



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**Misc Civ Appli 612 of 2004**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PERMANENT SECRETARY/SECRETARY TO**

**THE CABINET AND HEAD OF PUBLIC SERVICE**

**OFFICE OF THE PRESIDENT ... .. 1<sup>ST</sup> RESPONDENT**

**THE PERMANENT SECRETARY, MINISTRY OF GENDER,**

**CULTURE AND SOCIAL SERVICES.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE:**

**STANLEY KAMANGA NG'ANG'A .....APPLICANT**

**THE KENYA NATIONAL LIBRARY SERVICES BOARD....INTERESTED PARTY**

**RULING**

Judicial review – Prohibition – application seeking an order of prohibition to prohibit the Head of the Civil Service and Permanent Secretary Ministry of Gender, Sports, Culture and Social Services from transferring the Applicant from his current position as Chief Executive Officer/Director of Kenya National Library Services to the Ministry of Trade and Industry as the Chief Documentalist/Information Officer (KIPO) –whether an order of prohibition can issue after the decision in issue has already been made – The Judicial Reform Act, ss. 8 and 9; The Civil Procedure Rules, Order 53.

Judicial review – certiorari – application seeking an order of Certiorari to bring into the court the decision of the Head of Public Service transferring the Applicant from the position of the Chief Executive Officer/Director of Kenya National Library Services to working as Chief Documentalist/Information Officer at KIPO, in the Ministry of Trade and Industry for the purposes of being quashed – application seeking an order of Certiorari to bring into the court the decision of the Permanent Secretary Ministry of Gender, Sports, Culture and Social Services transferring the applicant from the position of Chief Executive Officer/Director, Kenya National Library Services to the Ministry of Trade and Industry as Chief Documentalist/Information Officer for the purposes of being quashed – whether the Applicant was

entitled to a hearing before the transfer was effected

The Applicants Notice of Motion dated 2<sup>nd</sup> June, 2004 and brought under Section 8 and 9 of the Law Reform Act and Order LIII Rule 3 of the Civil Procedure Rules, seeks orders:

- “1. THAT an order of prohibition do issue to prohibit the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service, Office of the President, from transferring and effecting any such transfer of the Applicant from his current position as Chief Executive Officer/Director of Kenya National Library Services to the Ministry of Trade and Industry as the Chief Documentalist/Information Officer (KIPO) or to elsewhere.***
- 2. THAT an order of prohibition do issue to prohibit the Permanent Secretary Ministry of Gender, Sports, Culture and Social Services from transferring and effecting any such transfer of the Applicant from his current position as Chief Executive Officer/Director of Kenya National Library Services to the Ministry of Trade and Industry as the Chief Documentalist/Information Officer (KIPO) or to elsewhere.***
- 3. THAT an order of Certiorari do issue to bring into this court the decision of the Permanent Secretary, Secretary to the Cabinet and Head of Public Service contained in a letter dated 27<sup>th</sup> January, 2004 to transfer the Applicant from the position of the Chief Executive Officer/Director of Kenya National Library Services to working as Chief Documentalist/Information Officer at KIPO, in the Ministry of Trade and Industry for the purposes of being quashed.***
- 4. THAT an order of Certiorari do issue to bring into this court the decision of the Permanent Secretary Ministry of Gender, Sports, Culture and Social Services, contained in a letter dated the 5<sup>th</sup> February, 2004 to transfer the applicant from the position of Chief Executive Officer/Director, Kenya National Library Services to the Ministry of Trade and Industry as Chief Documentalist/Information Officer for the purposes of being quashed.***
- 5. THE costs of this Application be provided for.***
- 6. THAT the Honourable Court be pleased to give further orders and directions as it may deem fit and just to grant”.***

A recapulation of the facts of this case are that the applicant was on 4<sup>th</sup> August, 1989, vide a letter of appointment from the interested party herein appointed as the Director of the Kenya National Library Services (hereinafter referred to as “KNLS”). This was in consequence of a newspaper advert that the interested party had published on March 8, 1989, in the Kenya Times. The applicant held onto his position until 2003, when a friction appeared to erupt between the applicant and the Minister for Gender, Sports, Culture and Social Services, the Hon. Najib Balala (as he then was). This occasioned the Hon. Minister on 18<sup>th</sup> August, 2003 to write a memo to the Permanent Secretary, Ministry of Gender Sports, Culture and Social Services stating that after consultation with the Head of the Civil Service, Ambassador Francis Muthaura, it was advisable that the necessary disciplinary action be taken against the applicant relieving him of his responsibilities and having him redeployed within the headquarters and assigned to other responsibilities for engaging in ‘acts of insubordination’. On 5<sup>th</sup> February, 2004, the applicant received a letter from the Ministry of Gender, Sports Culture and Social Services (hereinafter referred as the Ministry) informing him that he had been posted to the Ministry of Trade and Industry (KIPO) as Chief Documentalist/Information Officer. This forms the basis of this suit, as the applicant alleges that the actions by the Permanent Secretary in the Ministry and the Permanent Secretary, Office of the President were prejudicial, an abuse of the process and a breach of the rules of natural justice.

