



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI**

**Misc Civil Appli 413 of 2004**

**SAMUEL KIMUCHU GICHURU.....PLAINTIFF**

**VERSUS**

**HON. OCHILO AYACKO & 6 OTHERS.....DEFENDANTS**

**RULING**

This Notice of Motion, dated 5/04/2004, under Section 8 of the Law Reform Act and Order 53 of the Civil Procedure Rules, seeks the following seven (7) orders:

- a) An order of certiorari to remove to this court the Report dated 24/10/2003 compiled by the Technical and Financial Audit Committee on the Kenya Power and Lighting Company Limited. (KPLC) and the Kenya Electricity Generating Company Limited (Ken.Gen) including the findings, recommendation, and decisions contained in such Report for the purposes of being quashed.
- b) A Declaration that the 1st Respondent did not have any authority or power to constitute the committee, c) An Order of prohibition to prohibit the 1st Respondent or any other person, authority or body from implementing or acting upon such Report including instituting any investigations, preferring any charges, prosecuting any proceedings or instituting any surcharge process and/or any other punitive or oppressive action against the Applicant on the basis of such Report;
- d) A Declaration that the findings and recommendations in the Report are grossly inconsistent with the terms of reference set out in the Gazette Notice No. 7105 published in the Kenya Gazette Vol. CV No. 100 of 9/10/2003; e) A Declaration that in reaching the purported findings which form the basis of the recommendations set out in the Report, the committee acted and adopted a course of action or a process that is in gross violation of the principles of Natural Justice and in breach of the Applicant's Constitutional rights;
- f) A Declaration that the committee as constituted, was not and could not have been an impartial and objective tribunal.
- g) Costs of any incidental to this suit. The application is on the grounds set out in the Statutory statement and the Verifying Affidavit of the applicant sworn on 31/03/2004.

The detailed grounds upon which the application is founded are set out in both the statutory statement and the applicant's Verifying Affidavit, both dated 31/03/2004, and may be summarized as herein below; for the purposes of this Ruling. The applicant retired from the employment of the Kenya Power and Lighting Company Limited; a limited liability company under the Companies Act, (Cap. 486) on 6/02/2003, where he had worked and risen through the ranks from the position of assistant company secretary in 1974 to the position of Managing Director, the level at which he retired.

On 10/03/2003, the 1st Respondent purportedly in exercise of his functions and powers of Minister for Energy, appointed a Technical and Financial Audit Committee composed of the 2nd to 7th Respondents as members, to inquire into the affairs of Kenya Power and Lighting Company limited and the Kenya Electricity Generating Co. Limited. The terms of Reference of the committee as per a press release by 1st Respondent dated 11/03/2003 were as under:

- (a) Review contract award modalities for consistency with overall Government Procurement guidelines and establish whether procurements were done in accordance with the laid down regulations and procedures;
- (b) For each contract awarded establish whether it was completed on time and as per the contract amount, and if not establish any variations made leading to over expenditure and whether such variations were justifiable, cost effective and regularized;
- (c) Review any payments made as regards their consistency with procedure guidelines and work done or services rendered.
- (d) Review the relevance to the core business of all contracts awarded and any in house procurements made;
- (e) Review the effectiveness of Boards and Management performance and recommend remedial measures to ensure accountability;
- (f) Review any financial irregularities and impropriety
- (g) The committee in the course of its work should regularly report to the Minister cases of impropriety requiring either prosecution or disciplinary action or both; and prepare a comprehensive report on findings and recommendations on actions to be taken to ensure efficiency in resources allocation.

Committee sittings were approved for three days a week and the report was to be submitted to the Minister by 4/09/2003. The 1st Respondent officially gazetted the appointment of the 2nd to 7th Respondents on 9/10/2003, (even though the committee began its work in March, 2003). The applicant alleges that he was never afforded opportunity to appear before the committee, even though the 1st Respondent had instructed the Committee to receive views from any person. Notwithstanding the foregoing, the committee presented a Report containing its purported findings, basis for such findings and various recommendations. The applicant alleges that the Report included diverse accusations against him – the applicant.

The applicant avers that the selection of the committee members was capricious lacking in objectivity and designed to arrive at a particular conclusion since close to half its members were former subordinates of the applicant whose employment had been terminated for diverse reasons. Finally, the appellant avers that the findings set out in the report and the alleged basis for such findings were revealed to the public and widely covered in local and international media without affording the applicant the opportunity to rebut the allegations made against him. The report, concludes the applicant is motivated by malice and improper motives.

In opposition to the application, only the 1st Respondent, swore a Replying Affidavit, dated 26/06/2004, stating, in paragraph 7 thereof, that the appointment of the committee was within the mandate of the Ministry. Having carefully perused the pleadings herein, and the submissions by Learned Counsel for both sides, it is only natural to begin with the legality of the committee whose composition, appointment and Report, sparked this application. This issue of the legality of the committee appointed by the 1st Respondent in the crux of the matter upon which virtually every aspect of this application revolves, and or stands or falls. It is the SINO QUO NON in the matter before us. This is also the basis for the applicant's prayer number one – an order of certiorari.

