which had initially employed the applicant at the time he was issued with the 1st retirement notice and upon return, he was employed by Manderla Town Council now the Respondent and the Respondent does not know how the applicant was deployed to them and yet the County Council and Town Council are two different bodies. The applicants’ counsel did not respond to this allegation. I have only seen one document, the letter dated 15th January, 1998 which is addressed to Manderla County Council. I have noted that the addresses of the Town Council & County Council are different. whereas the rest of the annexures are addressed to Manderla Town Council. What I am unable to tell is whether these are two different bodies or one took over from another.

Section 28 of the Local Government Act Cap 265 (Local Government Act) – reads

“(1) For every County or Township there shall be a County or Town Council established under this Act, and every County or Town Council shall consist of such number of Councillors as may be elected, nominated or appointed under Section 39.

(2) The Minister shall, by order establish a County or Town Council in respect of any County or Township for which there is not in existence a County or Town Council established under this Act and may in like manner assign a name and alter the name of any county or Town Council.”

The above section in my view seems to suggest that every County shall have a County Council and likewise for a township, there shall be a Town Council. I do not think that Manderla is both a town council as well as a county council. It is either of them. There is no evidence that Manderla County Council is not the same as Manderla Town Council. Be that as it may, that is not the court’s concern. The fact is the Town Council had employed the applicant as of the time the 2nd retirement notice was issued on 8th July, 2002.

Section 28 (3) of the Local Government Act reads. **“Every county or town council shall under the name of “the county council of....” or “the town council of” as the case may be, be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued, and acquiring, holding and alienating land.”**

This above section means that the Respondent is a legal entity or person. It can enter into contracts, which include contracts of employment and be able to hire and fire. It is the council that wrote to the

applicant about his retirement date being due and the council must be the employer.

It is apparent from the provisions of the Local Government Act – Section 90 A –103 that the council operates through committees, which make resolutions, which will then bind the local authority. It is pursuant to these provisions that the Respondent appointed a committee meeting held on 21st January, 2004 and as per the minutes of the meeting that were exhibited, the sole purpose of the meeting was to discuss the retirement of Abdow Issack, market inspector and the committee came up with recommendations that the applicant should have retired on 31st December, 1997 and that the applicant had been illegally reinstated. It is the applicant's contention that he should have been given a hearing and failure to do so breached the rules of natural justice. The Applicants' counsel relied on the case of **ANYANGO v. ATTORNEY GENERAL (1987) KLR 711** where a prisoner was deprived of his right to remission without being notified as to why the denial. The court held that the principles of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and that the Commissioner of prisons had acted unfairly by denying the prisoner remission without giving him an opportunity to be heard. In the present case, the applicant had been returned to work by the Council somehow, whether it was regularly or not. He had worked from 1998 when he first received his notice of retirement and challenged it, till 8.7.2002 when he received a notice of retirement from the Town Clerk. It is my considered view that the Town Clerk and later, the committee should have given the applicant a hearing or even notification of why they decided to terminate his duties before 2005 as he had been reinstated. In the case of **R.V. EAST BERKSHIRE HEALTH AUTHORITY EX PARTE WALSH (1984) ALL ER 924** the court observed that the right to be heard is so elementary that even if the contract does not provide for a right to a hearing, the court will imply that the right exists. The Respondent's counsel argued that the applicant was not required to sit on the committee and that is why he could not be heard but that is neither here nor there. He was the subject of discussion and his live hood was at stake. He should have been given a hearing even if it did not end in his favour.

The next question is whether the committee exceeded its power in failing to heed the contents of the letter from the Ministry of Local Government dated 14th October, 2003 and signed by one S.G. Karicho for the Permanent Secretary. As earlier noted, the Mandera Town Council is a Legal entity and has the power to hire and fire its employees. Except for officers seconded to the council by Public Service Commission under the sections 107-114 of the Local Government Act, e.g. Town Clerk, engineer, medical officer of Health etc, the applicant was not one of those officers. The Town Clerk being the Chief Executive Officer of the Town council could have fired the applicant provided proper procedure was followed. The Local Government Ministry has only got a supervisory role over the Council and could not direct on what the Council could have done with the applicant. The letter from the Permanent Secretary Local Government dated 14th October, 2004 was in my considered view merely advisory but not directory. The letter did not impose on the Town Clerk any duty to act as required. The Respondent cannot be forced to on the applicant on the advice of that letter.

The letter of the Permanent Secretary notwithstanding, I do agree and find that the Respondents breached the rules of natural justice in denying the applicant a hearing before sending him home before 2005. The question, is can mandamus issue in the circumstances. Halisbury Laws of England 4th Edition No.1 court page III – para. 89, says as follows on the scope of an order of mandamus.

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. The purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient beneficial and effectual.”

Bearing in mind the scope of the order of mandamus I find that it cannot issue in the circumstances. Even if the letter of the Permanent Secretary dated 14th October, 2003 had been directory in nature, yet

with the existence of the town clerks notice to the applicant dated 8th July, 2002 asking the applicant to retire having attained 55 years of age, an order of mandamus may have been issued in futility. The applicant should have sought an order of certiorari to quash the decision of the Town Clerk and also the committee's decision dated 24th January, 2004 resolving not to reinstate the applicant.

As per the letter dated 14th October, 2003, the correct date that applicant retirement would have taken effect would have been October, 2005. It is now June, 2006. Had the order of mandamus been available, it would not have been granted because it is overtaken by events and it is no longer efficacious in the circumstances it would have been issued in vain. If the applicant feels aggrieved by the decision of the Town Clerk and the committee that discussed his retirement, the best remedy may be in private law.

For the above reasons, I hereby dismiss the application. Since the applicant is no longer in the employment of the Respondent, I will order each party to bear their own costs.

Dated and delivered at Nairobi this 16th day of June, 2006

R.P.V. WENDOH

JUDGE

Mr. Owino holding brief for Ms Guerswa for Applicant

Mr. Omboge for Respondent

Ojijo CC