At submissions, Ms Gathaga for the Respondents, relied wholly on the affidavit of Wellington P Godo sworn on 13<sup>th</sup> October, 2005. He stated that the Permanent Secretary informed the Head of Public Service of the decision to transfer the applicant, which transfers affected 58 other public officers. That the decision of the Head of Public Service was within his powers as conferred under Section 107 of the

Constitution as the applicant was a public servant. Further, that the Kenya National Library Board is under the control of the Ministry for Gender Sports, Culture and Social Services, and as such it is not an independent board. Ms Gathaga further clarified that the applicant was only transferred and not dismissed, and that no evidence had been adduced to show loss of any salary or benefits in the new job. Relying on the case of **Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji Njoroge and 9 Others Civil Appeal No 266 of 1996**, Counsel stated that the order of prohibition was not available, as a decision had already been made and secondly, that certiorari could not lie as there was no decision made by the permanent secretary, to quash. Counsel went on to say that failure by the applicant to report to the new station was abandonment of his duty, and the position had already been filled. As such, the prayer to restore him is an act in futility. Ms Gachaga finalized by arguing that this being a “transfer” and not a “dismissal”, there was no need nor any obligation for consultation with the applicant.

Mr Koech, for the Interested Party, also relying wholly on the replying affidavit of Haniel Luku Igwo, sworn on 12<sup>th</sup> October, 2005, stated that the KNLS board had maintained its powers as conferred to it by The Kenya National Library Service Board Act (Cap 255 of the Laws of Kenya) and such powers had not been interfered with. Further, that the power to transfer was vested in the Head of Public Service and the Board’s only power was to hire and fire. Mr Koech further submitted that the Central Government has an interest in the running of state corporations as stipulated in the State Corporations Act (Cap 446 of the Laws of Kenya) and as such, the board is not autonomous. Counsel finalized by stating that there was a multiplicity of suits, and that The Hon. Ojwang J had already dealt with various issues being raised in this suit.

Mr Wachira for the applicant stated that Hon Ojwang J’s ruling related to an application for interlocutory injunction only and that what was now before the Court was an application for Judicial Review. Secondly, that Ojwang J’s ruling was only persuasive, and that the prayers sought herein, were available. The Applicant relied on the cases of **Paul Kipkemoi Melly vs The Permanent Secretary, Treasury and Minister for Finance HCCC No 1179 of 2006**, **Charles Kariuki Wambugu vs The Kenya National Library Service Board, HCCC No 2013 of 1989**, **Apollo Richard Oluoch vs Kenya National Library Services, HCCC No 1299 of 1990**.

I have identified three pertinent issues that need to be addressed. Starting with the first one:-

## **1. Multiplicity of Suits**

Counsel for the interested party has contended that the applicant has filed multiple suits to defeat the ends of justice. Let me clarify that the purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. The institution of a judicial review suit is not a bar to seeking other forms of relief as judicial reviews posits that as soon as a public body exceeds its jurisdiction, or acts unfairly, or disregards the principles of natural justice, then the very act of the public body must be scrutinized. That said, I do not feel that there is a multiplicity of suits in this instance.

## **2. The Writs of Prohibition and Certiorari**

Starting with the writ of prohibition, Kuloba J in the case of **Kenya National Examinations Council vs Republic ex-parte Geoffrey Gathenji Njoroge and 9 Others** clearly articulated when an order of prohibition is to issue.

***“Prohibition is an order from the High Court directed to an inferior tribunal or body, which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. ... It does not, however lie, to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings”.***

And further,

***“Prohibition cannot quash a decision which has already been made, it can only prevent the making of***

***a contemplated decision”.***

In effect, therefore, prayers 1 and 2 of the Notice of Motion must fail as the decision to transfer the applicant from his current position as Chief Executive Officer/Director of Kenya National Library Services to the Ministry of Trade and Industry as the Chief Documentalist/Information Officer (KIPO) has already been effected.

But what about certiorari?

***“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons”.***

I will look at three acts: The Kenya National Library Services Board (Cap 225 of the Laws) The State Corporations Act (Cap 446 of the Laws of Kenya and The Constitution (Cap 1 of the Laws of Kenya).

Starting with The State Corporations Act. Section 2 Defines a State Corporation as:

***(a) a state corporation established under Section 3;***

***(b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not ...***

Section 4 goes on to say that;

***“The President shall assign ministerial responsibility for any state corporation and matters relating thereto to the Vice-President and the several Ministers as the President may by directions in writing determine”.***

Section 5 (3) gives a state corporation power to employ such members of staff, including the Chief Executive, on such terms and conditions of service as the Minister may, in consultation with the committee approve.

From the above, therefore, The Kenya National Library Service is a State Corporation as it is established under Cap 225 of the Laws of the Kenya. Ministerial responsibility is assigned to the Ministry of Gender, Sports, Culture and Social Services, being its parent body.