It is the applicant's contention that the 1st Respondent, the Minister, had no legal authority or jurisdiction to appoint the Technical and Financial Audit Committee on the Kenya Power and Lighting Company

limited (KPLC) and the Kenya Electricity Generating Company Limited (Ken-Gen). If that be so, then the 1st Respondent acted without any authority and the committee was null and void, and all that such committee did was effectively of no legal consequence.

The applicant's submissions, on the above point, are valid, but are based on somewhat shaky grounds. That KPLC is a public limited company under the Companies Act, Cap. 486, Laws of Kenya, and operates under the provisions of that act, a Memorandum and Articles of association and the Electric Power Act, 1997 does not, in our humble view mean that KPLC is not a State Corporation under Chapter 446, Laws of Kenya.

Whereas by Legal Notice No. 43 of 1996 KPLC – the Interested Party in this case – was exempted from the State Corporations Act, the full legal import of such measure was not explained to this court by the Learned Counsel for the applicant. By definition **a State Corporation is any Statutory Corporation whose interest is wholly controlled by the Government or a Company Limited by shares registered under Cap.486, whose shares are controlled by the Government, or is a subsidiary of a State Corporation whose shares are so controlled by the Government or such Corporation.**

Our understanding is that the Government owns 40% of the shares of the KPLC, and is thus the majority shareholder in Interested Party in this case, being represented on its Board of Directors by two Permanent Secretaries – namely Energy and the Treasury. In our view, KPLC was emptied from the State Corporations Act purely for the purposes of getting round the Government bureaucracy in management that bog down State Corporations Act. Further, KPLC is an important Government policy body for the growth and the promotion of the energy sector within the country's economy. The above clarifications are crucial as they seem to have misled both the applicant and the 1st Respondent. The former thinking that the 1st Respondent acted ultra vires in appointing the committee and the latter in thinking that since the Interested Party fails within his sector mandate he has the authority to appoint the committee that he did on 10.3.2003.

The correct position seems to be that there is no Statutory power conferred upon the Minister to appoint a committee or agency to probe into the activities of the KPLC. In the absence of such power of authority, the doctrine of ultra vires is strictly a misnomer under the instant case. Ultra vires strictly means acting beyond a body's or an agency's powers. We have gone through the company's Memorandum and Articles, as well as the State Corporations Acts, and there is no statutory authority on the 1st Respondent to appoint the committee. Accordingly, in our view, where a body or agency, or in this case Minister, has no authority he cannot go or act beyond nothing. Such an act is down right illegal and is null and void.

It is beyond any dispute that the Interested Party falls within the mandate of the Ministry of Energy. But even with that, the authority if any, would be with the Ministry, not the Minister – the 1st Respondent herein. Either way then, the fact of mandate within the Energy sector does not confer upon the 1st Respondent the authority to appoint the committee he purported to appoint. There is no statutory power or provision upon which the 1st Respondent could have relied upon in appointing the Committee, and without that legal power anything done by the committee is a nullity.

In REPUBLIC VS. THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT – Civil Appeal No. 77 of 1997 – the Court of Appeal held that in the absence of a Statutory authorization for an annual general meeting convened by the Commissioner of Co-operatives in 1994 was a nullity ab initio. In the recent case of EXPARTE RADIO AFRICA LIMITED VS. THE MINISTER FOR TOURISM & INFORMATION AND ANOTHER, MISC. Application No. 479 of 2004 the Court held that the Minister for Tourism and Information and no power to appoint a probe or review panel to review the contents of the programmes of Radio Africa Limited through its station, KISS 100FM. The setting up of the Committee was ultra vires the Ministers powers.

Herein, in the instant case, as we have held, there was no power to be exceeded and in our view the appointment of the committee was illegal, pure and simple. Having held as we have hereinabove, that is sufficient to see the applicant through his prayer for an order of certiorari. But other issues were raised with respect to the way the committee conducted its proceedings. The applicant submitted that the

committee, even if it were valid, conducted its work in violation of the Rules of Natural Justice in that half of its members were people who had a grudge against the applicant by virtue of their having been subordinate staff under the applicant during his employment with KPLC and who were sacked for various reasons from KPLC during the applicant's headship of the Interested Party.

On that basis, counsel for the applicant submitted, there could not be any objectivity or impartiality in the committee's investigations as regards the applicant. Further, the applicant averred that he was not granted any opportunity to defend himself against the adverse allegations contained in the Committee's Report. We begin with the first leg of this issue of natural justice. The basic rule is that no one may be a Judge of his own cause, nor should one sit in the seat of judgment where such person has an interest. In any proceedings, the outcome of which has the potential of adversely affecting a person's interests such as property, reputation or career then such proceedings must be conducted in a manner that embraces the rules of natural justice. In the instant case, the pleadings show that some of the committee members might have had an impartiality problem given their past relationship with the applicant. Bias need not be shown to have actually existed. The possibility of its creeping into the decisions of the committee is sufficient for the violation of the impartiality rule in natural justice.