Going into Cap 225, Section 6 (1) states that:

***“The Board shall appoint a professional librarian as the Director of Kenya National Library service who shall be the chief executive of the Board and who shall be entitled to be present and to speak (but not to vote) at the Boards meetings”.***

and further in Section 6 (2)

***“The appointment of the Director and his terms and conditions of service shall be subject to the approval of the Minister”.***

Let me move further to Cap 1 of the Laws of Kenya, at Section 107 (1) which states that,

***“Subject to this Constitution, the power to appoint persons to hold to act in offices in the public service and in the service of local authorities (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those persons from office shall rest in the Public Service Commission:...***

Now let us look at the facts before this court. It has already been established that The Kenya National

Library Service Board is a State Corporation. The applicant was appointed to be its Director vide a letter dated 4<sup>th</sup> August, 1989. It will be assumed that the relevant ministerial approval was sought and granted as required by Section 6 (2) of Cap 225 and Section 5 (3) of Cap 446.

It would also appear that the Ministry of Gender, Sports, Culture and Social Services has a major role to play in the administration of The Kenya National Library Service Board. This is by virtue of the ministerial responsibility conferred to the Ministry by Section 4 of Cap 446. The role of the Public Service Commission cannot be downplayed either, as KNLS under Section 4 of Cap 225 carries out functions of a public nature, thereby making its affairs those in the public service.

Section 4 states:

The functions of the Board shall be –

- (a) to promote, establish, equip, manage, maintain and develop libraries in Kenya as a National Library Service;**
- (b) to plan and co-ordinate library, documentation and related services in Kenya;**
- (c) to advise the Government, local authorities and other public bodies on all matters relating to library, documentation and related services;**
- (d) to provide facilities for the study of, and for training the principles, procedures and techniques of librarianship and such other related subjects as the Board may from time to time decide;**
- (e) to advise the Government on library education and training needs for library documentation and related services;**
- (f) to sponsor, arrange or provide facilities for conferences and seminars for discussion of matters in connection with library and related services;**
- (g) to carry out and to encourage research in the development of library and related services;**
- (h) to participate and assist in campaigns for the eradication of illiteracy.**
- (i) to stimulate public interest in books and to promote reading for knowledge, information and enjoyment;**
- (j) to acquire books produced in and outside Kenya and such other materials and sources of knowledge necessary for a comprehensive national library;**
- (k) to publish the national bibliography of Kenya and to provide bibliographical and references service.**

As such, the hiring, discipline and removal of officers from offices in the public service is vested in the Public Service Commission.

Based on the evidence before me, I feel that the Minister of Gender, Sports, Culture and Social Services together with his counterpart, the Head of the Civil Service, were within their ambit in deciding to transfer the applicant.

Secondly, the allegation by the applicant that he was not given a hearing before his transfer is not valid as there is no provision for a hearing before a transfer is effected.

In conclusion, therefore, I do not feel that the writ of certiorari is appropriate, as there is no irregular decision to quash.

### **3. Private Contract**

As pointed out by Counsel for the interested party, Hon. Ojwang J has dealt with this issue in length and I totally agree with his ruling dated 26<sup>th</sup> September, 2005 when he held that there exists a private contract between the applicant and the Kenya National Library Services. Allow me to explain further, KNLS advertised for the position of director in the Kenya Times on March 8, 1989. A copy of the advertisement, which was produced in this court, was very specific as to the requirements that were being sought. The applicant averred that there was a competitive vetting process, before he was appointed as the Director vide a letter of appointment dated 4<sup>th</sup> August, 1989. The said letter stated the annual salary as well as other benefits, that went with the job. The letter further stated that termination of the appointment would be by three months notice on either side, or three month's salary in lieu of such notice.

The question is whether there was "statutory protection" afforded to the Director. Section 6 of Cap 225 directs the Board to appoint a director, but subject to the approval of the minister. Is the director's appointment therefore statutorily underpinned? The definition was sought in the case of ***Eric J Makokha & Others vs Lawrence Sagini and Others (HCCC No 73 of 1994)*** where it was stated that,

***"... where the employment is governed by Rules or Regulations made under a statute the same is not terminable like in the case of ordinary employment"***.

And Further

***"To underpin, is to strengthen ..."***

Can it therefore be said that the applicant's employment was underpinned by Statute? I think not, as Cap 225 only gives direction as to how the appointment of the Director is to be done; that is by the Board and with the Minister's approval. Nothing in this terms expounds on the "protection" that is afforded to the director's position and as such the applicants terms of employment were intended to be governed by the terms in the letter of appointment.

This is, therefore, a clear case of private contract, and the Applicant, having already filed a suit in the High Court (HCCC 746 of 2004) I see his remedy lying entirely in that suit.

As such, and for the reasons outlined above, I decline to grant the prayers sought in the Notice of Motion dated 2<sup>nd</sup> June, 2004, and award the costs to the Respondents.

Dated and delivered at Nairobi this 5<sup>th</sup> day of July, 2006.

**ALNASHIR VISRAM**

**JUDGE**