From the pleadings before us, the Terms of Reference clearly show that the committee was effectively to inquire into and audit the system of KPLC, rather than any individual, even though it is difficult to separate the two given that any system is operated by individuals. But having said that the report singles out the applicant as if he was the system within KPLC. No other servant, or officer in the Interested Party is focused. We refuse to believe that the applicant ran the KPLC single handedly. This factor we believe is an indicator of partiality in the committee members which found its way in the report.

The applicant also averred that he was not afforded an opportunity to be heard and defend himself. This he further avers was a violation of the rules of natural justice captured in the maxim *AUDI ALTERAM PARTEM* which literally means **hear the other party.**

Counsel for the applicant submitted at length on this point. However, our perusal of the pleadings, and the annexures thereto, lead us to the conclusion that the applicant, and even his counsel, are either not candid with the court or the point was overstretched and exaggerated. We have come to the conclusion that the applicant was indeed afforded an opportunity to present his side of the case. This is based on the fact that the applicant was invited to appear before the committee towards the end of the committee's inquiry.

The applicant failed to cease the opportunity and instead he wrote through his counsel, to the committee chairman, effectively giving the committee the conditions upon which he would appear before the said committee. Granted that the notice might have been short. But nevertheless an opportunity was granted to the applicant. The property thing, in our view, was to request that he be given another date or even brief his lawyer to appear before the Committee and seek another date under the circumstances. If the applicant could brief the lawyer to write back to the committee, we fail to see why such lawyer, who was here in Nairobi, could not have been instructed to appear on behalf of the applicant and explain the position and get a fresh date.

In our view, this ground of challenge of the Committee's conduct has no merit and we reject it as unfounded. In doing this we observe that there is no rule of natural justice to the effect that the person claiming to be afforded an opportunity to be heard shall set the time and mode of his being heard by the tribunal or committee inquiring into his conduct. The tribunal, or as in this case, the committee, is the one with the power and authority on how its proceedings shall be conducted. In that case, the committee had the right to choose when to hear the applicant – either at the beginning; midway or at the close of receipt of evidence.

In our humble view, we hold that the applicant was afforded an opportunity to be heard but he squandered the same through militant posturing. There was no violation of the rule of natural justice on this count of not being heard. We hasten to add that were this the only ground for the applicant's prayer for an order of certiorari, the application could have successfully failed. We now turn to the second limb of the applicant's application, namely an Order of Prohibition to prohibit the 1st Respondent or any other

person, authority or body from implementing or action upon such Report including instituting any surcharge, process and/or any other punitive or oppressive action against the Applicant on the basis of such Report.

In considering this prayer, I have had to read extensively the Report and around the Order of Prohibition; the import of the applicant's prayer vis-à-vis a public company like the KPLC in which the Government of Kenya holds 40% of the shares on behalf of the Kenyan citizenry. Prohibition is an order preventing or prohibiting a body or authority from acting. As stated by the Court of Appeal in KENYA NATIONAL EXAMINATION COUNCIL VS. REPUBLIC Exparte G.G. Njoroge, Civil Appeal No. 266 of 1996, **“prohibition looks to the future”**

The Report is not a mere summary of the Committees findings and conclusions. The over 500 page document contains essential documents relating to KPLC which include financial statements; procurement documents; evaluations of different jobs and projects undertaken by the KPLC over a period of time, etc. In light of the above, prayer ( c ) of the applicant's application raises issues probably never imagined even by applicant himself. If granted, the prohibition would be flashed at not only the Respondent in this application but also against “any other person, authority or body from implementing or acting on such report...” Would such other persons or authority not include the police and the constitutionally established officer of the Attorney General, from investigating possible crimes committed by the applicant herein, and taking the relevant action as by law required? My concerns about the above questions are that such an order would, if granted, act like an iron-shield to protect the applicant from all manner of crimes and wrong doing during his tenure as the Chief Executive of a public body like the KPLC. I must also confess my inability to visualize any investigation or inquiry into the management and financial affairs of the KPLC that would not deal with the very documents and information as are attached and that form part and parcel of the Report herein.

Further, apart from the mischief to which such a prohibitory order by this court could be put to, the prayer is either downright naïve or machiavellian. When the police carry out their investigations into any matter like the issues enumerated in the Terms of Reference of the Committee herein, they don't have to state their source of information, or disclose their informers! Finally, on this matter of a prohibitory order, we have no doubt in our minds that a prohibitory order as prayed for here would fly directly against the principles of good governance, accountability and transparency in the leadership of a publicly owned body like the KPLC. Such an order would, in our humble view, be a gagging order, difficult to enforce especially with respect to the public good and the constitutional offices alluded to herein above.

We accordingly decline to grant the Prohibitory order as prayed by the applicant in his payer C of his application. We believe that we have covered each and every prayer in the application including the prayers for various Declarations which are subsumed in the Ruling towards the Order for certiorari and the order for Prohibition. The upshot of all the foregoing is that we have granted the order for certiorari as per prayer (a) in the application but have declined to grant a prohibitory order, as prayed for in prayer ( c ) of the application herein. We further order that each party shall bear its or his own costs for this application.

DATED and delivered in Nairobi, this 28th Day of July, 2005.

**O.K. MUTUNGI**

**JUDGE**

**A. EMUKULE**

**JUDGE**

